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211 Cal. 228

PERKINS MFG. CO. v. CLINTON CONST. CO. OF CALIFORNIA.

S. F. 13367.

Supreme Court of California.
Dec 30, 1930.

Rehearing Denied Jan. 29, 1931.

1. Corporations 🔑636.

Under police power, state may exclude foreign corporations from doing intrastate business, and hence may permit doing of business on conditions or restrictions.

2. Corporations 🔑657(3).

As penalty for foreign corporation's noncompliance with statute regulating intrastate commerce, state may make corporate contracts absolutely void (St. 1915, p. 422, § 1, as amended; St. 1923, p. 1034).

St. 1915, p. 422, § 1, as amended in 1923 (repealed by St. 1927, p. 396, and re-enacted as Civ. Code, §§ 405, 406, 408, 409), provides that, as condition precedent to doing intrastate business, foreign corporation must file certain papers, etc., and, as penalty for noncompliance, statute imposes fine, prohibits actions by corporation, and, in addition, provides that contracts of corporation affecting its liability or property shall be void on its behalf, but shall be enforceable against it.

3. Corporations 🔑657(3).

Under statute regulating intrastate business, making contracts of foreign corporation void for noncompliance, subsequent compliance does not render contracts enforceable by corporation (St. 1915, p. 422, § 1, as amended; St. 1923, p. 1034).

4. Corporations 🔑657(3).

Repeal of statutory penalty, rendering foreign corporation's contracts void for noncompliance with intrastate business regulations, does not revive void contracts.

5. Corporations 🔑641.

Statute repealing provisions regulating foreign corporations doing intrastate business, and re-enacting substantially same provisions simultaneously, *held* merely modified continuation thereof, rather than abrogation or annulment (St. 1915, p. 422, as amended; St. 1923, p. 1034; St. 1927, p. 396).

In Bank

Appeal from Superior Court, City and County of San Francisco; Louis H. Ward, Judge.

Action by the Perkins Manufacturing Company against the Clinton Construction Company of California. Judgment for defendant, and plaintiff appeals.

Affirmed.

Gaylord & Smith and Willard P. Smith, all of San Francisco (W. L. Southwell, of San Francisco, of counsel), for appellant.

Ernest K. Little, of San Francisco, for respondent.

PER CURIAM.

This case involves an interpretation of certain provisions of the law dealing with foreign corporations never before passed upon by the courts of this state. Plaintiff is a foreign corporation, organized under the laws of the state of Minnesota, while defendant, as its name implies, is a California corporation. On November 20, 1923, plaintiff entered into a written contract with defendant, by and through its duly authorized California agent, whereby plaintiff agreed to "furnish and install all steel rolling doors" at a specified price in a certain building then being constructed by defendant in California. The contract was entered into in California, and, at least as far as performance by plaintiff was concerned, was to be performed here. The doors were duly and properly installed by the California agent of plaintiff, and accepted by defendant. The latter then issued two checks in the correct amounts as payment for the same, and delivered the checks to the California agent of plaintiff. It appears that the agent cashed the checks and has failed to account to his principal for the proceeds. Plaintiff contends that the payment to the agent was not authorized.

On August 24, 1925, plaintiff herein commenced an action in the superior court of San Francisco against this same defendant for the full amount alleged to be still due on the doors, relying on the written contract, which is likewise the basis of this present action, and also setting forth a cause of action based on a common count. The defendant answered, setting up as a defense, payment to the agent, and likewise setting up that the plaintiff had not complied with the statute of this state prescribing the terms and conditions upon which foreign corporations may transact intrastate business in this state. St. 1915, c. 190, p. 422, as amended; St. 1923, c. 443, p. 1034. That action proceeded to trial on April 21, 1926, and, upon the evidence showing that the plaintiff was a foreign corporation and had not complied with the terms of the above statutes, the court ordered a judgment of dismissal in favor of defendant. In that case the court made a specific finding that the contract involved was a contract dealing with intrastate commerce. No appeal was taken from this judgment, and the same has since become final.

On April 20, 1927, section 1 of the Act of 1915, as amended, said section being the section prescribing the terms and conditions upon which foreign corporations can do business in this state, was repealed. St. 1927, c. 221, p. 396. By a statute enacted the same day, all of the provisions of section 1 of the Act of 1915 were re-enacted as sections 405, 406, 408, and 409 of the Civil Code. St. of 1927, c. 222, p. 396. The repeal of the old statute and the re-enactment in the Code became effective simultaneously on July 29, 1927.

On September 28, 1927, plaintiff complied with the provisions of the 1927 statute in reference to filing a copy of its articles, etc., and on September 29, 1927, commenced this present action on the written contract, and likewise on an open book account. The answer of defendant denies the allegations of the complaint, and sets up as a defense on the merits payment to the agent. As a special defense, defendant likewise sets up that plaintiff had failed to comply with the provisions of the statute concerning foreign corporations at the time the contract was entered into. The action proceeded to trial, the court finding for defendant on the merits, and likewise finding that plaintiff had not complied with the statute on the date the contract was entered into, and that the contract was therefore void as to it. From the judgment thus entered, plaintiff prosecutes this appeal.

The theory upon which appellant seeks to evade the effect of the prior adjudication, and the effect of the provisions of the 1915 act as amended, as hereafter set forth, is substantially as follows: Appellant contends that the provisions of the 1915 act, imposing certain penalties on foreign corporations for failure to comply with the provisions of the act, merely rendered contracts entered into in violation of the act voidable and not void; that the penalties imposed merely cut off the remedy of the foreign corporation to enforce such contracts; that it is within the power of the Legislature to remove such a disability; that the repeal of the 1915 act in 1927 served to remove this disability; that the repeal operates retrospectively so as to remove disabilities existing before its passage; that the re-enactment of 1927 only has prospective application; that compliance with the 1927 act before suit is all that is required. This argument, although ingenious, is unsound.

Section 1 of the Act of 1915, as amended in 1923, supra, provides that every foreign corporation engaged in intrastate commerce in this state, must, as a condition precedent to doing business in this state, file with the secretary of state and with certain county clerks, certain designated papers and affidavits; it must pay a filing fee and appoint a process agent. Failure to comply with the provisions of this section renders the noncomplying corporation subject to certain penalties:

(1) Such noncomplying corporation is subject to a $500 fine.

(2) Such noncomplying corporation is prohibited from maintaining or defending any action or proceeding concerning its property or transactions in this state in the courts of this state.

(3) "In addition to the penalty herein provided, every contract made by or on behalf of any such foreign corporation, affecting the personal liability thereof or relating to property within the state, shall be void on its behalf and on behalf of its assigns, but shall be enforceable against it or them."

It is admitted that appellant had not complied with the terms of this statute on the date the contract was entered into, nor on the date the contract was performed by it, and it is conceded that the contract involved is one in intrastate commerce within the meaning of the above penalty provisions.

The courts of this state have never passed upon the effect of the third penalty provision quoted, supra, upon contracts coming within its operation. This point will first be discussed without reference to the question as to the effect of the subsequent repeal of the statute.

[1] The law is well settled that a state, by virtue of its police power, may entirely exclude foreign corporations from the right to

do intrastate business within its borders, and therefore may permit them to do business here upon such conditions or subject to such restrictions as it may see fit to impose. Hooper v. California, 155 U. S. 648, 15 S. Ct. 207, 39 L. Ed. 297; London, etc., Bank v. Aronstein (C. C. A.) 117 F. 601; H. K. Mulford Company v. Curry, 163 Cal. 276, 125 P. 236; San Francisco v. Liverpool, etc., Company, 74 Cal. 113, 15 P. 380, 5 Am. St. Rep. 425; Jameson v. Simonds Saw Company, 2 Cal. App. 582, 84 P. 289; Black v. Vermont Marble Co., 1 Cal. App. 718, 82 P. 1060.

The constitutionality of such restrictions as are contained in the 1915 statute is no longer open to attack. All states agree on this point. The decisions of the various states, however, are in substantial conflict on the question as to whether the failure of the corporation to comply with such restrictive statutes before undertaking to do business in the domestic state will render its contract void or voidable, and whether compliance with the statute any time before suit is sufficient. See annotation in 24 L. R. A. 315; 14 A. Cor. Jur. 1294, § 4002; 9 Fletcher Cyclopedia Corporations, 10,027, § 5941; 8 Thompson on Corporations (3d Ed.) 899, § 6662 et seq. This conflict in the decisions is at least partially due to a difference in the language of the statutory or constitutional provisions of the different states.

It will be noted that the California statute imposes three penalties for failure to comply, viz. $500 fine; prohibition against the maintenance of any action on such a contract; and finally the statute declares any such contract void as to the corporation. The second penalty—the prohibition against the maintenance of an action—has been, in a slightly different form, part of our statute law since long before 1915. Under the former statute (old section 406, Civ. Code [1915]) it was held that, as to transactions included within it, if the defendant failed to plead noncompliance in the answer or before trial, he waived this defense. In other words, under that provision, failure to comply with the statute rendered the contract voidable and not void, and compliance any time before suit was sufficient. Cal. Jur. 212, § 698; 8 Thompson on Corporations (3d Ed.) 894, § 6659; 9 Fletcher, Cyclopedia Corporations 10,112, § 5972.

[2] In many states the only penalties imposed for failure to comply with the statute are the prohibition against the maintaining of an action and a money penalty. But, as we have seen, California, and some other states, have seen fit to declare, in addition, that certain contracts of such noncomplying corporations, such as the contract herein involved, are void. This the state has an unquestioned right to do. 8 Thompson on Corporations (3d Ed.) 899, § 6662; 9 Fletcher, Cyclopedia Corporations 10,051, § 5947; State v. American Book Co., 69 Kan. 1, 76 P. 411, 1 L. R. A. (N. S.) 1041, 2 Ann. Cas. 56; Tri-State Amusement Co. v. Highlands Amusement Co., 192 Mo. 404, 90 S. W. 1020, 4 L. R. A. (N. S.) 688, 111 Am. St. Rep. 511, 4 Ann. Cas. 808; Fruin-Colnon Contracting Co. v. Chatterson, 146 Ky. 504, 143 S. W. 6, 40 L. R. A. (N. S.) 857. Although the point, as stated above, has never been passed on in this state, in other states that have seen fit to declare such contracts void the decisions are uniform as to the effect of noncompliance. All contracts coming within the prohibition are absolutely void as to the foreign corporation, and no action may be maintained by the corporation thereon. Diamond Glue Co. v. United States Glue Co., 187 U. S. 611, 23 S. Ct. 206, 47 L. Ed. 328; In re Springfield Realty Co. (D. C.) 257 F. 785; Ashland Lumber Co. v. Detroit Salt Co., 114 Wis. 66, 89 N. W. 904; Indiana Road Mach. Co. v. Lake, 149 Wis. 541, 136 N. W. 178; Duluth Music Co. v. Clancy, 139 Wis. 189, 120 N. W. 854, 131 Am. St. Rep. 1051; International Textbook Co. v. Peterson, 133 Wis. 302, 113 N. W. 730, 14 Ann. Cas. 965; Joseph T. Ryerson & Son v. Shaw, 277 Ill. 524, 115 N. E. 650; Hoskins v. Rochester Sav. & Loan Ass'n, 133 Mich. 505, 95 N. W. 566; Rough v. Breitung, 117 Mich. 48, 75 N. W. 147; Barron G. Collier, Inc., v. American Cafeteria, 215 Mo. App. 182, 256 S. W. 118; Parke, Davis & Co. v. Mullett, 245 Mo. 168, 149 S. W. 461; First Nat. Bank v. Leeper, 121 Mo. App. 688, 97 S. W. 636; Dunn v. Utah Serum Co., 65 Utah, 527, 238 P. 245; First Nat. Bank of Price v. Parker, 57 Utah, 290, 194 P. 661, 12 A. L. R. 1373; Alabama, etc., Co. v. Talley-Bates Const. Co., 162 Ala. 396, 50 So. 341; Hanchey v. Southern Home Building & Loan Ass'n, 140 Ala. 245, 37 So. 272; Goodner Krumm Co. v. J. L. Owens Mfg. Co., 51 Okl. 376, 152 P. 86; Tripp State Bank v. Jerke, 45 S. D. 448, 188 N. W. 314, affd. in 45 S. D. 580, 189 N. W. 514.

In the case of Ashland Lumber Co. v. Detroit Salt Co., supra, 114 Wis. 66, 89 N. W. at page 908, the Wisconsin court used the following language, which has often been quoted by other courts: "We must hold that the words, 'shall be wholly void on its behalf, and on behalf of its assigns, but shall be enforceable against it and them,' mean just what they say; and, if they [the statutes] are valid, they render the contract in question absolutely void and a nullity, in so far as it is sought to be enforced on behalf of the defendants by way of counterclaim in this action."

In First National Bank of Price v. Parker, supra, 57 Utah, 290, 194 P. at page 663, the Utah court thus referred to its statute: "In our judgment the language of our statute with reference to noncomplying foreign corporations is susceptible of but one construction. Its meaning is not doubtful. Courts uniformly hold that in the application of such statutes there is but one thing to do, namely, enforce the statute as it is. 'Whenever the statute has expressly declared that the contract is unenforceable, that, of course, is the end of the controversy. Such a statute is self-construing, and the court has no other duty than to give it effect.'"

[3] In those states which have declared the contract void, the decisions are practically uniform that subsequent compliance with the statute in no way enlarges the legal rights of the noncomplying corporation as far as the particular contract is concerned. In other words, subsequent compliance with the statute can have no legal efficacy to change the status of a contract declared to be wholly void at the time it was entered into.

In Alabama, etc., Co. v. Talley-Bates Const. Co., supra, 162 Ala. 396, 50 So. at page 344, the Alabama Supreme Court stated the rule as follows: "That purpose is not to be accomplished by a filing at the pleasure of the corporation, or when it may be to its interest to appeal to the courts of this state. We may safely affirm that nothing short of a compliance before any business is engaged in or transacted in this state satisfies either the literal requirement of the statute and Constitution or their policy."

In Interstate Const. Co. v. Lakeview Canal Co., 31 Wyo. 191, 224 P. 850, at page 851, the Wyoming Supreme Court stated the rule as follows, after referring to an earlier case holding such contracts unlawful: "The holding in that case is inconsistent with the contention that a compliance with our law subsequent to the making of an unlawful contract, but before suit is started, avoids the necessity of declaring such a contract void. If a contract, or any business that gives rise to a claim is unlawful, it cannot well be made lawful by anything that is done subsequently. * * * But the courts are agreed, we think, that where the claim sued on arises out of a transaction unlawful by reason of noncompliance with the Constitution or laws, a subsequent compliance has no effect."

See, also, 9 Fletcher, Cyclopedia Corporations, 10,112, § 5972, where many cases are cited in support of the above rule.

The situation involved is analogous to that presented by the question as to the validity of acts performed by a corporation while its powers are suspended by virtue of its failure to pay the license tax. The law is settled in this state that a subsequent payment of the tax in no way validates prior transactions. 7 Cal. Jur. 155, § 643. The same result follows in reference to the problem here presented. Subsequent compliance, at least where defendant sets up as a defense the failure to comply at the time the contract was entered into, does not render the contract enforceable by the noncomplying foreign corporation.

We are therefore irresistibly led to the conclusion that, since the Legislature has seen fit to declare such contracts "void" as to the noncomplying foreign corporation, the Legislature meant what it said, and such contracts must be deemed to be void, and subsequent compliance cannot validate the same so as to permit the maintaining of any suit thereon by such corporations.

[4] The above analysis would dispose of this appeal, were it not for the fact that the act imposing the penalty was repealed, and simultaneously similar provisions were enacted into the Civil Code. We turn now to a discussion of the problem thus presented.

The new sections added to the Civil Code (sections 405, 406, 408, 409) contain exactly the same provisions as were contained in section 1 of the repealed 1915 act, with the following exceptions: (1) The order of certain sentences is reversed; (2) the fee required upon compliance with the law is raised from $75 to $100; (3) some repetitious phrases are omitted; (4) various minor changes in the administrative features of the act are provided for; (5) minor changes are provided for in reference to the papers necessary to be filed upon compliance with the statute.

It is to be noted that the provisions in reference to the imposition of the three penalties above enumerated, found in the 1915 act, were re-enacted into the 1927 act without change.

Appellant contends that the penalties imposed by the 1915 act merely cut off its remedy to enforce the contract, and that the Legislature has power to remove the disability thus imposed; no vested rights being involved. This, appellant contends, the Legislature did by the repeal of the law imposing the penalty, the repeal acting retroactively as to the penalty. Appellant therefore contends that, since the penalty has been removed and since it has now complied with the provisions of the 1927 act, it may maintain this action.

The result reached by appellant is non sequitur for two reasons. In the first place, the whole argument is based upon the premise that the penalties imposed by the 1915 act merely served to render the contract unenforceable and not void, but this premise, we have seen, is incorrect. The contract herein involved was void as to appellant when entered into and performed. The rule in reference to repeal of statutes imposing penalties would seem to have no application to a contract rendered void by statute. In other words, we are of the opinion that the repeal of a penalty rendering a contract void, would not serve to revive the void contract.

[5] However, there is another principle of law that applies to the facts of this case that seems to us conclusive of the facts herein involved. As stated above, simultaneously with the repeal of the 1915 act, the same provisions, slightly modified, were re-enacted into the Civil Code. In other words, there was not a moment in which the repealing act stood in force without being replaced by the new sections added to the Code. The correct principle applicable to such a situation was thus stated by the United States Supreme Court in interpreting the repeal and re-enactment of several California statutes in the case of Pacific Mail Steamship Co. v. Joliffe, 2 Wall. (69 U. S.) 450, at page 458, 17 L. Ed. 805:

"The new act re-enacts substantially all the provisions of the original act, relating to pilots and pilot regulations for the harbor of San Francisco. It subjects the pilots to similar examinations; it requires like qualifications; it prescribes nearly the same fees for similar services. * * * The new act took effect simultaneously with the repeal of the first act; its provisions may, therefore, more properly be said to be substituted in the place of, and to continue in force with modifications, the provisions of the original act, rather than to have abrogated and annulled them. The observations of Mr. Chief Justice Shaw, in Wright v. Oakley, 5 Metc. [Mass.] 406, upon the construction of the Revised Statutes of Massachusetts, which in terms repealed the previous legislation of the State, may with propriety be applied to the case at bar.

"'In construing the revised statutes and the connected acts of amendment and repeal, it is necessary to observe great caution to avoid giving an effect to these acts which was never contemplated by the legislature. In terms, the whole body of the Statute law was repealed; but these repeals went into operation simultaneously with the revised statutes, which were substituted for them, * * * with such modifications as were intended to be made by that revision. There was no moment in which the repealing act stood in force without being replaced by the corresponding provisions of the revised statutes. In practical operation and effect, therefore, they are rather to be considered as a continuance and modification of old laws than as an abrogation of those old and the re-enactment of new ones.'"

The principle has been recognized by the California courts many times. In the Estate of Martin, 153 Cal. 225, 94 P. 1053, a former succession tax statute was expressly repealed and simultaneously a new succession tax act was passed, containing most of the provisions of the old act. It was contended that, since the old act had been repealed, the right of the state to collect taxes accrued thereunder was lost. The court held that the new act should be construed as a continuation of the old, with the modifications found in the new act, stating at page 229 of 153 Cal., 94 P. 1053, 1055: "These re-enactments come within the scope and effect of section 325 of the Political Code, declaring that, when a part of a statute is amended, it is 'not to be considered as having been repealed and re-enacted in the amended form; but the portions which are not altered are to be considered as having been the law from the time when they were enacted.' The rule particularly applicable to this case is thus stated in Sutherland on Statutory Construction (2d Ed.) § 238: 'Where there is an express repeal of an existing statute, and a re-enactment of it at the same time, or a repeal and a re-enactment of a portion of it, the re-enactment neutralizes the repeal so far as the old law is continued in force. It operates without interruption where the re-enactment takes effect at the same time.' Speaking of a similar case, the Supreme Court of the United States in Bear Lake I. Co. v. Garland, 164 U. S. 11, 17 S. Ct. 7, 41 L. Ed. 327, say: 'Although there is a formal repeal of the old by the new statute, still there never has been a moment of time since the passage of the act of 1888 when these similar provisions have not been in force. Notwithstanding, therefore, this formal repeal, it is as we think, entirely correct to say that the new act should be construed as a continuation of the old, with the modification contained in the new act'"—citing many cases. See, also, Carter v. Stevens, 208 Cal. 649, 284 P. 217; Riley v. Havens, 193 Cal. 432, 225 P. 275; San Joaquin, etc., Co. v. Stevinson, 164 Cal. 221, 128 P. 924; 23 Cal. Juris., page 699, § 87; Spokane & Eastern Trust Co. v. Hart, 127 Wash. 541, 221 P. 615.

The above reasoning appeals to us as applicable here. The new act must be deemed to be a continuance and modification of the old law, and not the complete abrogation of it so as to work the result sought by appellant herein, which, if arrived at, would abrogate the entire policy of this state in reference to foreign corporations as to past offenders. This result was never intended by the Legislature. Moreover, it must be remembered that the provisions in reference to penalties for noncompliance are identical in both the old and new statutes, and, at least as far as they are concerned, it must be held that the repeal and re-enactment merely operated to continue them in effect.

From the foregoing, it follows that the judgment of the trial court holding the contract herein involved void for failure to comply with the provisions of the statute in reference to foreign corporations was and is correct, and should be and hereby is affirmed.

211 Cal. 271

VENTURA COUNTY HARBOR DIST. v. BOARD OF SUP'RS OF VENTURA COUNTY et al.

S. F. 13755.

Supreme Court of California.

Dec. 31, 1930.

1. Statutes 🔑76(1).

Where existing general statutes authorized harbor districts, as well as harbor improvements and developments, special act for construction of harbor *held* unconstitutional (St. 1915, p. 1459, as amended by St. 1921, p. 1314; St. 1927, p. 1819, and p. 362 as amended by St. 1929, p. 817; Const. art. 1, § 11; art. 4, § 25, subd. 33).

It appeared that certain harbor district sought to construct harbor at designated place under special act, called the Ventura County Harbor District Act (St. 1927, p. 1819); that proposed improvement could be carried out either under General Harbor Act (St. 1927, p. 362, as amended by St. 1929, p. 817), or under St. 1915, p. 1459, as amended by St. 1921, p. 1314; and that general statutes were more equitable because they gave landowner opportunity to be heard, and made harbor bonds lien on both personal and real property, instead of real property only, as under special act. Const. art. 1, § 11, requires all laws of general nature to have uniform operation, and article 4, § 25, subd. 33, forbids Legislature to pass local or special laws where general law could be made applicable.

2. Evidence 🔑83(1).

Public officers are presumed to have discharged duties properly.

3. Constitutional law 🔑48.

In absence of judicial determination to contrary, statutes are presumed valid.

4. Constitutional law 🔑70(2).

Question whether special act can be made applicable is addressed in first instance to Legislature, and will be upheld, unless invalidity appears on face, or from facts of which court takes judicial cognizance.

5. Evidence 🔑5(1), 29.

Court judicially notices existing general harbor acts, and facts appearing on face of special harbor act, and matters of common knowledge and observation.

6. Constitutional law 🔑70(2).

Whether special act can be made applicable is ultimately judicial, not legislative, question.

7. Constitutional law 🔑48.

Presumptions that both general and special statutes are valid, and that special act controls, are inoperative, where question is whether special act can be made applicable, in view of existing general act.

In Bank.

Petition for a writ of mandate by the Ventura County Harbor District, a public corporation and body politic, to compel the Board of Supervisors of Ventura County and T. G. Gabbert and others, as members of and constituting the Board, to call a special election to vote on a proposal to incur a bonded indebtedness for a harbor.

Alternative writ discharged, and petition denied.

Heaney, Price & Postel, of Santa Barbara, and Harold A. Parma, of San Francisco, for petitioner.

Farrand & Slosson, of Los Angeles (Ross C. Fisher, of counsel), amici curiæ for petitioner.

James C. Hollingsworth and Don R. Holt, both of Ventura, for respondents.

J. M. Mannon, Jr., Edwin S. Pillsbury, and McCutchen, Olney, Mannon & Greene, all of San Francisco, amici curiæ for respondents.

Walter J. Forest, Blackstock & Rogers, and Sheridan, Orr, Drapeau & Gardner, all of Ventura, for City of San Buenaventura.

PRESTON, J.

The petitioner, asserting itself to be a public corporation created by special act of the Legislature (St. 1927, p. 1819), seeks to compel respondent board of supervisors of the county of Ventura to call a special election in said district under said act to vote upon the proposition of incurring a bonded indebtedness of $2,000,000 to be used in constructing and maintaining a land-locked harbor at a place called Hueneme in said county.

Issue is made by demurrer and answer to the petition, supported by a stipulation of facts. Respondent, in refusing to comply with the demand of petitioner, attacks the validity of said special act. Secondly, assuming the act to be valid, respondent alleges failure of petitioner to faithfully follow certain jurisdictional steps requisite for calling the said election. Numerous questions of both types are elaborately briefed and argued both by the respective parties and numerous amici curiæ as well. But we have been led to a conclusion upon one of the constitutional questions which disposes of the entire case; hence a consideration of the other matters urged becomes unnecessary.

The provisions of the Constitution involved are: Article 1, § 11, which reads: "All laws of a general nature shall have a uniform operation"; and article 4, § 25, subd. 33, which reads: "The legislature shall not pass local or special laws in any of the following enumerated cases, that is to say: * * * Thirty-third—In all other cases where a general law can be made applicable."

The facts necessary to a discussion of said question are: There are three statutes in existence relating to harbor development by the district assessment plan. Two are of general application; the third is the special act here under consideration. The first Harbor Act was passed in 1915 (St. 1915, p. 1459), amended in 1921 (St. 1921, p. 1314). This act applies to all counties wherein a harbor exists and provides for "the improvement, development, or protection of any harbor, bay, inlet, or other arm of the sea existing within any county of this state"; then follows a line of procedure for the organization of a harbor district, voting upon a bond issue, construction of the development works, and management of same. It is not necessary to our inquiry to set forth these steps in detail, but it should be noted that this act is known as a county harbor improvement act, and the bond issue is a lien upon the property of the whole county, and the project was to be managed by the board of supervisors, unless a state board of harbor commissioners was in existence authorized to manage and control same.

In 1927 the Legislature passed another General Harbor District Act, approved April 20, 1927, effective July 29, 1927 (St. 1927, p. 362), which provides that "any portion of a county in this state, the exterior boundaries of which include a bay, harbor, or inlet of the Pacific ocean, may be formed into a harbor district for the improvement or development of such harbor, upon proceedings being had and taken as provided for in this act." The word "harbor" is therein defined as follows: "The word 'harbor' means any bay, harbor, inlet, or other arm of the sea in which the tides of the Pacific ocean ebb and flow." Section 3 of the act provides that the improvement and development work proposed to be done in the harbor "may include the dredging of channels, shipways, ship berths, anchorage places and turning basins, the construction of jetties, breakwaters, bulkheads, sea walls, wharfs, ferry slips, and warehouses. * * *"

The act further provides that the organization of the district may be set in motion by a petition signed by fifty or more persons of the county who are registered voters, residents, and freeholders within the proposed harbor district, which petition shall pray for the organization of a harbor district; shall specify the harbor to be improved or developed, the nature of the work to be done; shall describe the boundaries of the proposed district; and shall be filed with the board of supervisors of the county in which the district is located. Publication of the petition is then provided for, and also hearing thereof by the board of supervisors. Power is vested in the board of supervisors to change the exterior boundaries of the proposed district by excluding therefrom such lands as in its judgment would not be benefited by the improvement or development of the harbor and to include therein such other contiguous lands as in its judgment would be benefited thereby.

It further provides that, if the owners of more than 10 per cent. of the lands to be included shall object to having their lands so included, no further proceedings shall be had until the boundaries of the proposed district shall have been changed to exclude said lands. It provides also for notice to the owners of the lands proposed to be added to said district. After a consideration of the feasibility of the project and whether the cost thereof is proportionate to the benefits to be derived therefrom, the board may call an election and submit to the voters a proposal to form the district and incur the necessary bonded indebtedness to carry out the improvement. If the proposition carries by a majority vote, the district is formed, and the bonds authorized may be issued and sold by the board of supervisors. Further steps provided for in the act need not be here recited, except to say that the assessment upon the said district covers all classes of property, real and personal, located therein.

It should here be noted also that, before the respondent was required to act in the present case, the said General Harbor Act of 1927 was amended (St. 1929, p. 817), so as to make section 1 of said act read as follows: "Any portion of a county in this state, the exterior boundaries of which include a bay, harbor, inlet or navigable water of the Pacific ocean, may be formed into a harbor district for the improvement or development of such harbor, upon proceedings being had and taken as provided for in this act." This amendment made it doubly sure that a harbor might be located, constructed, or developed under this act at any point in the state bordering upon the navigable waters of the Pacific Ocean.

The legislature, however, on June 1, 1927, approved an act effective July 31, 1927, called the "Ventura County Harbor District Act" (St. 1927, p. 1819). This is the act under which petitioner is attempting to proceed. It creates a district out of practically the whole of Ventura county, excepting alone two islands and a national forest reserve therein, and it has for its purpose "to provide for the location, development, improvement and protection of a harbor on the coast of the Pacific ocean in said Ventura county and within said district including the construction, operation, and maintenance of said harbor. * * *" Section 2.

The peculiar feature about this district is that its boundaries are inflexible and fixed by law; no method being allowed for testing the question as to whether or not any landowner therein is benefited by the improvement. It also provides that a harbor commission of sufficient members be appointed who shall ascertain "the best, most feasible and practical plan and system for the location, improvement, development and protection of a harbor on said coast." Section 6. It further provides that the bonds to carry the plan into execution shall become a lien upon the taxable real property only in said district, excluding all other classes of property assessment for liabilities of the district. The remaining provisions of the act are not necessary to relate.

It is plain, therefore, from the above recital of facts, that under either of the general laws above referred to, and particularly under the latter one, the proposed improvement could have been carried out. It also appears that it would be more consonant with justice and equity that the general plan be followed rather than the special act, for the general act is more flexible and allows the property owner a chance to be heard as to whether or not it is proper to include his property within the said district. It is also preferable because the assessments may be provided for from personal as well as real property of the district, which is not the case in the special act.

[1] This brings us to a consideration of the above-quoted sections of the Constitution. Is it possible that the special act and the general acts may all stand? Is it not true that either the general law is invalid because it lacks uniformity of operation or the special act is invalid because it is a case where a general law may be made applicable? No conceivable reason exists for any lack of uniformity to result from operation of the general laws alone. Every purpose of the special law may be obtained by invoking the one, if not both, the general acts. It seems clear to us that, if the Legislature itself defines, declares, and puts in operation a general law upon a subject, the courts can do nothing less than apply the constitutional provisions quoted and declare the special act invalid under the mandatory provisions of the Constitution.

[2-6] In coming to this conclusion, we have in mind, of course, that there is a presumption that public officers have discharged their duties properly, and that every act of the Legislature is valid until there is a judicial determination to the contrary. We realize also that in the first instance the question as to whether or not a special act can be made applicable is addressed to the Legislature, and that, unless we can see from the face of the act or from facts of which we take judicial cognizance that the case is one in which a special act may not be passed, we will uphold the validity of such legislation. But these presumptions do not aid us where, as here, the Legislature itself has by its own solemn act declared that a general act may be passed covering the subject-matter contained in the special act. We then have the Legislature itself deciding that a general statute is applicable to the subject covered by the special act. This court, of course, will take judicial knowledge of the existence of the general act and its terms and judicial knowledge of facts appearing on the face of the special act and judicial knowledge of those matters of common knowledge and observation taught by the experience of mankind, and, when these matters are considered, we must either declare the question a legislative one or else assume the responsibility of declaring it to be a judicial one, and holding the act invalid by reason of the undisputed facts of which we take judicial knowledge. Although great deference must be shown to the implied findings of a co-ordinate branch of the government still, in its last analysis, this question is a judicial one.

In making this holding we are not unmindful of the case of People v. Mullender, 132 Cal. 217, 222, 64 P. 299, 301, wherein the court had under consideration a special act relating to the improvement of the harbor of San Diego, and where against the claim that it was special legislation the court said: "The act in question, if made general, could only apply to the harbors within the state. These are of different size and importance, and we may well assume that the legislature determined that laws suitable and adapted to one would not be suitable or adapted to the others, or to any of the others. There would seem to be the same necessity for diversity of laws and regulations for the different harbors that exists in the case of cities and counties; but the constitution has not directed the classification of harbors, nor would their classification at all simplify or diminish the legislation required."

But it must be observed that at that time there was in existence no general law upon the subject, and the court presumed that the Legislature had before it the facts which made it impractical to pass a general law covering the subject-matter, and by reason of the indulgence of this presumption it declared the act valid, and it may be here said that, were the special act under consideration alone all the legislation upon the subject, we might be disposed to indulge the same presumption, but, as above stated, where the Legislature has spoken, the matter does not rest upon presumption but upon the open facts which show that the general law is valid and the special act is therefore invalid.

We might also say that a special law creating a drainage district has been declared valid, there being no general law on the subject

(People v. Sacramento Drainage Dist., 155 Cal. 373, 103 P. 207); that a special act creating a flood control district has also been upheld (Los Angeles C. F. C. Dist. v. Hamilton, 177 Cal. 119, 169 P. 1028), and other similar statutes have been upheld, but in no instance have we found that, where a general law fully applicable and complete on the subject is in existence, a special law has been upheld.

As authority for a contrary holding to the one here announced, counsel cite us two other cases: Wheeler v. Herbert, 152 Cal. 224, 92 P. 353; Rec. Dis. No. 1500 v. Superior Court, 171 Cal. 672, 154 P. 845. We regard the first case as distinctly in favor of, and not opposed to, our conclusion. There it is recited that new counties had been uniformly created by special act prior to the constitutional amendment of 1894 requiring it to be done by general law—and it was later done by such an act. In that case, however, a special act was passed altering the boundary between the counties of Fresno and Kings. This, the court held, was a different matter from the creation of a county. The holding is simply that, until it is demonstrated that a general law can be made applicable, the courts will presume the special act had sufficient facts to support it, as it theretofore did as to counties. The other case simply holds that, inasmuch as drainage districts had uniformly been held to be a proper subject for special legislation, such legislation could coexist with a general law on the subject. Here, as above set forth, we are to consider the propriety of having the subject of harbor development provided for by special law. In other words, the citation of this case seems to beg the question here before us.

Authority for the holding we here make is not wanting. In the case of Pasadena v. Stimson, 91 Cal. 238, 27 P. 604, 606, plaintiff city sought to condemn a right of way for a sewer. Defendant appealed from the decree of condemnation, and raised the point that Pasadena, being a city of the sixth class, was required under the law to make an effort to agree with property owners before commencing eminent domain proceedings, which it had not done. The same sections of the Constitution here quoted were there invoked, and in disposing of the question the court said: "It seems to us perfectly clear that the clause of the incorporation act requiring cities of the fifth and sixth classes to make an effort to agree, while all other persons are exempt from such condition, is in plain and direct conflict with both of these constitutional inhibitions. It destroys the uniform operation of a general law, and is special in a case where a general law not only can be made applicable, but in which a general law had been enacted, and in which there is no conceivable reason for discrimination."

In Cullen v. Glendora Water Company, 113 Cal. 503, 39 P. 769, 45 P. 822, 1047, an act was declared invalid which provided special procedure for seeking new trials in proceedings for the confirmation of irrigation districts, a procedure different from that described in the Code of Civil Procedure. The court approved the language above quoted from the case of Pasadena v. Stimson, supra.

In Krause v. Durbrow, 127 Cal. 681, 60 P. 438, an act providing for a special mode of conducting the election of mining corporation directors was declared invalid upon the same line of reasoning.

In Pratt v. Browne, 135 Cal. 649, 67 P. 1082, a special act fixing the salaries of official reporters in counties of the thirtieth class was held void because of a general law on the subject fixing their compensation.

In re Raleigh, 177 Cal. 746, 171 P. 950, a special act which purported to except from the real estate brokers' license law a certain class of individuals was held unconstitutional.

In Mordecai v. Board of Supervisors, 183 Cal. 434, 192 P. 40, the California Irrigation Act of 1919 was held unconstitutional because it excepted from its operation any district wholly or in part within a county of the state which had prior to a certain date adopted a freeholders' charter under the Constitution.

In fact, in the recent case of Mojave River Irr. Dist. v. Superior Court, 202 Cal. 717, 727, 262 P. 724, 728, this court held unconstitutional a special provision of the Water Commission Act providing that a party interested in the application before the water commission should have the right to commence an action in the superior court for the review of an order granting or denying such application. The court held the provision unconstitutional in these words: "The inhibition of the Constitution against special enactments regulating the practice and procedure in courts of justice is further enforced by the subsequent clause in the same section of the Constitution, which forbids the Legislature to enact local or special laws upon any subject, 'where a general law can be made applicable.' Const. subd. 33, § 25, art. 4. We have been pointed to no reason why a general law could not be made applicable to the situation presented by the amendment under review, nor, in fact, why the general laws of the state already in existence are not entirely adequate to deal with the controversies of those who are claiming or seeking to exercise conflicting rights in or to the use of waters of the state."

[7] Petitioner asserts that, in view of the presumption that both the general and special statutes are valid and may operate together, and in view of the presumption that the special act controls the general act, we are thereby required to declare the special act valid. As above noted, these presumptions referred to by counsel are proper in a case

where the right to legislate both generally and specially upon a subject exists but are inapplicable to a case like the present where we are testing the question as to whether or not there is room for the operation of a special act, in view of the existing general law. Our conclusion is that the special act of 1927 above discussed is inoperative and void.

We deem this a disposition of all the questions raised, and it follows that the alternative writ of mandate is hereby discharged and the petition denied.

We concur: WASTE, C. J.; SHENK, J.; RICHARDS, J.; CURTIS, J.; SEAWELL, J.

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211 Cal. 344

DAIRY DALE CO. v. AZEVEDO et al.

S. F. 13409.

Supreme Court of California.

Jan. 8, 1931.

Rehearing Denied Feb. 5, 1931.

1. Good will ⇨7.
Injunction ⇨56.

Names, addresses, and requirements of employer's customers on milk route in city constitute good will and trade secrets, which equity will protect.

2. Injunction ⇨56.

Dairy company selling and distributing milk over regular route *held* entitled to injunction restraining former employee, who operated route, from disclosing trade secrets.

> Dairy company was engaged in business of selling and distributing milk and other dairy products in large city. It dealt with customers through persons employed as drivers and collectors. Milk was distributed on regular routes, and drivers were under duty to solicit new customers and build up routes. One of dairy company's employees for several years learned names, addresses, and requirements of its customers on certain route, and, before terminating employment, commenced to solicit such customers on behalf of competing milk company.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Louis H. Ward, Judge.

Action by the Dairy Dale Company, a corporation, against Thomas Foster Azevedo and another. Judgment for plaintiff, and defendant named appeals.

Affirmed.

Daniel A. Ryan and G. F. Snyder, both of San Francisco, for appellant.

Jesse H. Steinhart and John J. Goldberg, both of San Francisco, for respondent.

PER CURIAM.

This is an appeal from a judgment of the superior court of the city and county of San Francisco enjoining the defendants from soliciting the patronage of certain customers of plaintiff.

Plaintiff is engaged in the business of selling and distributing milk and other dairy products in San Francisco. It deals with its customers through persons employed as drivers and collectors. The milk is distributed on regular routes, and it is the duty of the drivers and collectors to solicit new customers and thus build up the routes. They are paid a monthly salary, and are aided in their efforts by advertising carried on by plaintiff.

For a period of seven years up to February 15, 1928, defendant and appellant, Azevedo, was employed by plaintiff as a driver and collector. In the course of such employment he learned the names and addresses and requirements of plaintiff's customers on certain routes. Just prior to the termination of his employment with plaintiff, he commenced to solicit these customers on behalf of defendant Russell Milk Service Company. It is to this solicitation of customers listed in the particular routes on which appellant was employed that the injunction is directed.

[1, 2] These facts clearly present a proper case for an injunction. It is settled in this state that the names, addresses, and requirements of an employer's customers on such a route, which constitute part of the good will of the business, are trade secrets; and equity will restrain their disclosure by an employee. We recently gave full consideration to this question and restated the principles upon which such relief is granted in Pasadena Ice Company v. Reeder, 206 Cal. 697, 275 P. 944, 947, 276 P. 995.

Appellant argues that in the particular districts where the routes in question are located plaintiff serves nearly one-half of the people, and that therefore the knowledge which the employee has of such customers is not actually secret and confidential. There is no merit in this assertion, since obviously it is not merely the knowledge of the identity of the customers, but the friendly contact with them, which is important to the solicitors: "* * * They became personally acquainted with the customers of the respondent, their respective places of residence, their peculiar likes and fancies and other characteristics, a knowledge of which would greatly aid them in securing and retaining the business of said former customers." Pasadena Ice Company

v. Reeder, supra. See, also, Colonial Laundries, Inc., v. Henry, 48 R. I. 332, 138 A. 47, 54 A. L. R. 343.

The judgment is affirmed.

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211 Cal. 210

COMMERCIAL CASUALTY INS. CO. v. INDUSTRIAL ACCIDENT COMMISSION et al.

S. F. 13943.

Supreme Court of California.

Dec. 30, 1930.

1. Master and servant 🔑347.

Constitutional provision limits power of Legislature in enacting Workmen's Compensation Act to provide for compensation by employers of their own employees (Const. art. 20, § 21, as amended in 1918).

2. Master and servant 🔑347.

Statutory provision conferring upon Industrial Commission power to entertain proceedings to enforce payment into "subsequent injuries fund" *held* void as beyond Legislature's power (St. 1917, p. 839, § 9(b)(10)(d), as amended by St. 1929, p. 423; Const. art. 20, § 21, as amended in 1918).

3. Statutes 🔑64(2).

Invalidity of statutory provision respecting proceedings before Industrial Commission to enforce payment into "subsequent injuries fund" does not affect validity of other provisions (St. 1917, p. 839, § 9(b)(10)(d), as amended by St. 1929, p. 423).

> Invalidity of Workmen's Compensation, Insurance and Safety Act (St. 1917, p. 839) § 9(b)(10)(d), as amended by St. 1929, p. 423, relating to proceedings before Industrial Commission to enforce payment into "subsequent injuries fund" did not affect validity of other provisions, in view of fact that the statute expressly provides that decision holding any section, subsection, or clause unconstitutional shall not affect validity of remaining portions, and that subsection 10(d) is not so related to other portions of the section that its invalidity would in any way affect them.

In Bank.

Application for certiorari by the Commercial Casualty Insurance Company against the Industrial Accident Commission of the State of California and others, for the purpose of annulling an award of the Industrial Accident Commission against petitioner.

Award annulled.

Bronson, Bronson & Slaven and R. P. Wisecarver, all of San Francisco, for petitioner.

Edward O. Allen, of San Francisco, for respondents.

CURTIS, J.

This proceeding was instituted for the purpose of annulling an award of the Industrial Accident Commission against the petitioner, requiring it to pay to the treasurer of the state of California, for the benefit of the "subsequent injuries fund," the sum of $300. The proceeding was instituted and the award made under an amendment by the Legislature of 1929 to the Workmen's Compensation, Insurance and Safety Act of 1917 (St. 1929, p. 420), which, for the sake of brevity, will be hereinafter referred to as the Workmen's Compensation Act. The amendment so far as it applies to the questions presented in the present proceeding is designated as section 9(b) (10) of the Workmen's Compensation Act, and reads in part as follows:

"(10) (a) The fact an employee has suffered previous disability or received compensation therefor shall not preclude compensation for a later injury nor preclude compensation for death resulting therefrom; but in determining compensation for the later injury or death his average weekly wages shall be such sum as will reasonably represent his earning capacity at the time of the later injury; provided, however, that an employee who is suffering from a previous permanent disability or physical impairment and shall sustain permanent injury thereafter shall not receive compensation for a later injury in excess of the compensation allowed for such injury when considered by itself and not in conjunction with or in relation to the previous disability or impairment. The employer shall not be liable for compensation to such employee for the combined disability but only for that portion due to the later injury as though no prior disability or impairment had existed. If an employee who has previously incurred permanent disability or impairment incurs such additional permanent disability that the combined effect of such subsequent injury and previous disability or impairment shall amount to seventy per cent or more of total permanent disability as the result of any subsequent injury, as defined in this section he shall be paid in addition to the compensation for permanent partial disability hereinbefore provided, and after the cessation of the payments for the period of weeks prescribed therefor special additional compensation, which shall compensate him for the remainder of the combined disability existing after the last injury to him. Such additional compensation shall be paid out of a special fund created for such purpose in the following manner: The employer, or if insured his insurance carrier, shall pay into such special fund whenever any fatal injury is suffered within this state by an employee under such circumstances as to entitle him to the benefits of this act, but for his death, and such employee does not leave surviving him any person entitled to a death benefit as a dependent under this act the sum of three hundred dollars for each such fatal injury in addition to all other payments required by said act; provided, that the total payments required of the employer under this section shall not exceed the maximum payment due from the employer under this act. All moneys payable under this section shall be paid to the state treasurer and be placed into a special fund to be known as the 'subsequent injuries fund,' which fund is hereby created and appropriated for the purposes set forth in this section.

"(b) The subsequent injuries fund shall be used to pay the special additional compensation provided for in this section. The industrial accident commission is hereby authorized, and it shall be its duty, to administer said fund, to fix and award the amounts of special additional compensation to be paid under this section, to authorize payments from said fund to carry out the provisions of this section, and to make any orders, rules or regulations which may be necessary or convenient for the administration of said fund.

"The industrial accident commission may draw upon said fund for the purposes specified in this section, and the controller is hereby authorized and directed to draw his warrant on said fund from time to time in accordance with the direction of the commission, and the treasurer is hereby authorized and directed to pay the same.

"(c) Proceedings to enforce the payment into the subsequent injuries fund, of any sum for which an employer or insurance carrier may become liable under the provisions of this section may be brought by the attorney for the industrial accident commission in the name of the people of the state of California in the superior court, or municipal court, of the county, or city and county, in which such fatal injury shall have occurred or in which the defendant resides. Costs shall be allowed or not as in other cases, and if allowed for or against said commission, said costs shall be paid into or from the subsequent injuries fund in the same manner as other expenditures provided by this section. The commission's expenses of litigation shall be payable out of said fund or the general revenues of the commission.

"(d) Proceedings to enforce the liability created by this section may as an alternative remedy and without interfering with the right to proceed under the preceding subdivision of this section, be instituted before the industrial accident commission of its own motion or upon application of any interested party, in the name of the people of the State of California, and such proceedings shall be tried and determined in the same manner and with the same procedure and effect as other proceedings before said commission. In any proceeding before said commission brought by any person to collect compensation benefits the commission may, if it shall appear from the evidence in said proceedings that the employer is liable under the provisions of this section, award payment of the sum of three hundred dollars herein prescribed to the subsequent injuries fund without joining the people of the State of California as a party."

The facts upon which this proceeding is predicated are, briefly stated, that one W. Pitts, while employed as a laborer on August 14, 1929, at Oakland, Cal., by Rex Floor Company, sustained injury arising out of and occurring in the course of his employment, which injury caused the death of said employee on the same day; that at said time said employer's insurance carrier for workmen's compensation was the petitioner herein, the Commercial Casualty Insurance Company; that at the time of said injury and death said employer and employee were subject to the provisions of the Workmen's Compensation Act of 1917, and the amendments thereof; and that said W. Pitts did not leave any known dependents at the time of his injury and death.

Acting upon the purported authority conferred upon the Industrial Accident Commission by section 9(b) (10) (d) of said act as amended in 1929, the Industrial Accident Commission by and through its secretary filed with itself an application for adjustment of claim against the petitioner herein. At the hearing of said application said commission found the facts as hereinbefore stated, and upon the facts so found made the award which the petitioner herein seeks to have annulled by this proceeding.

There is no dispute as to the facts, and no claim is made that the commission in the proceeding before it, which resulted in the making of said award, did not strictly follow and comply with the provisions of said section of the Workmen's Compensation Act.

The principal contention made by petitioner relates to the constitutionality of section 9 (b) (10) (d) of said act which purports to confer upon the Industrial Accident Commission jurisdiction to entertain proceedings and to make awards like the proceeding and award involved herein.

Petitioner relies upon the case of Yosemite Lumber Co. v. Industrial Accident Commission, 187 Cal. 774, 204 P. 226, 230, 20 A. L. R. 994, in support of the contention that the

Industrial Accident Commission is without authority to entertain this proceeding. In that case this court had under consideration an act of the Legislature of 1919, which purported to provide for the creation of a fund known as the "Industrial Rehabilitation Fund." St. 1919, p. 273. This act provided that, where a valid compensable injury was suffered by an employee leaving no dependents, the employer must pay into said fund the sum of $350. Said statute, like the statute of 1929, provided that the Industrial Accident Commission might institute proceedings before itself for the collection of said sum in the same manner as in any other industrial accident claim. The validity of the act of 1919 was attacked on the ground that the Legislature was without authority to confer upon the Industrial Accident Commission jurisdiction to determine any dispute, except a dispute between an employer and his employees or the dependents of his deceased employees. The court sustained the ground of attack made by the petitioners therein, and in doing so held that the power to determine whether or not the liability imposed by the provisions of said statute existed against an employer was a judicial power; that the sole authority of the Legislature to confer judicial power upon the Industrial Accident Commission was derived from section 21 of article 20 of the Constitution as amended in 1918; that said section of the Constitution gave to the Legislature authority to create a tribunal with judicial power to settle disputes arising between employers and their employees, or the dependents of deceased employees; that the liability imposed by said statute upon the employer was a liability, not to any of his employees or the dependents of any employees, but was a liability to the state, and the dispute, which the proceeding before the Industrial Accident Commission was brought to settle, was a dispute between the employer and the state, and the court concluded its opinion on this branch of the case with the following words: "Our conclusion is that section 21 of article 20, as amended in 1918, did not authorize the Legislature to impose a liability on an employer to pay money to the state for the purposes specified in the act of 1919. It follows by necessity that said section gives no authority to the Legislature to confer on the Industrial Accident Commission jurisdiction to determine any dispute that may arise concerning the liability of employers sought to be imposed by said act of 1919."

We can see no escape from the logic of this decision. That case is identical in principle with the proceeding before us. In each case the liability sought to be imposed upon the employer is not one in favor of his employee nor the dependents of any deceased employee. In each case the jurisdiction to determine this liability is attempted to be conferred upon the Industrial Accident Commission. We feel bound by this authority, not only by reason of the rule of stare decisis, but on account of the manifest soundness of the decision.

[1] Respondent further contends, however, that there is a marked difference between the objects and purpose of the statute of 1919 and those of the statute of 1929; that in the 1919 statute the fund therein provided for was to be expended for the purpose of vocational re-education and rehabilitation of persons disabled in industry in this state; that the subsequent injuries fund provided for in the amendment of 1929 is to be used for the purpose of paying special additional compensation to employees sustaining permanent disability by reason of industrial injuries, who at the time of such injuries were already partially permanently injured by reason of injuries previously received. The point made by respondent is that the 1919 legislation sought to impose a liability upon an employer, not for the purpose of compensating employees, but for their re-education and rehabilitation, while the amendment of 1929 creates a liability solely for compensating employees. Respondent concedes that the compensation provided for in the amendment of 1929 is not wholly for the employees of the particular employer upon whom the liability is imposed, and that it may be expended in payment, in part or in whole, as compensation to employees, who are not, and who never had been, in the service of the employer making said payment, but respondent contends that a fair and reasonable construction of section 21 of article 20 of the Constitution permits legislation of this character. In this connection respondent calls to our attention the particular language of the Constitution which is in part as follows: "The Legislature is hereby expressly vested with plenary power, unlimited by any provision of this Constitution, to create and enforce a complete system of workmen's compensation, by appropriate legislation." Had the language of the section of the Constitution stopped with the above quotation therefrom, we would be inclined to agree with the contention of the respondent. But the above-quoted words of the section are immediately followed by the additional words: "And in that behalf to create and enforce a liability on the part of any or all persons to compensate any or all of their workmen for injury or disability, and their dependents for death incurred or sustained by said workmen in the course of their employment, irrespective of the fault of any party." The above provision of this section of the Constitution, both that quoted and relied upon by the respondent and the latter part thereof which we have quoted, must be read together, as the two parts form but one

complete sentence. As so read, we think that the intent of the framers thereof is clear and unambiguous, and that they intended by this amendment of the Constitution to limit the power of the Legislature in enacting a Workmen's Compensation Act to provide for the compensation by the employers of their own employees, and that any legislation which exceeds these limits is beyond the power of the Legislature, and, therefore, void. This same question was considered and passed upon by this court in the case of Yosemite Lumber Co. v. Industrial Accident Commission, supra, as will appear from the reading of the following excerpt therefrom:

> "The first grant to the Legislature by the new section is the grant of power 'to create and enforce a complete system of workmen's compensation.' This does not authorize the creation of a liability on any person to pay such 'compensation,' or require any person to contribute funds to support the proposed system. It does not purport to touch upon the subject of liabilities.
>
> "The next phrase of the new section empowers the Legislature 'in that behalf to create and enforce a liability on the part of any and all persons to compensate any and all of their workmen for injury or disability and their dependents for death incurred or sustained by the said workmen in the course of their employment.' This does not authorize the creation of a liability on the part of any person to compensate the workmen of other persons, nor the dependents of workmen of other persons. The phrase 'their workmen' necessarily confines the persons to be compensated to workmen who are in the employ of the person who is made liable. This is also shown by the provision that if the workman is killed by an injury in the course of his employment, the compensation is to be made to his 'dependents' thus excluding any idea of liability in such a case to provide for the welfare of workmen in general, or of a particular class of disabled workmen, in no way connected with the employer who is made liable for the particular injury."

[2] Subsection (d), therefore, of section 9 (b) (10) of the Workmen's Compensation Act, as amended in 1929, which attempts to confer upon the Industrial Accident Commission the power to entertain this proceeding, is void as beyond the power of the Legislature to enact.

[3] It does not necessarily follow, however, that the whole amendment of the act of 1929 is also unconstitutional. By the express terms of the statute enacting this amendment, it is provided that, if any section, subsection, subdivision, sentence, clause, or phrase of the act be held unconstitutional, such decision shall not affect the validity of the remaining portions of said act. Subsection (10) (d) of said section 9 (b) is not so related to the other portions of said section that its invalidity will in any way affect the other portions of said section. Petitioner concedes that the first sixteen lines of section 9(b) (10) are valid, and they should be sustained by the courts. It contends, however, that all the balance of subdivision (10), and particularly subsection (c) thereof, should be declared unconstitutional by us in this proceeding. In this we cannot agree. Subsection (c) of said subdivision (10) is not before us, and whatever we might say in this proceeding in regard to its validity would be a mere expression of opinion and of no binding effect hereafter. We, therefore, expressly refrain from an expression of opinion as to its constitutionality.

For the reasons hereinbefore expressed, the award of the Industrial Accident Commission against petitioner is annulled.

We concur: WASTE, C. J.; RICHARDS, J.; SEAWELL, J.; LANGDON, J.; PRESTON, J.; SHENK, J.

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211 Cal. 304

JONES et al. v. CITY OF LOS ANGELES et al.

L. A. 10654.

Supreme Court of California.

Dec. 31, 1930.

Rehearing Denied Jan. 30, 1931.

1. Injunction 🔑85(2).

Where penal statute causes irreparable damage to property rights, injured party may attack constitutionality by action to enjoin enforcement.

2. Injunction 🔑85(2).

If ordinance excluding hospitals for insane from certain areas is unconstitutional as applied to owners of sanitariums within excluded area, they may enjoin enforcement thereof.

3. Municipal corporations 🔑601.

Ordinance prohibiting establishment of sanitariums for insane within certain districts, viewed as part of general zoning plan, *held* valid.

4. Municipal corporations 🔑601.

Zoning ordinances, when reasonable and not arbitrary, constitute justifiable exercise of police power which extends to regulating uses of property not actually amounting to nuisances.

5. Municipal corporations ⚷601.

Residential character of restricted districts *held* sufficient to justify exclusion therefrom of hospitals for insane and feebleminded persons.

6. Municipal corporations ⚷626.

Relative density of population in permissive and restricted districts is not controlling test of validity of zoning plan as regards discriminatory classification.

7. Municipal corporations ⚷626.

Ordinance excluding additional hospitals for insane from residential districts *held* not based on arbitrary and unreasonable classifications because permitted districts contained densely populated areas and prohibited districts were sparsely populated.

8. Municipal corporations ⚷601.

Zoning legislation looks to future as effective means of city planning and is approved by courts.

9. Municipal corporations ⚷63(1).

Appellate court should not be drawn into minute examination of alleged discriminatory operation of zoning ordinances if, broadly considered, reasonable basis of classification exists.

10. Constitutional law ⚷278(1).

Ordinance establishing restricted areas for hospitals for insane does not result in denial of due process.

11. Municipal corporations ⚷601.

In determining constitutionality of zoning ordinance applying to hospitals for insane, finding that sanitariums involved were nuisances was immaterial.

12. Nuisance ⚷23(1), 80.

Individual or city may enjoin acts constituting private or public nuisance as protection against improper conduct of any lawful business.

13. Nuisance ⚷3(8).

Properly conducted sanitarium for insane *held* not to constitute "nuisance."

[Ed. Note.—For other definitions of "Nuisance," see Words and Phrases.]

14. Municipal corporations ⚷611.

Private businesses may be wholly prohibited where danger is sufficiently great, and may be excluded from certain districts where maintenance has become public nuisance.

15. Municipal corporations ⚷601.

Zoning regulations may take into consideration factors not bearing on public health, safety, or morals, but coming within term "general welfare," and may deal with uses of property which are not harmful.

16. Municipal corporations ⚷625.

Where retroactive zoning ordinance causes substantial injury and prohibited business is not nuisance, ordinance is to that extent unreasonable exercise of police power.

17. Municipal corporations ⚷601.

Ordinance zoning hospitals for insane within certain districts, though valid as to additional hospitals, was invalid as applied to sanitariums within district annexed to city and excluded from permitted area.

In Bank.

Appeal from Superior Court, Los Angeles County; H. V. Alvarado, Judge.

Action by E. B. Jones and another against the City of Los Angeles and others. Judgment for defendants, and plaintiffs appeal.

Reversed.

Rehearing denied; SEAWELL, SHENK and CURTIS, JJ., dissenting.

Superseding opinion of District Court of Appeal in 286 P. 161.

Woodruff, Musick, Pinney & Hartke and Roy A. Linn, all of Los Angeles, and Walter W. Rennie, of Venice, for appellants.

Jess E. Stephens, City Atty., Frederick Von Schrader, Deputy City Atty., and Erwin P. Werner, all of Los Angeles, for respondents.

LANGDON, J.

This is an action to enjoin the enforcement of a zoning ordinance of the city of Los Angeles. The said ordinance was enacted independently of the general zoning plan of the city, and its restrictive provisions are directed toward one type of business. It provides that outside of certain designated districts, it shall be unlawful for any person, firm or corporation "to erect, establish, operate, maintain or conduct any hospital, asylum, sanitarium, home, retreat or other place for the care or treatment of insane persons, persons of unsound mind, or persons affected by or suffering from mental or nervous diseases." Penalties of fine and imprisonment are specified for its violation.

In March, 1927, the city of Los Angeles annexed the territory known as the Mar Vista District. At that time, there were already in operation in this district four sanitariums for the treatment of nervous diseases: The Casa Del Mar Sanitarium, the Marshall Manor Sanitarium, the St. Erne Sanitarium, and the Wittman Home for Children. These institutions take as patients only persons suffering from the milder forms of mental disorder. No insane persons are admitted. Each institution has been established by a substantial investment in land, buildings, and equipment.

The above-mentioned zoning ordinance, adopted on August 11, 1927, some months after the annexation of the Mar Vista District, excluded that territory from the area in which the establishment and maintenance of such sanitariums was permitted. When the ordinance went into effect, plaintiffs, as the owners of the institutions, sought to enjoin its enforcement. The superior court of Los Angeles county, in each of the actions, denied the relief prayed for, and appeals were then taken. Because their grounds are practically identical, the four appeals were, by stipulation, consolidated, and will be considered together in this opinion.

[1, 2] A preliminary question which may readily be disposed of relates to the availability of the equitable remedy. It is settled that where a penal statute causes irreparable damage to property rights, the injured party may attack its constitutionality by an action to enjoin its enforcement. San Diego Tuberculosis Ass'n v. East San Diego, 186 Cal. 252, 200 P. 393, 17 A. L. R. 513; Abbey Land Co. v. San Mateo County, 167 Cal. 440, 139 P. 1068, 52 L. R. A. (N. S.) 408, Ann. Cas. 1915C, 804. Hence, if the ordinance is unconstitutional in its application to these plaintiffs, they are entitled to the decree which they seek.

[3, 4] Viewing the ordinance as part of a general zoning plan, and disregarding for the moment the question of its applicability to plaintiffs, there can be no doubt of its validity. That zoning ordinances, when reasonable in object and not arbitrary in operation, constitute a justifiable exercise of police power, is now well established; and it is equally well established that the power extends to the regulation of uses of property which do not actually amount to nuisances. As Mr. Justice Lennon said in Miller v. Board of Public Works, 195 Cal. 477, 487, 234 P. 381, 384, 38 A. L. R. 1479: "* * * The police power as evidenced in zoning ordinances, has a much wider scope than the mere suppression of the offensive uses of property * * * it acts, not only negatively, but constructively and affirmatively, for the promotion of the public welfare." And in Village of Euclid v. Ambler Realty Company, 272 U. S. 365, 387, 47 S. Ct. 114, 118, 71 L. Ed. 303, 54 A. L. R. 1016, we find a similar statement: "Building zone laws are of modern origin. * * * Regulations, the wisdom, necessity, and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive. * * * And in this there is no inconsistency, for, while the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation." See, also, Baker, Legal Aspects of Zoning, p. 113; Bettman, Constitutionality of Zoning, 37 Harv. L. Rev. 834, 837.

[5] The evidence shows and the lower court found that the restricted districts were mainly residential in character. This is sufficient to justify the exclusion of businesses such as that carried on by plaintiffs. The decisions uphold the validity of ordinances excluding from residential districts property uses much less incongruous than these, as, for example, flats, stores, and business buildings. See State v. Houghton, 164 Minn. 146, 204 N. W. 569, 54 A. L. R. 1012; Ware v. Wichita, 113 Kan. 153, 214 P. 99; State v. New Orleans, 154 La. 271, 97 So. 440, 33 A. L. R. 260; Spector v. Building Inspector, 250 Mass. 63, 145 N. E. 265.

[6-8] The objection most vigorously urged by plaintiffs is that the ordinance violates the constitutional guarantee of equal protection of the laws in that the classification of permitted and prohibited districts is arbitrary and unreasonable. It is not contended, nor could the contention be made, that the permitted zones are too small or unsuited to plaintiffs' businesses. The permitted districts cover considerably more than one-third of the area of the city and include the downtown business district, as well as various other built-up sections. Hence the instant case does not come within the principles of those decisions which hold an ordinance discriminatory where it makes the permitted area unreasonably small. See In re White, 195 Cal. 516, 234 P. 396. It appears, however, that in the permitted districts are certain densely populated areas, and in the prohibited districts there is some territory which is sparsely populated. This is attacked as discriminatory, chiefly on the authority of In re Throop, 169 Cal. 93, 145 P. 1029; Curtis v. Los Angeles, 172 Cal. 230, 156 P. 462; and In re Smith, 143 Cal. 368, 77 P. 180. The first of these cases was concerned with the use of a stone crusher, the second with stables, and the third with gas works. They are representative of the older group of decisions dealing with the power of a municipality to prohibit or regulate the conduct of businesses which are in the nature of public nuisances. To test the validity of zoning legislation by the strict language of some of the nuisance cases would be to ignore the change in both legislative and judicial views on this subject, a change which has been remarked upon by a number of authorities. See Miller v. Board of Public Works, supra; Village of Euclid v. Ambler Realty Company, supra; State v. Houghton, supra. It cannot be seriously contended that relative density of population in the permissive and restricted districts is a

controlling test of the validity of a zoning plan, so far as the claim of discriminatory classification is concerned. The object of the present ordinance is to exclude hospitals for the treatment of insanity and nervous diseases from these districts which are devoted to residential purposes, because it is in such districts that they adversely affect the public welfare. This being so, it is immaterial whether the restricted district is densely or sparsely populated, if it is residential. The ordinance is concerned with the nature of the district. A growing residential area is as reasonable an object of protection as one which is fully built up. On the other hand, while the permitted districts include some territory which is densely populated, that territory is not residential in character. It is devoted to business purposes and hence requires none of the special regulation deemed desirable to foster and protect the development of homes and the maintenance of a proper environment for children. Moreover, the argument of plaintiffs, carried to its logical conclusion, would destroy the usefulness of zoning ordinances as an effective means of city planning, for it would require an examination of the regulation solely on the basis of present conditions. But zoning legislation looks to the future. It is a constructive movement in municipal legislation and, as such, it has received the approval of our courts. Miller v. Board of Public Works, supra; Zahn v. Board of Public Works, 195 Cal. 497, 234 P. 388.

[9] An appellate court should not permit itself to be drawn into a minute examination of alleged discriminatory operation of such ordinances if, broadly considered, a reasonable basis of classification exists. Zahn v. Board of Public Works, supra; Bettman, Constitutionality of Zoning, 37 Harv. L. Rev. 834, 850. Bearing in mind the object of the ordinance and the findings of the court, we are satisfied that no unconstitutional discrimination has been made.

[10] We have thus arrived at this conclusion: The ordinance in question, in so far as it prohibits the establishment of hospitals for the treatment of nervous diseases in certain districts in the city of Los Angeles, and permits their establishment in other specified districts, is valid. The businesses so restricted are proper subjects of such regulation, and hence the ordinance does not result in a denial of due process. The classification of districts is reasonable and not arbitrary, and therefore there is no denial of equal protection of the laws. This much is clear, we feel, with respect to the *establishment of new businesses* of this character in the prohibited districts. But does the same result necessarily follow with regard to existing businesses in these districts? In other words, does the broad view of the police power which justifies the taking away of the *right to engage in such businesses* in certain territory, also justify the *destruction of existing businesses?* We do not think that it does.

We have already emphasized the fact that courts, in their consideration of zoning legislation, have not deemed themselves bound by their prior decisions on the legislative regulation or prohibition of nuisances. They have recognized that the right to use private property may be restricted by an ordinance which follows a reasonable plan, even though the use is neither a nuisance per se, nor a menace to health, safety, or morals in the particular district from which it is excluded. It would seem, therefore, at first glance, that the zoning decisions reach the conclusion that businesses may be prohibited in the sense of being excluded from specified districts, although they do not come within any reasonable view of what constitutes a nuisance. An examination of those decisions, however, reveals the fact that nearly all of them deal with the attempt to establish businesses in the prohibited areas. They decide nothing more than this: The right to engage in a lawful and not dangerous business in a certain area may be taken away in pursuance of a reasonable zoning scheme. They do not decide that an established and not dangerous business, operating in a lawful manner in a certain territory, may be eradicated in pursuance of a reasonable zoning scheme. That problem, which is the important problem of this case, has, so far as we are aware, only been squarely presented to appellate courts in a few instances. The reason for the paucity of decisions is illuminating: Zoning laws have almost invariably been prospective in nature. Indeed, in some states, including Kansas, Ohio, Wisconsin, Illinois, Massachusetts, Maine, and New Hampshire, the enabling statutes which give the zoning power to municipalities, expressly provide that no retroactive ordinances shall be passed. See Baker, Legal Aspects of Zoning, p. 158, note 220.

As a matter of practice, also, those who have drafted ordinances have usually proceeded with due regard for valuable, vested property interests, and have permitted existing, nonconforming uses to remain. They are very generally agreed that the destruction of an existing nonconforming use would be a dangerous innovation of doubtful constitutionality, and that a retroactive provision might jeopardize the entire ordinance. "Zoning * * * holds that an ounce of prevention is worth a pound of cure and that it is fairer to all concerned to prevent the establishment in residence districts of objectionable business than to drive them out once they were established. * * * Zoning looks to the future, not the past, and it is customary to allow buildings and businesses already in the district to remain, although of a class which cannot be established. If such a business constitutes a nuisance, it can still be removed under the police power, but the zoning acts in themselves do not customarily interfere with existing conditions." Chamberlain and Pierson, Zoning Laws and Ordinances, 10 Am. Bar Assn. J. 185. "Retroactive operation of the provisions of the ordinance is generally avoided. * * *" Bettman, Constitutionality of Zoning, 37 Harv. L. Rev. 834, 853. "Retroactive zoning is not to be recommended. * * *" Young, City Planning and Restrictions on the Use of Property, 9 Minn. L. Rev. 593, 628. "The purpose of zoning, which is said to be the crystallization of present conditions and the constructive control of future development, does not require that existing uses be changed. Hence it has been generally assumed that any attempt to make zoning ordinances retroactive would meet with the opposition of the courts and might result in their declaring the ordinance as a whole unconstitutional." Retroactive Zoning Ordinances, 39 Yale L. J. 735, 737. "Nonconforming uses may be required to be removed, but the majority of the cases seem to indicate that if this procedure is attempted the ordinance will be declared unconstitutional because unreasonable." Byrne, The Constitutionality of a General Zoning Ordinance, 11 Marquette L. Rev. 189, 214. See, also, Baker, supra, p. 145.

These same views have been expressed in a number of decisions. In Pelham View Apartments, Inc., v. Switzer, 130 Misc. Rep. 545, 224 N. Y. S. 56, 58, a building permit had been issued for the erection of an apartment house, and the petitioner had borrowed money, bought property, prepared plans, and begun construction, in reliance upon the permit. Thereafter, a new zoning law was enacted, under which such a permit could not be granted, and an attempt was made to revoke it. The court said: "While it is unfortunate that the erection of this apartment house may be distasteful to people living in the neighborhood, and while perhaps it is unfortunate that their property should be thus affected, yet the protection of such rights must be legally done, and the public officials representing the people cannot legally be permitted to change the zoning law, and cancel a permit previously issued under the original zoning act, where an innocent purchaser of real estate has in good faith acted upon such official action of the city, and has thereby acquired vested rights under his permit. * * * It would be nothing short of confiscation, and a complete disregard of constitutional rights, if a municipality could revoke a building permit issued under the conditions as presented in this case." See, also, People v. Stanton, 125 Misc. Rep. 215, 211 N. Y. S. 438.

In Atkinson v. Piper, 181 Wis. 519, 195 N. W. 544, retroactive legislation of this type was strongly disapproved, and the court construed the particular act as prospective in its operation, although the buildings in question were only in the process of construction. The Wisconsin court made a similar decision in the later case of Rosenberg v. Village of Whitefish Bay, 199 Wis. 214, 225 N. W. 838, where construction was not yet under way, but the owner of the land had incurred expenses in the preparation of plans for the structure.

In holding another statute not to be retroactive, the New Jersey court said in Frank J. Durkin Lumber Co. v. Fitzsimmons (Err. & App.) 147 A. 555, 558: "* * * May a municipality, without making compensation, estop an owner from continuing a use that is in actuality, that was begun and continued lawfully, and that becomes unlawful only because the municipality has so ordained? * * * Recognizing that the granting of a permit and the subsequent beginning of work thereunder do clothe the owner with certain rights against municipal interference, this court very recently, in two instances, refused a municipality the privilege of revoking a permit theretofore given. * * * It seems that a logical application of the same principle is to recognize *the right to continue, as against subsequent zoning interference, a use that was actually instituted*, that was lawful when instituted, and that has been actively and constantly maintained." (Italics ours.)

In Adams v. Kalamazoo Ice & Fuel Co., 245 Mich. 261, 222 N. W. 86, 87, the court said: "The ordinance excepts from its restrictive provisions, existing nonconforming uses, but even if it did not contain such an exception, we cannot hold its restrictions retroactive, though defendant, anticipating its enactment, purchased the property and placed its small distributing building thereon. Threatened invasion of a residence district by business may be an impelling reason for affording protection by way of a zoning ordinance, *but such an ordinance may not operate to remove business found there.*" (Italics ours.)

In response to the charge that exemption of existing nonconforming uses would be discriminatory, the courts have very generally held the exemption to be valid and necessary. Baker, supra, p. 144. As the court said in City of Aurora v. Burns, 319 Ill. 84, 149 N. E. 784, 788: "The building zone ordinance * * * permits lawful uses of buildings at the time of the passage of the ordinance, although not in conformity with its provisions, to continue thereafter. This exception is made so that the ordinance shall not have a retroactive operation. It would be manifestly unjust to deprive the owner of property of the use to which it was lawfully devoted when the ordinance became effective." In Spector v. Building Inspector, 250 Mass. 63, 145 N. E. 265, 268, the same conclusion is reached: "To exempt buildings already devoted to a use from a prohibition of such use of other buildings or buildings thereafter erected in a specified area is not unequal but lawful." This court has also spoken to the same effect in Zahn v. Board of Public Works, 195 Cal. 497, where it is said on page 512, 234 P. 388, 394: "As to the objection that the ordinance was not retrospective, but permitted the continuance of existing uses, it will suffice to say that for the purpose of zoning it is not necessary that existing uses shall be removed. * * * The ordinance was enacted with the purpose of directing the present and future development of the city and no attempt was made to remold its past development. To have required, preliminarily to an enactment for future development, that all past development, not in harmony therewith, should be removed, might be impractical. That the council did not attempt such a task has no tendency to show discrimination against property to be developed in the future." See, also, A. C. Blumenthal & Co., Inc., v. Cryer, 71 Cal. App. 668, 236 P. 216.

It therefore appears that the instant case involves a situation materially different from that presented in the usual zoning case. The exercise of power in this instance is, on the whole, far more drastic than in those in which a mere right to engage in a particular business is restricted. We are asked to uphold a municipal ordinance which destroys valuable businesses, built up over a period of years. If we do so on the ground that this is a proper exercise of the police power in the enactment of zoning legislation, then it follows that the same thing may be done to apartment houses, flats, or stores. The establishment of many lawful and not dangerous businesses in a city would then become an extremely hazardous undertaking. At any time, in pursuance of a reasonable plan for its future development, the city could prohibit the continuance of the businesses, and make property valueless which was previously constructed and devoted to a useful purpose. It may well be that in the course of years one of the outlying permitted districts in the present scheme will become residential in character, and will, by another ordinance, be placed in the prohibited area. If the plaintiffs, at great expense, reestablish themselves in that district, they might be pursued and again eradicated. All this is to be justified under the police power as a proper taking of private property for public use, without compensation. The approval of such a doctrine would be a blow to rights in private property such as this court has never before witnessed. Only a paramount and compelling public necessity could sanction so extraordinary an interference with useful business.

What is the public necessity here? We have considered the ordinance solely as modern zoning legislation, for such is undoubtedly its character. There is, it is true, testimony in the record to show that the district was in some respects a less agreeable residential section than it would be if the businesses of plaintiffs were removed. Neighbors complained that the presence of the sanitariums depreciated the value of their own property. There is similar testimony as to occasional noises made by unruly patients, and of several patients having escaped; although in this connection the trial court found that "none of the inmates of any of said four sanitariums * * * has ever injured in any manner whatsoever any of the inhabitants of said Mar Vista District or elsewhere, nor has any of said inmates ever attacked or attempted to do bodily injury unto any of said inhabitants."

[11, 12] From the evidence the court found that the conduct and operation of plaintiffs' businesses will tend to and does "impair and endanger the health, safety, morals, convenience, comfort and welfare of the public, and will prevent the said district from obtaining its proper growth and from fully developing into the residential district to which it is devoted." Another finding is that "it is not true that said sanitarium * * * will not create, and is not a nuisance." Assuming that the above statements are intended as a finding that the sanitariums of plaintiffs are nuisances as now conducted, it hardly seems supported by the record. For a discussion of similar evidence, see Jardine v. Pasadena, 199 Cal. 64, 75, 248 P. 225, 48 A. L. R. 509. But even such a finding does not go to the root of the matter, and is, so far as the validity of this ordinance is concerned, wholly immaterial. The individual, or the city, still has the right to enjoin acts which constitute a private or public nuisance and this right is given as a protection against the improper conduct of any lawful business. Jardine v. Pasadena, supra; Adams v. Kalamazoo Ice & Fuel Co., 245 Mich. 261, 222 N. W. 86. This ordinance expressly applies to any hospitals, asylums, and sanitariums for the care or treatment of persons suffering from "mental or nervous diseases." It affects all such places in the same manner, irrespective of whether they are conducted properly or improperly. The question of its constitutional validity must therefore be considered apart from the particular conditions alleged to exist in the establishments maintained by plaintiffs.

[13] As so considered, we are satisfied that it cannot find support in the legislative power to prohibit nuisances. A properly conducted sanitarium for the care and treatment of persons affected with "mental or nervous diseases" cannot, we feel, be held to constitute a nuisance. Mr. Justice Olney said in San Diego Tuberculosis Ass'n v. East San Diego, 186 Cal. 252, 254, 200 P. 393, 394, 17 A. L. R.

513: "That a well-conducted, modern hospital, even one for the treatment of contagious and infectious diseases, is not such a menace, but, on the contrary, one of the most beneficent of institutions needs no argument." This language was approved and a similar conclusion was reached in Jardine v. Pasadena, supra. In Mayor & Council of Wilmington v. Turk, 14 Del. Ch. 392, 129 A. 512, an ordinance which prohibited the maintenance of a private hospital in a residential district was held to be unreasonable in the particular case. These decisions are concerned with businesses closely analogous to those involved in the instant case. A case directly in point is Ex parte Whitwell, 98 Cal. 73, 32 P. 870, 19 L. R. A. 727, 35 Am. St. Rep. 152, which fully supports our conclusion that a properly conducted institution for the treatment of nervous diseases is not a nuisance.

[14] We repeat, therefore, that the ordinance involved herein is to be supported upon principles of zoning and not as a prohibition directed against actual nuisances. With this conclusion as a basis, it becomes necessary to determine whether that part of the ordinance which prohibits the further operation or maintenance of plaintiffs' businesses is a reasonable means by which the zoning power may be exercised. And here the distinction between the power to prohibit nuisances and the power to zone is exceedingly important. The power over nuisances is more circumscribed in its objects; but once an undoubted menace to public health, safety, or morals is shown, the method of protection may be drastic. Private businesses may be wholly prohibited, where their danger is sufficiently great; and other businesses, no matter how well established and how great the resulting loss, may be excluded from certain districts where, by reason of the circumstances, their maintenance has become a public nuisance in those districts. In these cases, the public welfare demands even the destruction of existing property interests. Examples of decisions of this type are Ex parte Quong Wo, 161 Cal. 220, 118 P. 714, involving a laundry, and Hadacheck v. Sebastian, 239 U. S. 394, 36 S. Ct. 143, 60 L. Ed. 348, Ann. Cas. 1917B, 927, involving a brick yard. While the latter case is an extreme illustration of the hardship which may result from an exercise of police power, it can be justified on the ground of nuisance regulation. It is not a zoning case at all. See 39 Yale L. J. 735, 738, note 19.

[15] Zoning is not so limited in its purposes. It may take into consideration factors which bear no relation to the public health, safety, or morals, but which come within the meaning of the broader term "general welfare." It deals with many uses of property which are in no way harmful. If its objects are so much broader than those of nuisance regulation, if its invasion of private property interests is more extensive, and if the public necessity to justify its exercise need not be so pressing, then does it not follow that its means of regulation must be more reasonable and less destructive of established interests? Must we say that the property of some of the residents of a district can be taken from them, without compensation, in order to make more attractive and pleasant the lives of other residents? "This background of nuisance law in the development of zoning occasionally leads to erroneous results. Property regulation by means of zoning is not restricted to what is disorderly or offensive * * * in attempting to apply to all types of zoning ordinances the summary methods of prevention and suppression which are employed in the case of nuisances, municipalities obviously fail to take into account the fact that zoning not only includes but also supplements nuisance regulation. A restriction imposed to prohibit an offensive use is not a taking of property for which compensation must be made and in the abatement of nuisances retroactive measures are valid. Granting that a zoning ordinance may operate retroactively where there is clearly an element of nuisance, it does not follow that a similar disposition may be made of every type of non-conforming use dealt with in zoning." 39 Yale L. J. 738. "No one gainsays that a municipal government within its police power has the right to prescribe rules regulating the character of buildings to be erected and the material to be used within certain prescribed boundaries. * * * But such ordinances must * * * relate to the future. Of course, that does not prevent cities from moving to abate nuisances whenever occurring." Brown v. Grant (Tex. Civ. App.) 2 S.W.(2d) 285, 287.

Seemingly in opposition to these widely held views is the conclusion reached by the Supreme Court of Louisiana, with respect to an ordinance of the city of New Orleans which prohibited the establishment or maintenance of any business within a specified district, and provided that all businesses then in operation in the district should be liquidated in one year. In State v. McDonald, 168 La. 172, 121 So. 613, and in State v. Jacoby, 168 La. 752, 123 So. 314, the ordinance was held valid as applied to businesses in operation prior to its passage, which had failed to liquidate within the prescribed period. An examination of the language of the opinions indicates that the court did not consider the general question of the validity of retroactive zoning laws, but was concerned with the particular situation before it, and saw no material injury to the owner of the property. In the first case (State v. McDonald, supra, at page 616 of 121 So.), the court said: "In the instant case there is nothing * * * in the record on which the court would be authorized or justified in declaring the attacked provision of the ordinance harsh, arbitrary, or unreasonable. * * * For all that appears, the business may be a small retail grocery business located in an outlying section far removed from the business center of the city. The defendants have not shown, and the court is unable to conjecture, any substantial reason why such a business could not be liquidated and closed out within a year." In the second case, State v. Jacoby, supra, at page 317 of 123 So., the objection of the owner was disposed of in the same manner: "Defendant's drug store is a small one, and it is obvious that one year affords ample time within which to liquidate the business and close it."

These decisions are, we think, distinguishable from the instant case; but even if they were not distinguishable, we should not be disposed to follow them, for they exhibit, in our opinion, a confusion between the objects of zoning and nuisance regulation. See 39 Yale L. J. 738.

A more drastic decision, perhaps, is Village of Euclid v. Ambler Realty Co., 272 U. S. 365, 47 S. Ct. 114, 71 L. Ed. 303, 54 A. L. R. 1016, already mentioned in this opinion. There the ordinance created a residential district which included a large tract of land owned by the Ambler Realty Company, which had been held vacant for industrial purposes. The effect of the restrictive provisions of the ordinance was materially to impair the market value of the land. Although the lower federal court was of the opinion that this was an unreasonable interference with private property, the Supreme Court of the United States finally upheld it, three justices dissenting. This is an extreme case, and has been recognized as such by zoning authorities. Thus, Baker says (page 144): "The ordinance involved in this case does not seem to be a reasonable application of the zoning principle, and the result is a distinct surprise." However harsh be the result of this decision, it is nevertheless in no sense decisive of the instant case, for it did not involve a retroactive ordinance. The Supreme Court recognized the difficulty that would be encountered in laying down a test of the validity of a restriction based solely upon the value of the property interest affected, yet in the subsequent case of Nectow v. Cambridge, 277 U. S. 183, 48 S. Ct. 447, 72 L. Ed. 842, it was held that a similar restriction involving a "serious and highly injurious" invasion of property was, under the particular circumstances, unreasonable. No general test can be derived from these or other cases, all of which reiterate the well-worn doctrine that each one must be decided on its particular facts. See Mayor of Wilmington v. Turk, 14 Del. Ch. 392, 129 A. 512. But we think that there is a decided difference between an ordinance which operates to limit the future use of property, no matter how great the impairment of its value, and one which requires the discontinuance of an existing use. In the first situation, we see merely the familiar example of an intangible and speculative future value being reduced as a result of the necessities of city planning; in the second we see the destruction of a going business. This latter action, if sanctioned by law, may have a serious and damaging effect on private enterprise generally, in addition to its manifest injury to the persons whose businesses are prohibited.

We do not mean to hold that those engaged in the zoning of cities must always be faced with the impossibility of eradicating the nonconforming uses. In some jurisdictions this problem has been dealt with by provisions against alteration or enlargement of existing structures, or rebuilding after their destruction. See State v. Hillman, 110 Conn. 92, 147 A. 294; Appeal of Ward, 289 Pa. 458, 137 A. 630; City of Earle v. Shackleford, 177 Ark. 291, 6 S.W.(2d) 294. But ordinarily the added benefit to the majority of the residents of the restricted district should not be received at the expense of others. If the city desires to abolish the nonconforming use, this may be a legitimate object of the police power, but the means of its exercise must not include the destruction of the property interest without compensation. The words of Mr. Justice Holmes in Pennsylvania Coal Co. v. Mahon, 260 U. S. 393, 413, 43 S. Ct. 158, 159, 67 L. Ed. 322, 28 A. L. R. 1321, are very much in point:

> "As applied to this case the statute is admitted to destroy previously existing rights of property and contract. The question is whether the police power can be stretched so far.
>
> "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not all cases there must be an exercise of eminent domain and compensation to sustain the act. So the question depends upon the particular facts. The greatest weight is given to the judgment of the legislature but it always is open to interested parties to contend that the legislature has gone beyond its constitutional power."

Further on, the learned justice remarks: "The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking. * * * In general it is not plain that a man's misfortunes or necessities will justify his shifting the damages to his neighbor's shoulders. * * * We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."

The principles set forth in the Pennsylvania Coal Company Case were approved in Piper v. Ekern, 180 Wis. 586, 194 N. W. 159, 162, 34 A. L. R. 32, where a statute limiting the height of buildings surrounding the state capitol was held unconstitutional. The court said: "* * * In one sense such a restriction under the police power does not transfer property from the private owner to the public, as is the case where the power of eminent domain is exercised; nevertheless such restriction may be of such a nature as to practically accomplish the same result. * * * It has also been held that any regulation which deprives any person of the profitable use of his property constitutes a taking of property and entitles him under the Constitution to compensation, unless the invasion of rights is so slight as to permit the regulation to be justified under the police power. * * *" See, also, Isenbarth v. Bartnett, 206 App. Div. 546, 201 N. Y. S. 383.

Even where the destruction of private property is warranted by vital public necessity, it is sometimes the legislative practice to compensate the injured owner. Such, for example, was the case with our legislation directed toward the eradication of bovine tuberculosis by the destruction of diseased cattle. See Patrick v. Riley (Cal. Sup.) 287 P. 455.

[16, 17] Our conclusion is that where, as here, a retroactive ordinance causes substantial injury and the prohibited business is not a nuisance, the ordinance is to that extent an unreasonable and unjustifiable exercise of police power. Whether, under our present law, there exists the power to eliminate the nonconforming use by payment of compensation for the loss suffered, is a question not presented by this case, and one which we therefore do not attempt to determine.

It follows that the present ordinance is valid in so far as it prohibits the further establishment of businesses of this type in the restricted districts; and is invalid in its application to these plaintiffs.

The judgment is therefore reversed.

We concur: WASTE, C. J.; RICHARDS, J.; SEAWELL, J.; CURTIS, J.; PRESTON, J.

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211 Cal. 778

Emil WITTMAN and Elsie Wittman, Plaintiffs and Appellants, v. CITY OF LOS ANGELES (a Public Corporation) et al., Defendants and Respondents.

L. A. 10655.

Supreme Court of California.

Dec. 31, 1930.

Rehearing Denied Jan. 30, 1931.

In Bank.

Appeal by plaintiffs from a judgment of the Superior Court of Los Angeles County, H. V. Alvarado, Judge, in an action to enjoin the enforcement of an ordinance of the City of Los Angeles prohibiting the establishment and maintenance within certain areas of hospitals or sanitariums for the care and treatment of insane or feeble-minded persons. Reversed.

Rehearing denied; SEAWELL, SHENK and CURTIS, JJ., dissenting.

Superseding opinion of District Court of Appeal in 286 P. 165.

Woodruff, Musick, Pinney & Hartke, of Los Angeles, for appellants.

Jess E. Stephens, City Atty., and Frederick Von Schrader, Deputy City Atty., both of Los Angeles, for respondents.

PER CURIAM.

The facts and problems involved in this case are set forth in the opinion in the case of Jones v. City of Los Angeles (Cal. Sup.) 295 P. 14, this day filed. On the authority of that case, the judgment is reversed.

211 Cal. 778

Jerrold A. STERN, Plaintiff and Appellant, v. CITY OF LOS ANGELES (a Public Corporation) et al., Defendants and Respondents.

L. A. 10656.

Supreme Court of California.

Dec. 31, 1930.

Rehearing Denied Jan. 30, 1931.

In Bank.

Appeal by plaintiff from a judgment of the Superior Court of Los Angeles County, H. V. Alvarado, Judge, in an action to enjoin the enforcement of an ordinance of the City of Los Angeles prohibiting the establishment and maintenance within certain areas of hospitals or sanitariums for the care and treatment of insane or feeble-minded persons. Reversed.

Rehearing denied; SEAWELL, SHENK and CURTIS, JJ., dissenting.

Superseding opinion of District Court of Appeal in 286 P. 165.

Woodruff, Musick & Hartke, of Los Angeles, and Walter W. Rennie, of Venice, for appellant.

Erwin P. Werner and Frederick Von Schrader, both of Los Angeles, for respondents.

PER CURIAM.

The facts and problems involved in this case are set forth in the opinion in the case of Jones v. City of Los Angeles (Cal. Sup.) 295 P. 14, this day filed. On the authority of that case, the judgment is reversed.

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211 Cal. 777

Ruth Enna RUTHERFORD, Gertrude R. Glasow, and Gilbert Glasow, her Husband, Plaintiffs and Appellants, v. CITY OF LOS ANGELES (a Municipal Corporation) et al., Defendants and Respondents.

L. A. 10657.

Supreme Court of California.

Dec. 31, 1930.

Rehearing Denied Jan. 30, 1931.

In Bank.

Appeal by plaintiffs from a judgment of the Superior Court of Los Angeles County, H. V. Alvarado, Judge, in an action to enjoin the enforcement of an ordinance of the City of Los Angeles prohibiting the establishment and maintenance within certain areas of hospitals or sanitariums for the care and treatment of insane or feeble-minded persons. Reversed.

Rehearing denied; SEAWELL, SHENK and CURTIS, JJ., dissenting.

Superseding opinion of District Court of Appeal in 286 P. 165.

Roy A. Linn and Woodruff, Musick & Hartke, all of Los Angeles, and Walter W. Rennie, of Venice, for appellants.

Erwin P. Werner and Frederick Von Schrader, both of Los Angeles, for respondents.

PER CURIAM.

The facts and problems involved in this case are set forth in the opinion in the case of Jones v. City of Los Angeles (Cal. Sup.) 295 P. 14, this day filed. On the authority of that case, the judgment is reversed.

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211 Cal. 358

CARPENTER v. STATE BAR OF CALIFORNIA.

S. F. 14029.

Supreme Court of California.

Jan. 12, 1931.

1. Attorney and client ⚷36(1).

Power to suspend attorney for nonpayment of membership fees in state bar is in court and not in board of governors (St. 1927, pp. 44, 45, §§ 46, 47).

St. 1927, pp. 44, 45, §§ 46, 47, provides that member of state bar failing to pay fees after written notice of delinquency must be suspended from membership, and that no person shall practice law unless he be an active member of the state bar.

2. Attorney and client ⚷32.

Board of governors of state bar may impose reasonable expenses of enforcing State Bar Act upon members in form of fees or dues (St. 1927, p. 38).

3. Attorney and client ⚷32.

State Bar Act is not subject to criticism as conferring unregulated discretion respecting fees and penalties on executive body (St. 1927, p. 38).

The statute limits membership fees to not exceeding $10, and provides that no penalty can exceed double the amount of the delinquent dues.

In Bank.

Original proceeding by A. H. Carpenter against the State Bar of California to review action of the Board of Governors of the State Bar in suspending applicant from practice of law.

Petitioner suspended.

A. H. Carpenter, of Stockton, in pro per.

Fitzgerald, Abbott & Beardsley, of Oakland, for respondent.

PRESTON, J.

Proceeding to review the action of the board of governors of the state bar.

Petitioner, on December 17, 1927, at the time the State Bar Act went into effect, was a licensed attorney authorized to practice in the courts of this state. He paid his membership dues as prescribed in said act for a time. However, on November 22, 1929, the board of governors increased the annual dues from $5 to $7.50 and at about the same time imposed a penalty for delinquency in this payment of $3.

Petitioner paid neither the dues nor the penalty for the year 1930. The two months' notice prescribed by section 46 of the act was regularly given, and following the expiration of this period, on June 20, 1930, the board of governors took action purporting to suspend petitioner from membership in the state bar.

The section of the State Bar Act (Stats. 1927, pp. 38, 44, 45) involved, so far as here material, is as follows: "Sec. 46. Any member * * * failing to pay any fees * * * and after two months written notice of his delinquency, must be suspended from membership in the state bar. * * *" This section is followed by section 47, which reads: "No person shall practice law in this state subsequent to the first meeting of the state bar unless he shall be an active member thereof as hereinbefore defined."

[1] It is clear, therefore, that the sum total or aggregate effect of these provisions is to suspend the right of petitioner to practice law, which suspension will terminate only upon his compliance with the law. It is to be noted, however, that the act does not in so many words say that the board of governors shall make the order of suspension from membership. It occurs to us that, as this really amounts to suspension from the right to practice law, and further that, inasmuch as an attorney is an officer of the court, it would seem to have been the legislative intent that his suspension should be made by an order of this court, and that the action of the board of governors in the matter should be treated as a finding of fact and recommendation that this court make such order. This, too, is in consonance wiith our holdings in matters of admission and discipline of attorneys. In re Shattuck, 208 Cal. 6, 9–12, 279 P. 998; Brydonjack v. State Bar, 208 Cal. 439, 443, 281 P. 1018, 66 A. L. R. 1507. It also avoids a discussion of the contention that it is in effect the conferring of judicial authority upon a tribunal other than a court. See Suckow v. Alderson, 182 Cal. 247, 187 P. 965.

[2] It is true that petitioner disclaims liability and denies the power of the board of governors to fix or collect membership dues or assess penalties, but he offers no argument or authority germane to the subject. The validity of the State Bar Act as a regulatory measure under the police power has been repeatedly upheld by this court. When that fact is conceded, it follows as a matter of course that the reasonable expenses necessary to pay the costs of enforcement of the act, in furtherance of the purposes thereof, may be imposed upon the membership in the form of fees or dues. Shaffer v. Beinhorn, 190 Cal. 569, 213 P. 960; Riley v. Chambers, 181 Cal. 589, 593, 185 P. 855, 9 A. L. R. 418; Goer v. Taylor, 51 N. D. 792, 200 N. W. 898.

[3] The act is not open to the criticism that an unregulated discretion is conferred upon an executive body. The act provides that the membership fee above mentioned may be increased by the board of governors to an amount not to exceed $10. It also provides that no penalty can exceed double the amount of the delinquent dues. Thus it seems that the discretion of the board of governors is strictly controlled by the act, apparently drafted especially to obviate this criticism. Ex parte McManus, 151 Cal. 331, 90 P. 702; Riley v. Chambers, supra; Tarpey v. McClure, 190 Cal. 593, 213 P. 983; Dominguez Land Corp. v. Daugherty, 196 Cal. 468, 238 P. 703.

It appearing from the action of the board of governors of the state bar that a membership fee of $7.50 and a penalty for delinquency of $3 have been regularly imposed upon petitioner, and that two months' notice of such delinquency has been regularly given, and that such delinquency still obtains, and that the effect of such delinquency is to deprive petitioner during the continuance thereof of the right to practice law, it is, therefore, ordered that the petitioner, A. H. Carpenter, be, and he is hereby, suspended from the practice of the law in this state until such time as he may be reinstated upon the payment of said delinquent membership fee and penalty.

We concur: WASTE, C. J.; CURTIS, J.; LANGDON, J.; RICHARDS, J.; SEAWELL, J.; SHENK, J.

GILLANDERS et al. v. DA SILVA et al.*

S. F. 13426.

Supreme Court of California.
Jan. 9, 1931.

Rehearing Granted Feb. 5, 1931.

1. Judgment 🔑393.

Finding that liability policy did not mistakenly name automobile therein did not support order setting aside judgment for insurer sued on policy (Code Civ. Proc. § 663).

2. Insurance 🔑143(4).

Liability policy covering jitney operator *held* intended to include automobile specified in application for license, but by mutual mistake including different automobile, requiring reformation (Civ. Code, § 3399; Code Civ. Proc. § 956a).

> Transfer of jitney bus license and application for permit both specified named automobile as jitney bus to be operated. Operator secured liability policies issued in accordance with jitney bus ordinance, but policy by mutual mistake specified different automobile. Injury to passenger in jitney bus occurred while policy was in force, specifying different automobile.

3. Insurance 🔑143(4).

Type of automobile *held* not material in liability policy on jitney bus, where insurance rates were not shown to be different, and mistake in specifying automobile did not prevent reformation.

4. Insurance 🔑598.

Judgment against insurer with interest for amount of principal judgment against insured, plus interest *held* unauthorized allowance of compound interest.

In Bank.

Appeal from Superior Court, Alameda County; J. J. Trabucco, Judge.

Action by Grace Gillanders and husband against Manuel da Silva, etc., and others. Judgment for defendant Zurich General Accident & Liability Insurance Company, Limited, plaintiffs' motion to set aside such judgment was granted, and judgment was rendered for plaintiffs, and defendant insurance company appeals.

Modified and affirmed.

J. Hampton Hoge, of San Francisco, for appellant.

Wesley W. Kergan and Alfred B. Weiler, both of San Francisco, for respondents.

SHENK, J.

This is an appeal from an order made after judgment pursuant to section 663 of the Code of Civil Procedure and from the judgment which followed that order. The plaintiffs are husband and wife.

The action is one to reform a liability indemnity insurance policy issued by the defendant insurance company and to recover on said policy when so reformed.

On March 11, 1924, and while said policy was in effect, the plaintiff, Grace Gillanders, was struck and injured by an automobile operated as a jitney bus by the defendant da Silva in the city of Oakland. In a prior action said plaintiff recovered a judgment against da Silva in the sum of $5,116.30 and costs. That judgment being unpaid, this action was commenced. The defense of the insurance company was and is that the policy issued by it did not cover the automobile operated by da Silva at the time of the accident.

It appears from the findings of the court that on April 6, 1915, the commissioners of the city of Oakland passed an ordinance providing for the regulation of the business of operating automobiles for hire within the city. This ordinance was amended on January 13, 1916, is commonly called the jitney bus ordinance, and the same was in effect at all times involved in this controversy. Section 3 provides that before operating any automobile for hire in said city the owner or lessee thereof should apply for and obtain annually a license so to do from the city council, and the operator of such automobile should obtain a permit as therein provided; that the applicant for the license should state under oath (a) the route proposed to be followed; (b) the price to be charged; (c) the schedule to be observed; (d) the transfer points; (e) the type of motor vehicle and the name of the manufacturer or the popular name thereof; (f) the horse power, factory number, and state license number; (g) the seating capacity of the motor vehicle; and (h) the name, age, residence, and business address of the applicant. Said section further provides that the license after investigation should be granted unless it should appear (a) that the bond or insurance policy elsewhere required by the ordinance had not been furnished and approved "or the same is insufficient in form or substance to properly safeguard the public interest and safety," and (b) that the applicant has not complied with all of the terms and conditions of the ordinance. Section 8 provides that a license once issued might be transferred to another qualified person upon application to and approval by the chief of police.

Section 18 of the ordinance provides that, in order to insure the safety of the public, it shall be unlawful for any person to operate

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Rehearing granted 299 P. 722.

an automobile for hire or to obtain a license therefor unless he shall obtain and keep on file in the office of the city clerk either (a) a bond, or (b) a policy of insurance in an authorized company insuring the owner or lessee of said automobile against any loss or damage that may result to any person from the operation of the automobile, said policy to be in limits of $5,000 for each person injured, etc. The ordinance contains the usual penal clause.

The findings further show that on March 10, 1924, the defendant da Silva was duly licensed under said ordinance to drive a 1917 Haynes touring automobile for hire, factory No. 26,182; that prior to February 26, 1924, one Guidotti was a duly licensed jitney bus operator having a route on Seventh street in said city and operating a Haynes automobile; that the defendant da Silva applied to the city in writing for permission to acquire the license of Guidotti to operate on Seventh street and that prior to and on March 11, 1924 (the date of the accident), the defendant da Silva was duly licensed to operate the Haynes automobile as a jitney bus on the Guidotti route on Seventh street; that during the months of February and March, 1924, the firm of Spengler & Fraser were insurance brokers in said city, and during that time placed with insurance companies all of the applications of jitney bus drivers on Seventh street; that on March 1, 1924, that firm applied to the defendant insurance company to issue its policy of insurance to da Silva covering the operations of a 1919 Oldsmobile theretofore operated by Guidotti on said route and the policy was issued to da Silva covering said Oldsmobile; that it was not, as alleged by the plaintiff, through the mistake of the scrivener of the defendant insurance company that the policy described the Oldsmobile instead of the Haynes automobile, and it was not until March 24, 1924, that the mistake in the description of the automobile was discovered, at which time the defendant issued its policy correcting the name of the automobile operated by the defendant da Silva; that the defendant insurance company, during the months of February and March, 1924, had agreed to write and did write all of the insurance policies covering jitney buses on the Seventh street route for the purpose of complying with said jitney bus ordinance, and that the original and corrected policies above described and issued by the defendant insurance company were two of the sixteen bus policies written by the defendant insurance company pursuant to said agreement; that Spengler & Fraser in so applying for and the defendant insurance company in issuing said policies did so in order to comply with said jitney bus ordinance, and that Spengler & Fraser were not the agents of the defendant insurance company.

On the foregoing and other findings not material to this discussion, the court concluded that the plaintiffs take nothing, and that the defendant insurance company have judgment for its costs, and judgment was entered accordingly. Thereafter, as authorized by section 663 of the Code of Civil Procedure, the plaintiffs moved to vacate and set aside the judgment and to enter a judgment in their favor on the ground that the findings of fact do not support the conclusions of law or the judgment. This motion was granted, and judgment was thereupon entered reforming the insurance policy issued on March 1, 1924, so as to describe the 1917 Haynes automobile in the place and stead of the Oldsmobile, and further adjudging that the plaintiffs recover the sum of $5,000 against the defendant insurance company with interest at the rate of 7 per cent. per annum from January 30, 1925 (the date of the entry of the prior judgment in the personal injury action), "said principal and interest amounting to the sum of $6,341, and interest upon said sum of $6,341 from the date hereof" until paid, with costs. The defendant insurance company appealed from the order and from the judgment.

[1] The appeal from the order will first be passed upon. The complaint alleged the issuance by the defendant insurance company to da Silva on March 1, 1924, of a policy covering the operations of a Haynes automobile. This allegation the court found to be untrue and found that said policy of March 1, 1924, was issued to da Silva to cover the operation of an Oldsmobile. The accident occurred on March 11, 1924, while the policy was in effect. It was alleged in the complaint "that through the mistake of the scrivener employed by said insurance company to write said policy, the policy described a 1919 Oldsmobile touring automobile No. 2122, instead of said Haynes automobile." This allegation was found to be untrue, and it is the only finding upon the subject of mistake. We conclude that the findings as they now stand are deficient in some respects and are insufficient to support the judgment entered pursuant to the motion under said section 663, and the order granting said motion should be, and it is hereby, reversed.

The foregoing determination does not necessarily result in a right in the appellant to have a judgment directed in its favor, for we now have to consider the appeal from the judgment. It is alleged in the complaint that da Silva in applying for the policy of March 1, 1924, and the defendant insurance company, in issuing the same, did so in order to comply with the requirements of the jitney bus ordinance of the city of Oakland. This allegation was denied in the answer of the insurance company, but the court found that the allegation was true. The record supports this finding. The evidence in support thereof, so far as the insurance company is concerned, is found in the testimony of the company's division manager who testified that he was approached by Mr. Johnson of Spengler & Fraser, who were acting on behalf of all of the jitney bus operators on Seventh street; that he was requested to write up policies covering jitney bus operations on Seventh street "and we agreed to write the whole line." The insurance company then proceeded to carry out this agreement and in doing so wrote sixteen policies, among them the one to da Silva. In doing so the insurance company must be held to have intended that the policies it should write would be as required by the ordinance of the city enacted in behalf of the patrons of jitney buses and pedestrians on the streets of the city. The public was the real beneficiary of the municipal legislation, and all of those participating in a compliance with the law on behalf of the public were charged with the responsibility of seeing that it was not set at naught because of errors which by the exercise of reasonable diligence would not have occurred.

[2] The record shows that on December 7, 1922, Guidotti applied to the city council for a permit to operate a jitney bus on Seventh street. In this application he specified a Haynes automobile as the type of car he intended to use. The permit was granted. Later on da Silva bought his route and applied to the city council for approval of a transfer of Guidotti's license to himself. On February 13, 1924, da Silva filed his application with the city council requesting a permit to operate a Haynes automobile as a jitney bus on Seventh street. On February 26, 1924, the consent of the city council to the transfer of Guidotti's interest to da Silva was entered in the minutes of the council. On March 1, 1924, the insurance policy in question was issued, stating, among other things, that it was issued "in accordance with the provisions of the jitney bus ordinance * * * of the city of Oakland." It could not have been so issued unless it covered the operations of the Haynes automobile described in the application of da Silva and the orders of the city council made pursuant thereto, which were matters of public record and available to the insurance company in its efforts to cover the jitney buses operating on Seventh street. The allegations of the complaint are broad enough and the proof in support thereof is sufficient upon which to base a finding that it was the intention of both the insurance company and of da Silva to have the policy of March 1, 1924, cover the Haynes automobile, otherwise the entire purpose of the city legislation and of the jitney bus operators, and of the insurance company as well, would have been frustrated to the detriment of the public on whose behalf the entire plan was established. Through a mistake attributable in part to the insurance company and for which it cannot be relieved of responsibility, the jitney bus of da Silva was described as an Oldsmobile, not owned or intended to be operated by him, instead of a Haynes car described in the public proceedings necessary to effectuate the purpose of the ordinance. This mistake was therefore of such a character as to constitute a mutual mistake as is contemplated by section 3399 of the Civil Code. Under the authority granted this court by the Constitution and section 956a of the Code of Civil Procedure, it is now found to be a fact that such a mistake occurred, and as a conclusion of law it follows that the policy should be reformed so as to cover the Haynes automobile intended to be covered thereby.

[3] We are not impressed by the argument that the type of the car in this particular instance was a material consideration in the issuance of the policy. This is not a case merely between private parties where a material misrepresentation as to the year of manufacture and the type of car would avoid the policy, such as was the case in Solomon v. Federal Ins. Co., 176 Cal. 133, 167 P. 859. Rather it is a case where the year and type would be of no consequence to those for whose benefit the policy was issued, namely, the public. It would be immaterial, we take it, whether a passenger on the jitney bus or a pedestrian were injured by an Oldsmobile or a Haynes car. The rate of insurance is not shown to be different one from the other, and the insurance company received the premium of $180 on the policy issued. Furthermore, this company issued a policy on the Haynes automobile on March 24, 1924, at the same premium. There is no showing that the company would not have issued the policy if the automobile had been described as intended by all parties.

[4] The insurance company makes the further point that the form of the judgment results in a compounding of interest on the original judgment in favor of the plaintiff. This contention is well taken. The interest on the original judgment was computed at the legal rate from its entry on January 30, 1925, to the date of the judgment in the present action. The sum of the principal and interest was $6,341, and judgment herein was rendered for that sum with interest thereon until payment or satisfaction of the judgment. Obviously this was an allowance of interest on interest for which there appears to be no authority in law in such a case.

With the foregoing additional finding now made by this court the judgment of reformation rendered by the trial court is supported by the findings and the conclusions of law drawn therefrom.

The judgment is modified by striking from the third paragraph thereof the following language: "Said principal and interest amounting to the sum of $6,341, and interest upon said sum of $6,341 from the date hereof."

As so modified the judgment is affirmed.

We concur: WASTE, C. J.; RICHARDS, J.; SEAWELL, J.; CURTIS, J.; PRESTON, J.; LANGDON, J.

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211 Cal. 281

CARTER et al. v. STEVENS, State Fire Marshal, et al.

LEWIS et al. v. SAME.

L. A. 11958.

Supreme Court of California.

Dec. 31, 1930.

1. Appeal and error 🔑781(1).

Attack on statute amended before decision is moot unless portions of act continued in the amended act remain vulnerable to attack made (St. 1927, p. 1924, as amended by St. 1929, p. 288).

2. Licenses 🔑5.

Regulation of clothes cleaning establishments in use of which volatile and inflammable substances and heat, steam, and hot water are used is within state's police power.

3. Statutes 🔑188.

Words of statute must be given meaning germane to subject-matter and consistent with rational deductions, rather than meaning that would create absurdity.

4. Constitutional law 🔑62.

Statute regarding licensing of clothes cleaning establishments *held* not to confer unlimited or arbitrary powers on state officials (St. 1927, p. 1926, § 2, subd. f, as amended by St. 1929, pp. 291, 292, § 3).

> St. 1927, p. 1926, § 2, subd. f, as amended by St. 1929, pp. 291, 292, § 3, requires application for license to be made to the department of industrial relations, and provides that the department or its duly authorized representative shall make thorough investigation into fitness of applicant to conduct such establishment, and that if investigation reveals that the establishment or its plans, specifications, or premises, or the character or ability of the applicant to conduct the establishment are not in compliance with law or in any manner jeopardizes the public welfare, or in the opinion of the department or its representatives makes such establishment a menace to the public welfare and safety, the department may deny a permit or license.

5. Evidence 🔑83(1).

It is not to be presumed that department of industrial relations will exceed its authority in making rules under statute regulating clothes cleaning establishments (St. 1927, p. 1928, § 3, as amended by St. 1929, p. 293, § 4).

> St. 1927, p. 1928, § 3, as amended by St. 1929, p. 293, § 4, provides that department of industrial relations shall have power and authority to prescribe rules, regulations, and specifications governing construction, equipment, maintenance, and operation of clothes cleaning establishments deemed necessary to protect life and property against fire menace.

6. Licenses 🔑7(1).

Statute regulating clothes cleaning establishments is not unconstitutional as failing to set up definite standard or test by which delegated power is to be exercised or as conferring arbitrary power or judicial or legislative powers on enforcement agency (St. 1927, p. 1924, as amended by St. 1929, p. 288; Const. art. 3, § 1, and art. 4, § 1).

7. Licenses 🔑22.

Department of industrial relations may not arbitrarily deny license or permit for clothes cleaning establishment, and, if it should, courts may correct the wrong (St. 1929, p. 288).

8. Evidence 🔑83(1).

It is not to be presumed that department of industrial relations will deny license or permit for clothes cleaning establishment without good cause (St. 1929, p. 288).

9. Constitutional law 🔑296(1).
Licenses 🔑7(1).

Statute regulating clothes cleaning establishments does not violate due process clauses of state or federal constitutions (St. 1929, p. 288).

10. Appeal and error 🔑781(1).

Validity of rules promulgated under original act regulating clothes cleaning establishments *held* rendered moot by amendatory act (St. 1927, p. 1924, as amended by St. 1929, p. 288).

> So much of the substance of the rules adopted under the original act as was deemed necessary to effectuate the object of the act was written into the amended statute, and no attempt was made thereafter to enforce the rules adopted under the original act.

In Bank.

Appeal from Superior Court, Los Angeles County; Charles B. MacCoy, Judge.

Action by Jose D. Carter, doing business under the name and style of The Poppy, and others, against Jay W. Stevens, as State Fire Marshal of the State of California, and others, and action by L. M. Lewis, doing business under the name and style of City Cleaners, and others, against Jay W. Stevens, as State Fire Marshal of the State of California, and others, in which other persons intervened as plaintiffs. From a judgment partially adverse to plaintiffs and interveners, they appeal.

Appeal dismissed.

Superseding opinion in 208 Cal. 649, 284 P. 217.

William Schreider and Lyon, Fleming & Robbins, all of Los Angeles, for appellants.

U. S. Webb, Atty. Gen., and James S. Howie, Deputy Atty. Gen., for respondents.

SEAWELL, J.

In 1927 the Legislature adopted an act effective August 2, 1927, entitled "An act to reduce the fire *insurance* hazards of the business of clothes cleaning establishments, providing for the enforcement thereof by the state fire marshal, providing ways and means for enforcement and providing penalties for violations." Stats. and Amdts. 1927, p. 1924. The insertion of the italicized word *insurance* was clearly an inadvertence and must be disregarded. The intent of the title is in nowise affected by so doing.

In 1929 the Legislature adopted an act effective August 14, 1929, to amend the title (republishing the same in full) and sections 1, 2, 3, and 4 of said 1927 act "and to add two new sections thereto to be known as section 5, relating to hazardous buildings and equipment, and section 6, creating a division of industrial fire safety in the department of industrial relations, and transferring to said division the administration and enforcement of said act." Stats. and Amdts. 1929, p. 288.

On January 13, 1928, Jose D. Carter, proprietor of a cleaning and dyeing plant known as The Poppy, located in the city of Pasadena, and a number of other persons, corporations and firms engaged in the business of operating and conducting dyeing and clothes cleaning, feather cleaning, and fabric cleaning plants located within the city of Los Angeles and other cities within Los Angeles county, united in an action to enjoin Jay W. Stevens, as fire marshal of the state, and his assistants and deputies from enforcing certain rules promulgated by him by virtue of the provisions of said 1927 act, which they threatened to do, against appellants herein, on account of their refusal to comply with the same.

The original act, doubtless, was revised by the Legislature of 1929 with the object in mind of avoiding the objections which were urged against it upon the hearing of the cause in the court below. Certain sections of the original act remain intact, four were amended and two new sections were added.

[1] The complaint herein was filed January 13, 1928, and the decree was entered July 13, 1929, approximately one month prior to the day on which the amended act of 1929 became effective, if valid. This being so, the original act, which is under attack by appellants, has long since become dead and the questions now raised would be moot unless some of the sections of the original act or some portions of them which were continued in the act as amended remain vulnerable to the assault as then and there made. We must consider the objections made by the appellants with reference to the act as it now exists and not as to what it once was.

The trial court upheld the constitutionality of said 1927 act, including that portion which delegated to the state fire marshal authority to determine the conditions upon which persons may engage in the business of conducting and operating clothes cleaning and dyeing establishments. It enjoined the threatened enforcement of the rules promulgated by the state fire marshal against certain of the appellants and interveners, on the ground that as applied to them the requirements of said rules were oppressive and burdensome and entailed unreasonable and unnecessary expense to them. An additional reason assigned for granting the injunction was that the system and apparatus used in said certain plants were reasonably safe from fire hazard. Others were granted injunctive relief on the ground that their plants were constructed and operated in accordance with the ordinances of the cities within which they were located.

Certain proprietors of said dyeing and cleaning establishments, being dissatisfied with anything less than a decree invalidating substantially the entire act, including the portions which are reincorporated in the 1929 act, have appealed from the whole of the judgment.

Said act as it now exists and has existed since August 14, 1929 (St. 1927, p. 1924, § 1, as amended by St. 1929, p. 288, § 2), defines the term "clothes cleaning establishment" as any building, room, etc., in which the business or process of cleaning, dyeing or renovating clothes, wearing apparel, feathers or any fabrics or textiles, or hats is conducted or carried on, and where the process of such cleaning, dyeing or renovating is accomplished by the use of any volatile and inflammable product or substance, and where any liquid volatile and inflammable product or substance in an amount exceeding one gallon in the aggregate of all such volatile and inflammable products is kept or stored, or where any viscous or other compound, powder or solid volatile and inflammable product or substance in the aggregate amount of more than eight pounds is kept or stored. The act then proceeds to define and describe the various processes of cleaning and dyeing and the machinery and appliances used in clothes cleaning establishments. A better understanding of the hazards of the business may be had from a description of the uses and purposes of the "hazardous room." It is defined as a room wherein any volatile or inflammable product is kept or stored; or wherein any volatile or inflammable product is distilled, redistilled, filtered, clarified, etc., or wherein any still, filter, clarifier, extractor, washer, or tumbler is installed; or wherein any dust wheel is installed and the same is used for drying or deodorizing purposes following the operation of cleaning or dyeing; or wherein any clothes, wearing apparel, feathers, hats, fabrics, or textiles are dried or the odor removed therefrom after having been cleaned or dried by a cleaning process as in said act defined. A boiler room is defined as a room wherein is maintained or operated any appliances, machinery, or apparatus for the generation of steam or the heating of water where the American Society of Mechanical Engineers or other standard rating of such appliances or apparatus indicates a capacity thereof in excess of three horse power or more in one unit. Volatile and inflammable products are defined as any liquid, viscous or other compound, powder, or solid product or substance having the capacity to evaporate and during such evaporation generate and emit a gas or vapor propagative of flame or fire, or explosive in nature or explosive incident to evaporation.

The term "approved," where used in said act, means the authoritative sanction of the department of industrial relations prior to employment, installation, or use in or about a "clothes cleaning establishment" or a spotting and sponging establishment.

Section 2 of said act (St. 1927, p. 1926, § 2, as amended by St. 1929, p. 290, § 3) provides that it shall be unlawful for any person, corporation, etc., to establish, maintain, and operate a clothes cleaning establishment or to alter or reconstruct an establishment either as to buildings, machinery, or other equipment or apparatus, or to cleanse any clothing, wearing apparel, feathers, hats, fabrics, or textiles by means of a process defined as "cleaning"; or to keep or store therein or upon the premises wherein such cleaning process is operated any volatile and inflammable product as in said act defined, in any structure or in any manner other than approved by the state fire marshal, or without first making application to and obtaining from the state fire marshal of the state a license so to do. Every such permit or license shall contain the name of the person, corporation, copartnership, or association applying therefor and the name of the establishment and shall state the location of the establishment and the proprietors thereof, the maximum amount of volatile and inflammable product that is to be or may be stored in or upon said premises and the exact location of the tanks in which any volatile and inflammable products is to be or may be stored. Every application for a permit or license to establish and operate said establishment or to alter or reconstruct an existing establishment shall be accompanied by four blueprints not exceeding 24x42 inches, on which shall be shown a plot plan made to a scale showing the boundary lines of the property devoted or to be devoted to the establishment; all adjacent streets, alleys, easements; the materials to be used in the construction of all existing and proposed buildings, including that of existing buildings on adjacent property; also the dimensions and the location of rooms, the kind of materials to be used in the construction of the boiler house, hazardous buildings, and such other data as would assist the department of industrial relations in passing upon the application. Section 2, subd. (b) provides that "no change as to location, arrangement, or materials of construction, will be permitted in the execution of a design unless the same have been approved by the department of industrial relations." The permit or license shall be conspicuously posted in the building and shall be accessible to the representatives of the department of industrial relations, or the representatives of any city or county fire department within the state whenever request is made for its inspection. Subdivision (f) of section 2, to which appellants very strenuously object as an unlawful and unlimited delegation of judicial power, provides: "Application for such license shall be made to the department of industrial relations at its office within the State of California, and before the granting of such permit or license the department of industrial relations, or its duly authorized representative, shall make a thorough investigation into the fitness of such applicant to conduct a 'clothes cleaning establishment.' If such investigation reveals that the 'clothes cleaning establishment,' or the plans, specifications, premises, or character or ability of such applicant to conduct a 'clothes cleaning establishment' are not in compliance with the provisions of law or in any manner jeopardizes the public welfare or in any manner in the opinion of the department of industrial relations, or its duly authorized representatives, makes such proposed establishment a menace to the public welfare and safety, the department of industrial relations in its discretion is empowered to deny such applicant a permit or license to establish or maintain a 'clothes cleaning establishment.'"

[2] The Legislature has very properly placed the operation of clothes-cleaning establishments, conducted in the manner described in said act, and in which the use of volatile and inflammable substances and heat, steam, and hot water play the principal part, in the list of "hazardous businesses." That the whole subject-matter comes within the power of police regulation there is not room for a doubt.

[3, 4] In construing statutes it is a cardinal rule that the words of the statute must be given a meaning that is germane to the subject-matter of legislation and consistent with rational deductions, rather than a meaning that would create an absurdity. So, in interpreting the meaning of the words "character or ability" of the applicant to conduct a clothes-cleaning establishment, the nature of the business and the dangers that inhere in it, the care and vigilance to be exercised in properly safeguarding others as well as the temptations which the business may offer to persons who have a tendency to lead a questionable life, are matters to be considered in arriving at the purpose of statutes. We see nothing in the words which are sharply criticized by appellants that confers unlimited or arbitrary powers upon the department of industrial relations or upon the state fire marshal. The statute expressly authorizes that which the law impliedly authorizes, that is to say, if the applicant is found to be lacking in integrity or is recklessly indifferent to the rights and safety of others, or if he is lacking in ability to the degree that it would be dangerous to others for him to conduct a clothes-cleaning establishment, the department of industrial relations may reject his application and deny him a permit or license.

Section 3, as amended (St. 1927, p. 1928, § 3, as amended by St. 1929, p. 293, § 4), which is denounced by appellants as being unconstitutional on a number of grounds, follows:

"The department of industrial relations shall have the power and authority to prescribe rules, regulations and specifications governing construction, equipment, maintenance and operation of 'clothes cleaning establishments' deemed necessary to protect life and property against fire menace; provided, however, that such regulations in no manner restrict the operations of other statutes regulating such establishments; and provided, further, however, that any order of the department of industrial relations revoking the license of any clothes cleaning establishment is subject to a review by the court and can be set aside only upon the grounds that the department of industrial relations has exceeded its powers or has been guilty of fraud in the use of such order. The department of industrial relations is further empowered and directed to abate fire nuisances in any 'clothes cleaning establishment' pending a hearing upon such nuisance.

"In the event that any person, firm, association, copartnership, corporation or organization to whom such license or permit, has been issued to establish, conduct, maintain or operate a 'clothes cleaning establishment' or to store or to keep any volatile and inflammable product therein, shall violate or shall cause or permit to be violated any of the provisions of this act regulating such 'clothes cleaning establishment,' or shall conduct, maintain, or operate, or cause, or permit to be conducted, maintained or operated such 'clothes cleaning establishment' in an unlawful or careless manner dangerous to persons or property, within the discretion of the department of industrial relations or its duly authorized representatives, it shall be the duty of said department of industrial relations, and said department of industrial relations is hereby authorized and directed to revoke the permit or license issued to any such person, firm, association, copartnership, corporation or organization; provided, however, that no such permit or license shall be revoked until after a hearing as hereinafter provided has been had by said department of industrial relations in the mater of revocation of such permit or license. Notice of such hearing shall be given in writing and served upon the holder of such permit. * * *"

The act with considerable particularity prescribes the dimensions, height, and location of a hazardous building and the distance it shall be from the boundary line of the lot upon which it is located and its distance from street lines. The location, construction, equipment, and maintenance of the hazardous building is set out in the statute in detail. It provides, however, that where such buildings were in use on August 2, 1927, the effective day of the first statute on the subject, they shall be made to conform with the requirements of the act so far as it is physically possible. The statute very carefully sets forth in detail the plans and specifications of the plants and so far as the buildings, material, equipment, and machinery is concerned, but little is left to the discretion of the department of industrial relations. Violations of the provisions of the act are punishable as a misdemeanor by fine of not less than $200 or imprisonment not less than thirty days, or by both. It is further provided that if any sentence, clause, or portion of the act should be declared unconstitutional such decision shall not invalidate any remaining portions thereof.

[5] We are not now concerned with the extent of the state fire marshal's power to promulgate said rules by authority of the provisions of the 1927 act, since so much of the substance of said rules as was deemed necessary to effectuate the objects of the act has been written into the amended statute, and it is not claimed that the department of industrial relations, as successor of the state fire marshal, has made new or additional rules or that

any attempt has been made by it to enforce the rules made by virtue of a superseded statute. It is not to be presumed that the department of industrial relations will exceed its authority in making such rules as may be necessary to administer its office.

[6] Little need be said in defense of the claim made by appellants that the 1929 act is void as being in violation of article 3, section 1, and article 4, section 1, state Constitution.

Substantially every argument advanced by appellants in support of their contention that the acts fails to set up any definite standard or test by which delegated power is to be exercised by the enforcement agency with which a citizen may comply and demand a license; or that it confers arbitrary power upon said agency and that said act grants to an enforcement agency judicial or legislative powers, is answered by this court in Gaylord v. City of Pasadena, 175 Cal. 433, 166 P. 348, 349. That decision so pointedly answers the arguments made in the instant case that we feel justified in quoting from it to a considerable extent. There the validity of an ordinance of the city of Pasadena which delegated to the city electrician the power to determine whether electric wiring in buildings within the city was dangerous to life or property was attacked. The ordinance did not provide what conditions he must find existing before he could determine that the said installation was unsafe or dangerous. With substantially the same questions raised in the instant case before him, Mr. Justice Henshaw delivered a very able and comprehensive opinion, much of which may well be republished:

"Even a casual observer of governmental growth and development must have observed the ever-increasing multiplicity and complexity of administrative affairs—national, state, and municipal—and even the occasional reader of the law must have perceived that from necessity, if for no better grounded reason, it has become increasingly imperative that many quasi legislative and quasi judicial functions, which in smaller communities and under more primitive conditions were performed by the legislative or judicial branches of the government, are intrusted to departments, boards, commissions, and agents. No sound objection can longer be successfully advanced to this growing method of transacting public business. These things must be done in this way or they cannot be done at all, and their doing, in a very real sense, makes for the safety of the republic and is thus sanctioned by the highest law. For, as the Supreme Court of the United States declares: 'Indeed, it is not too much to say that a denial to Congress of the right, under the Constitution, to delegate the power to determine some fact or the state of things upon which the enforcement of its enactment depends would be "to stop the wheels of government" and bring about confusion, if not paralysis, in the conduct of the public business.' Union Bridge Co. v. United States, 204 U. S. 364, 51 L. Ed. 523, 27 S. Ct. 367.

"Since, as has been said, the city council of Pasadena would have in any proper case the unquestioned right under the exercise of its police powers to compel a householder to make good the electric appliances upon his premises, the present problem narrows itself down to a determination whether or not in the method which they adopted they conferred upon a subordinate officer or agent unreasonable powers, and herein the controlling consideration is not that the power conferred may be unreasonably or oppressively exercised, for every presumption is that it will be honestly and reasonably exercised. 'Laws are not made upon the theory of the total depravity of those who are elected to administer them; and the presumption is that municipal officers will not use these small powers villainously and for purposes of oppression and mischief.' [Citing cases.] Therefore, eliminating the possibility of an unjust and oppressive use of the power against which the courts will interfere (New York v. Van De Carr, 199 U. S. 552, 50 L. Ed. 305, 26 S. Ct. 144; Yick Wo v. Hopkins, 118 U. S. 356, 30 L. Ed. 220, 6 S. Ct. 1064), the question is, Can it be justly said that this delegated power is either in its terms illegally oppressive or in its terms lacks definiteness, thus allowing too great a play to the discretion of the city electrician? That an official charged with such a duty as this may, and indeed must, exercise discretion precisely as he may or must exercise judgment is, of course, true, but this fact in no way militates against the validity of the law, for, as said in the Van De Carr Case, supra, 'the authority sustained is the grant of power to issue or withhold permits in the honest exercise of a reasonable discretion.' A brief review of a few of the many cases will illustrate the nature and extent of powers exercised by inferior tribunals and officers whose grants of power have been upheld. The most familiar to which no citation of authority is necessary are the extraordinary grants of power, without express constitutional authority, by Congress and state Legislatures to interstate commerce and to railroad commissions. While recognizing that the Congress of the United States is the sole lawmaking power for all of its territory, the Supreme Court of the United States has held that the creation by Congress of a commission and the vesting in that commission of power to maintain a government in the Philippine Islands and to make necessary laws for that purpose was not an unconstitutional surrender by Congress of its legislative powers or an unconstitutional transference of those powers to an inferior board. [Citation of cases.] A law of the state of

Michigan which created a registration board of physicians empowered the board to say what physicians were duly and legally registered, and to forbid the practice of the profession to those not duly registered, was not, as held by the Supreme Court of the United States, an illegal nor unreasonable delegation of power; the court further saying that due process of law is not necessarily judicial process, and that the right of appeal is not essential to due process of law. Reetz v. Michigan, 188 U. S. 505, 47 L. Ed. 563, 23 S. Ct. 390. An act of Congress investing the Secretary of War and his subordinates with power to determine and declare whether a bridge over navigable waters is an unreasonable obstruction to navigation and to order its alteration or removal is a reasonable delegation of power, since Congress may clothe an executive officer with power to ascertain whether certain specific facts exist, and thereupon to act in a prescribed manner without in so doing granting in an unconstitutional sense legislative or judicial powers to such an officer. Monongahela Bridge Co. v. United States, 216 U. S. 177, 54 L. Ed. 435, 30 S. Ct. 356. * * * The requirements of the state Legislature that no milk shall be received for sale or delivery to the city of New York without a permit in writing from the board of trade and subject to the conditions of such permit is a reasonable delegation of authority (New York v. Van De Carr, supra); and like delegated powers of censorship in permitting or prohibiting the display of moving picture films are held valid. [Citation of cases.] * * *

"It [the ordinance] does not define what conditions the city electrician must find to exist before he determines that the electrical apparatus is unsafe or dangerous. From the very nature and character of such apparatus it would be impossible for any ordinance so to do without working in many instances the very oppression which its language, necessarily general, is designed to prevent. As we have said, it is presumed that the city electrician will act fairly. It is also presumed that he is competent. An unnecessary liberality is shown in this ordinance in conferring, as it does, a right of appeal to the council, for the ordinance, if good at all, would unquestionably be good without such right of appeal, and the householder, conceiving himself to be injured, would be left to his action in court. This ordinance is peculiarly like the North Carolina statute construed by the Supreme Court of the United States in Red 'C' Oil, etc., Co. v. Board of Ag. of N. C., 222 U. S. 380, 56 L. Ed. 240, 32 S. Ct. 152. The statute required only that illuminating oils 'be safe, pure, and afford a satisfactory light,' and gave to the state board of agriculture the power to establish rules and regulations and to determine what oils measured up to standard. The Supreme Court of the United States declared that this was not an illegal grant of legislative or judicial power and the requirements of the statute that illuminating oils should be 'safe, pure and afford a satisfactory light established a "sufficient primary standard."' The matter is concisely and clearly stated in 2 Dillon (Mun. Corp. 5th Ed.) § 598, where, discussing the question, he says: 'The fact that the dispensing power was apparently valid without restraint or qualification has been regarded as arising merely from the difficulty of defining in advance upon what conditions the permit shall be given or the dispensing power exercised.' It is concluded, therefore, that the ordinance here under consideration is not void as unwarrantedly conferring upon the city electrician judicial or legislative powers, nor yet void because its terms are either indefinite, arbitrary, or oppressive. Ex parte Fiske, 72 Cal. 125, 13 P. 310."

[7, 8] The 1929 act, being the only effective act in existence, provides the means by which a license may be obtained upon application to the department of industrial relations, which must make a thorough investigation of the fitness of the applicant to conduct a clothes cleaning establishment, as defined in the act. If it is found upon such investigation that the applicant is wanting in the respects pointed out in the statute, his application would, no doubt, be denied; if found otherwise, it would be granted. Of course, the department of industrial relations may not arbitrarily deny a license or permit, nor is it to be presumed that it will do so without good cause, and if it should, the courts are open for the correction of the wrong. A license may not be revoked without a hearing upon ample notice.

[9] It does not appear that the due process clauses of either the state or federal constitutions are impinged upon by the provisions of the 1929 act, which is a public safety measure.

[10] As stated in the beginning, the appellants have appealed from the whole of the judgment, a part of which was in their favor and part was adverse to them. Neither the state fire marshal nor the department of industrial relations, which was not made a party, has appealed. The act under which the rules were promulgated has been superseded by an amendment which sufficiently covers the subject matter as to render said rules unnecessary. Those portions of the original act which were carried into the amendment are held to be constitutional. It was the claim of the attorney-general from the beginning that the question of the validity of the rules became moot by the adoption of the act of 1929. That would seem to follow. No attempt seems to have been made to thereafter enforce them. We are of the opinion that a decision in favor of the validity of the parts of the 1927 act which were incorporated in the 1929 act

leaves appellants without an issue so far as the question of rules is concerned.

There seems to be no course other than to dismiss the appeal. It is so ordered.

We concur: WASTE, C. J.; RICHARDS, J.; SHENK, J.; CURTIS, J.; LANGDON, J.

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211 Cal. 218

CALIFORNIA CASUALTY INDEMNITY EXCHANGE v. INDUSTRIAL ACCIDENT COMMISSION et al.

S. F. 13970.

Supreme Court of California.

Dec. 30, 1930.

1. Master and servant 🔑417(7).

On certiorari to review reapportionment of death benefit to employee's mother, fact and extent of dependency are deemed conclusively established by findings on original award.

2. Master and servant 🔑386(1).

Death benefit to employee's mother must be computed on rate of contribution at time of injury (St. 1917, p. 844, § 14(b).

3. Master and servant 🔑393.

On death of dependent beneficiary of deceased employee, there being surviving dependent, death benefit not yet payable is subject to reassignment within commission's discretion (St. 1917, p. 844, § 14(e).

4. Master and servant 🔑347.

Permitting commission, upon death of dependent beneficiary of deceased employee, to reassign unpaid benefit, *held* within legislative power (St. 1917, p. 844, § 14(e).

5. Master and servant 🔑393.

Employer cannot complain of reassignment of death benefit by commission so long as a dependent survives, absent abuse of discretion (St. 1917, p. 844, § 14(e).

6. Master and servant 🔑393.

Reassignment, on death of deceased employee's wife, of unpaid portion of wife's benefit to employee's mother, who already received benefit based on partial dependency, *held* not abuse of discretion (St. 1917, p. 844, § 14(e).

In Bank.

Certiorari to Industrial Accident Commission.

Proceedings under the Workmen's Compensation Act by Violet G. Billings, widow, and Emma Jennings, mother of Leroy Billings, deceased, employee, opposed by the California Casualty Indemnity Exchange, insurer. To review an award of the Industrial Accident Commission, after the death of the widow, granting the mother's petition for reapportionment and ordering the unpaid portion of death benefit to wife paid to mother, insurer brings writ of review.

Award affirmed.

Daniel W. Burbank and C. F. Laumeister, both of San Francisco, for appellant.

Edward O. Allen, of San Francisco, for respondent.

SHENK, J.

Petition to review and annul a death benefit award of the Industrial Accident Commission. The petitioner is the insurance carrier of the employer of the deceased employee.

On December 17, 1928, Leroy Billings, an employee of the Union Ice Company, sustained injuries in an industrial accident at San Diego as a result of which he died on the same day. His surviving wife, Violet G. Billings, and his surviving mother, Emma Jennings, as dependents, filed with the commission an application for an adjustment of their claims for death benefits. The commission found the wife wholly dependent, and the mother partially dependent by reason of an annual contribution by the deceased toward the mother's support in the sum of $200. The commission thereafter awarded to the wife the sum of $4,400, and to the mother the sum of $600, all payable in weekly installments. Thereafter, and on October 6, 1929, the wife died, whereupon, on November 2, 1929, the mother petitioned the commission for a reapportionment of the death benefit and for an order for the payment to her of the unpaid portion of the death benefit previously awarded to the wife. After hearing, the commission granted the petition, made a reapportionment, and ordered that said unpaid portion of the death benefit to the wife be paid to the mother. The original award was not questioned, and the only point now presented relates to the power of the commission to make the subsequent order of reapportionment and award.

[1, 2] For the purpose of this determination, the fact and the extent of dependency must be taken as conclusively established by the findings on the original award. For the purpose of that award the fact and extent of dependency must be ascertained as of the date of the injury under section 14(b) of the act (St. 1917, p. 844) and "this necessarily means that the death benefit must be computed on the rate of contribution at that

time." Spreckels v. Industrial Acc. Com., 186 Cal. 256, 258, 199 P. 8, 9. The question is then narrowed to this: Was the power of the commission as to the distribution of the death benefits among dependents exhausted by the original award?

Section 9 of the act (St. 1917, p. 836), subsection 3(c) (1) (St. 1929, p. 420, § 1), provides: "In case the deceased employee leaves a person or persons wholly dependent upon him for support, such dependents shall be allowed the * * * death benefit equal to three times his average annual earnings," with a maximum of $5,000. This maximum was awarded in this proceeding and was apportioned $4,400 to the wife and $600 to the mother with an additional award in the sum of $150 for burial expenses as authorized by the act.

Section 9 of the act, subsection 3(c) (2), provides: "In case the deceased employee leaves no person wholly dependent upon him for support, but one or more persons partially dependent therefor, the said dependents shall be allowed * * * a death benefit which shall amount to three times the annual amount devoted by the deceased to the support of the person or persons so partially dependent." Under the foregoing provision, the undisputed evidence was that the annual amount devoted by the deceased to the surviving mother was $200, and the commission awarded to her three times that amount or $600, as specified by the statute.

Section 14(d) (1) of the act provides: "If there is one or more persons wholly dependent for support upon a deceased employee, such person or persons shall receive the entire death benefit, and any person or persons partially dependent shall receive no part thereof." Notwithstanding this provision, the commission awarded to the mother the sum of $600. No question was raised by the insurance carrier as to the power of the commission to make the award to the mother, probably, we assume, because the total did not exceed the maximum. The award to the mother was paid in full.

[3-6] At the time of the death of the wife, the death benefit awarded to her had been paid down to $3,963.85, which latter sum was reapportioned to the mother. The commission seeks to justify this reassignment by virtue of section 14(e) of the act, which reads: "The commission may, anything in this act contained to the contrary notwithstanding, set apart or reassign the death benefit to any one or more of the dependents in accordance with their respective needs and as may be just and equitable, and may order payment to a dependent subsequent in right, or not otherwise entitled, upon good cause being shown therefor. Such death benefit shall be paid to such one or more of the dependents of the deceased * * * as may be determined by the commission. * * * In the event of the death of a dependent beneficiary of any deceased employee, if there be no surviving dependent, the death of such dependent shall terminate the death benefit. * * *"

If it were not for the provisions of the foregoing section 14(e), the position of the petitioner would unquestionably be well taken. In the absence of that section it might well be argued that the statute had definitely and finally fixed the death benefit award to a partial dependent and that the reassignment of the death benefit theretofore awarded to a total dependent, since deceased, to a surviving partial dependent, would be tantamount to an award to one not entitled under the statute. But the provisions of section 14(e) are very broad. In effect, they provide that notwithstanding any other provision of the act, but within the maximum liability of the employer as provided by the statute and in the amount found by the commission to be due to dependents, the commission may reapportion and reassign the death benefit to such dependents "in accordance with their respective needs and as may be just and equitable," and may order payment to a dependent "not otherwise entitled, upon good cause being shown therefor." No point is made by the petitioner that the dependency of the mother did not and would not continue for a period far beyond the time when the original award to her was exhausted. The contrary satisfactorily appeared from the evidence at the hearing on the petition for reapportionment. So far as the employer was concerned, its liability to dependents was fixed at a definite amount by the commission within the statutory maximum. This amount became a fund for the benefit of the dependents of the deceased, to be administered according to their needs, and within the wise discretion of the commission. Under said section 14(e) the death of a dependent terminates the death benefit only "if there be no surviving dependent." When, as here, there is a surviving dependent, the death benefit not yet payable is subject to reassignment under that section within the proper discretion of the commission.

We discover no valid objection to section 14(e) of the act under the broad grant of powers to the legislature in dealing with this particular subject. So long as dependents of the deceased employee survive it would seem that the employer is in no position to complain provided the discretion of the commission under the statute be not abused. We find no such abuse in this case.

The award is affirmed.

We concur: WASTE, C. J., RICHARDS, J.; SEAWELL, J.; CURTIS, J.; LANGDON, J.; PRESTON, J.

211 Cal. 350

GARDNER v. SMITH et al.

S. F. 13392.

Supreme Court of California.

Jan. 10, 1931.

1. Partnership 🔑331.

In action for partnership dissolution and accounting, court's method, in determining profits during early part of year, of taking average based on whole year's profits, *held* not error, in view of seasonal nature of business.

Such method of calculating profits, made during first four months of year, in absence of satisfactory evidence as to what those profits or losses actually were, was fair and practical, where business, being manufacture and sale of farming and canning equipment, was seasonal and showed loss during early period and profits during late period when machines were delivered.

2. Partnership 🔑333.

In action for partnership dissolution and accounting, allowance for one partner's capital investment, consisting of machinery and premises, was properly refused, where he received substantial rental.

In Bank.

Appeal from Superior Court, Santa Clara County; J. R. Welch, Judge.

Action by George D. Gardner against J. S. Smith and another. From a judgment in favor of plaintiff, defendants appeal.

Affirmed.

Owen D. Richardson and Donald B. Richardson, both of San Jose, for appellants.

William F. James, of San Jose, and Lincoln V. Johnson, of San Francisco, for respondent.

PER CURIAM.

Plaintiff brought this action for the dissolution of a partnership alleged to exist between plaintiff and defendants, and for an accounting. On conflicting evidence, the trial court found in favor of the existence of the partnership, ordered it dissolved, and gave judgment in favor of plaintiff in the sum of $5,131.54.

On this appeal defendants concede that they are bound by the finding of the trial court in reference to the existence of the partnership, and also concede that the following facts were satisfactorily established by the evidence: That the partnership consisted of respondent and appellants, the latter being father and son; that all three should share equally in the profits and losses; that the partnership commenced on February 1, 1926, and continued until May 1, 1927; that the nature of the business was the manufacture and sale of farming and canning equipment; that appellant J. S. Smith was to furnish the plant and equipment; that there was charged therefor the sum of $400 a month as rental; that appellant C. O. Smith was to and did handle the sales and office end of the business; that respondent was to and did act as engineer and general supervisor of the shop; that appellant J. S. Smith handled all the finances of the business.

It is also accepted as an established fact that from February 1, 1926, to December 31, 1926, the partnership made a net profit over all expenses, including rental and depreciation, of $24,136.70. For this eleven-month period the share of each partner in the profits was $8,045.50, respondent receiving, however, only $2,936.10, leaving a balance owing him for 1926 of $5,109.40. From this should be deducted the sum of $75 paid by appellants to respondent for a purpose which the trial court determined made it properly deductible from respondent's share of the profits. This leaves a net of $5,034.40 owing to respondent for 1926.

[1] Some time in April, 1927, appellant J. S. Smith, who signed all checks for the partnership, refused to issue any further sums to respondent, and, as a result, respondent left the partnership on May 1, 1927. On this appeal the only controversy worthy of note is as to whether the trial court correctly computed the profits and losses of the partnership for the first four months of 1927. During these four months respondent admittedly drew $780. It is admitted that for the entire year of 1927 the business made a net profit of $7,900. The appellants introduced an audit which purported to show that for the first four months of 1927 the business suffered a $7,200 loss. The trial court was not satisfied with this audit, for reasons that will later appear, and, upon proof that the business was a seasonal one, and that the first months of the year were months in which money was spent, and the last months were periods in which the work of the earlier months was realized upon, used the following scheme in an attempt to determine equitably the share of profits due respondent for the four-month period involved: In order to determine the average monthly income for 1927, the trial court divided the net profit of that year by 12. Four times this result obviously gives the average profit for four months. Since there were three partners, if this result be divided by three, the total will be the profit due each partner for the first four months of 1927. From this must be deducted the $780 received by respondent, and, if the result be added to

the profits still due respondent for 1926, the total will be the sum for which the trial court gave judgment.

The appellants contend that the trial court was in error in thus averaging the monthly profits for 1927 based on the entire year's profits, and contend the audit introduced into evidence by them conclusively shows a loss for this period. The audit in question, mentioned supra, purported to cover the entire period of the partnership; that is, from February 1, 1926, to May 1, 1927. This audit did indicate that during the first four months of 1927 the partnership did lose over $7,200. It is appellants' contention that the entire $7,900 profit of 1927 is attributable to the last eight months of the year. If the audit correctly pictured the financial status of the business, there would be some merit in the appellants' contentions, but the evidence conclusively shows that the audit does not do so. The audit was not made until almost a year and a half after the end of the period it purported to cover. The accountant making the same testified that no inventory was taken as of May 1, 1927, and that the inventory of December 31, 1926, was taken as the basis for the audit. The audit shows that during this four-month period over $10,000 was spent for labor and materials invested in finished and unfinished machines. These expenditures obviously increased the physical assets of the firm to an appreciable extent; yet, inasmuch as the inventory taken was that of December 31, 1926, nowhere in the audit would the result of these expenditures be reflected. Moreover, the evidence showed, as stated supra, that the business was a seasonal one. Early in the year contracts were secured and machines manufactured for delivery later in the year. Appellant C. O. Smith testified that the first months of the year were months of paying out, so that in the most prosperous year the first months would show a loss. According to this same witness, there was no way to determine the profits or losses for any period in the year until "the income portion (of the year) had been balanced against the outgoing portion." He also testified that in his opinion the method of ascertaining the average monthly profit for 1927 used by the trial court was fair and practical.

Under such circumstances, we cannot say that the trial court was in error in averaging the monthly profits for 1927, in the absence of satisfactory evidence as to what those profits or losses actually were. Inasmuch as no physical inventory was taken in May of 1927, and taking into consideration the seasonal nature of the business, we are of the opinion that the method used by the trial court was fair and practical, and reached a result, which, for all practical purposes, gave respondent a fair share of the profits to which he was entitled. It would be obviously unfair to respondent to say that, although he worked for four months in building machines, because he left before they were sold, he cannot share in the profit. To state the proposition is to refute it.

[2] Appellant J. S. Smith complains that the court in its accounting made no allowance for his capital investment. This contention is without merit. It is admitted that this appellant received a substantial rent for the premises and machinery used by the partnership during the entire period of the existence of the partnership. There is no evidence that this appellant furnished the partnership with any of his private capital. Obviously, under such circumstances, no such allowance should be made.

The judgment appealed from is affirmed.

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211 Cal. 294

SMITH et al. v. LEWIS et al.

S. F. 13124.

Supreme Court of California.

Dec. 31, 1930.

1. Pleading ⚷214(1).

Demurrer admits truth of facts alleged in complaint.

2. Corporations ⚷630(6).

Judgment for domestic corporation can be collaterally impeached by showing that for failure to pay license tax corporation had no legal right to sue (St. 1915, p. 422, as amended by St. 1917, p. 371).

3. Corporations ⚷203.

Stockholder suing on behalf of corporation has no greater right than corporation would have had if it had been plaintiff.

4. Corporations ⚷213.

Judgment obtained by stockholder suing on behalf of corporation could be collaterally impeached by showing that by reason of failure to pay state license tax corporation had no right to sue (St. 1915, p. 422, as amended by St. 1917, p. 371).

5. Fraud ⚷41.

When fraud constitutes element of defense, it must be pleaded, since it is never presumed.

6. Appeal and error ⚷173(2).

Fraud in permitting corporate license tax to become delinquent *held* not presented in trial court in suit to enjoin enforcement of judgment for corporation and hence could not be urged on appeal (St. 1915, p. 422, as amended by St. 1917, p. 371).

> The suit sought to enjoin enforcement of judgment for corporation and to quash execution issued thereunder on ground that judgment was void because corporation was under suspension of its corporate rights at time action in which judgment was obtained was commenced for failure to pay state license tax as required by St. 1915, p. 422, as amended by St. 1917, p. 371, and as a return to the order to show cause why a temporary injunction should not be granted, the defendants filed a general and special demurrer to the complaint, and in a separate document charged that the complaint did not state facts sufficient to authorize issuance of injunction.

7. Appeal and error ⚷169.

Issues not tendered to trial court could not be urged on appeal.

8. Corporations ⚷592½.

Statute suspending corporate powers of domestic corporation for failure to pay license tax, *held* not unconstitutional in granting more favorable conditions to foreign corporation (St. 1915, p. 422, as amended by St. 1917, p. 371; Const. art. 12, § 15).

> Such statute, St. 1915, p. 422, as amended by St. 1917, p. 371 did not violate Const. art. 12, § 15, prohibiting the granting of favors to foreign corporations, for, although the part of the statute relating to foreign corporations was invalid, the state could require license tax of domestic corporation notwithstanding it could not impose such tax on foreign corporation.

9. Corporations ⚷630(6).

Revival of corporate powers did not have effect of validating judgment for corporation obtained during period corporate powers were suspended for nonpayment of license tax (St. 1915, p. 422, as amended by St. 1917, p. 371).

CURTIS and LANGDON, JJ., dissenting.

In Bank.

Appeal from Superior Court, Alameda County; J. D. Murphey, Judge.

Suit by O. F. Smith and others against Millie C. Lewis and another. From an adverse judgment, the defendants appeal.

Affirmed.

Superseding opinion 287 P. 470.

Milton S. Hamilton, of Oakland (Mark Averill, of Oakland, of counsel), for appellants.

Donahue, Hynes & Hamlin, of Oakland, for respondents.

SHENK, J.

This is an action to set aside a judgment and to permanently enjoin the enforcement thereof.

In July, 1925, Millie C. Lewis, defendant herein, commenced an action as a minority stockholder of the Borch Radio Corporation and on behalf of said corporation against O. F. Smith, F. O. Howe, E. L. Kirk, George E. Sheldon, and Max Lowenthal to compel said defendants as directors of said corporation to pay to the corporation the sum of $9,500 alleged to have been the value of certain property and assets wrongfully withdrawn from said corporation and delivered to another stockholder contrary to the provisions of section 309 of the Civil Code. Said corporation was alleged to be a corporation organized and existing under and by virtue of the laws of the state of California and was made a party defendant in said action under an allegation that it was controlled by the defendant directors, and it would be futile for the plaintiff therein to make a demand on said corporation to commence said or any action against said defendants, and therefore the plaintiff initiated said action on behalf of said corporation. The defendants therein named, except the defendants Lowenthal and the corporation, answered to the merits but did not allege in their answer, nor otherwise contend or show in said action, that said corporation at the time of the commencement of said action was under the disability of suspension of its powers by reason of the failure to pay its corporation license tax for the year 1923 as required by the Corporation License Act of 1915 (St. 1915, p. 422), as amended in 1917 (Stats. 1917, p. 371). Upon the trial of that action oral and documentary evidence was introduced. The court found the facts and rendered judgment in favor of the plaintiff, Millie C. Lewis, and against the answering defendants and ordered, adjudged and decreed that the Borch Radio Corporation have judgment against said defendants for the sum of $9,500, interest and costs. This judgment became final in January, 1927.

On March 25, 1927, the plaintiffs herein, defendants in the former action, commenced the present action against Millie C. Lewis and the sheriff of Alameda county to set aside the judgment in the former action, to quash the execution issued thereunder, and to enjoin the enforcement thereof, on the ground that said judgment was void for the reason that at the time the former action was commenced the Borch Radio Corporation was under suspension of its corporate rights, privileges, and powers for failure to pay its license tax for the year 1923, and that notwithstanding such suspension said Millie C. Lewis, as agent for and on behalf of said corporation, commenced said action and prosecuted the same to judgment.

Upon the filing of the complaint in the present action the plaintiffs applied to the court for a temporary injunction. An order was issued requiring the defendants herein to show cause on a day certain why the temporary injunction should not issue as prayed. As a return to the order to show cause the defendants filed a general and special demurrer to the complaint and in a separate document, signed only by the attorney for the defendants, charged also that the complaint in the present action did not state facts sufficient to authorize the issuance of an injunction and presented as a part of the return the answer of the plaintiffs to the complaint and the findings of fact and conclusions of law in the former action. The temporary injunction was issued and the cause came on for trial. It was thereafter stipulated in open court that the plaintiffs' right to a permanent injunction might be submitted on the demurrer to the complaint and on the application for a temporary injunction and the return thereto and that the court might enter judgment after argument thereon. Thereafter the court overruled the demurrer and found that "all of the allegations of the plaintiffs' complaint are true," concluded that the plaintiffs were entitled to the relief prayed for, and rendered its judgment of injunction accordingly. This appeal is from that judgment. The record is presented on the judgment roll and a bill of exceptions.

The judgment roll is in the usual form. To the complaint are attached a copy of the complaint and the judgment in the former action. The special demurrer charges uncertainty, in that it does not appear on the face of the complaint whether the plaintiffs herein pleaded as a defense in the former action the fact that the Borch Radio Corporation was under suspension of its powers when the former action was commenced or what, if any, defense was pleaded in the former action.

The bill of exceptions sets forth merely a copy of the order to show cause and the return thereto and recites the stipulation above referred to. The only specifications of error are the following: (1) The evidence is insufficient to support the findings that all of the allegations of the complaint are true; and (2) the evidence is insufficient to justify the finding that the plaintiffs are entitled to the relief prayed for in the complaint. The foregoing state of the record is set forth in detail in order to show the limitations thus placed by the appellant upon our inquiry on this appeal.

[1-4] As to the first specification of error there is no fact or other showing in the record to rebut the truthfulness of the allegations of fact in the complaint. In fact, the demurrer upon which the cause was in part submitted on the merits admitted the truth of those facts and the demurrer was properly overruled. Assuming that the attack therein made on the former judgment was collateral, such a judgment may be collaterally impeached by a showing that, by reason of the license statute, the corporation had no legal right to commence the action. Livermore v. Ratti, 150 Cal. 458, 89 P. 327; Crossman v. Vivienda Water Co., 150 Cal. 575, 89 P. 335; 15 Cal. Jur., p. 89. And a stockholder suing on behalf of the corporation, as in this case, has no greater right or standing as plaintiff than the corporation would have had if the corporation itself had been plaintiff. The stockholder stands in the shoes of the corporation. He is the mere nominal plaintiff and the corporation is the real party in interest, and if the corporation is not in position to attack the transaction, the stockholder may not. Turner v. Markham, 155 Cal. 562, 102 P. 272; 6 Cal. Jur. p. 865, and cases cited.

[5-7] The second specification of error, viz., that the evidence is insufficient to justify the finding that the plaintiffs are entitled to the relief prayed for in the complaint, might readily be dismissed as an insufficient specification of error, first, because the record contains no finding of that purport or effect, and, secondly, if such a finding were made it would be misplaced and constitute a conclusion of law. However, assuming this specification to be sufficient to raise the point the defendants assume thereunder to argue a question of estoppel against the plaintiffs by reason of their failure to allege in their answer, or otherwise disclose in the former action, that the corporation was under the disability of the statute at the time said action was commenced. Estoppel was not an issue presented to the court in the present action as disclosed by documents incorporated in the record, and the argument on the demurrer and the order to show cause is not included therein. The defendants argue with great earnestness that the plaintiffs are guilty of fraud in permitting the payment of the license tax to become delinquent and in not alleging the disability of the corporation in their answer in the former action. Fraud is never presumed. When it constitutes an element of defense it must be pleaded. 12 Cal. Jur. p. 800, and the cases cited. Certainly the issue of fraud was not presented in the demurrer to the complaint and the return to the order to show cause did not otherwise charge it. The trial court was therefore without power to find it as a fact. If the defendants relied upon it they should have filed an answer presenting the issue, which was not done. If that had been done, there may have been a defense to the charge. On the record now presented fraud may not therefore be infer-

red, and inasmuch as the defendants did not tender the issue of fraud or estoppel to the trial court, there was nothing before that court upon which to base a finding on that subject and the defendants are in no position on this appeal to urge the point.

[8] The defendants further contend that said license tax law, which has since been repealed (Stats. 1927, p. 396), was unconstitutional. This court, in Perkins Mfg. Co. v. Jordan, 200 Cal. 667, 254 P. 551, held the act unconstitutional as applied to foreign corporations, and it is argued that the decision in that case is applicable in principle to the imposition of license taxes upon domestic corporations; and that although the provisions of the act relating to license tax on domestic and foreign corporations were severable, the elimination from the act of the requirement of payment on the part of foreign corporations rendered that part of the act applicable to domestic corporations obnoxious to section 15 of article 12 of the state Constitution, which provides that no foreign corporation shall be allowed to transact business within this state on more favorable conditions than are prescribed by law to similar corporations under the laws of this state. In the Perkins Mfg. Co. Case this court felt impelled, in view of recent pronouncements by the Supreme Court of the United States, to hold that the provisions of the license tax relating to foreign corporations were invalid as constituting a burden on interstate commerce, and as a tax on property beyond the state's jurisdiction, contrary to the Fourteenth Amendment. But it would be going too far to hold that the state of California is powerless to require the payment of a revenue license tax by a domestic corporation merely because it is powerless to enforce a like measure on property beyond its jurisdiction. We are satisfied that the situation thus presented is not one contemplated by the section of our state Constitution invoked by the defendants.

Reduced to its lowest terms, this controversy is one wherein a judgment is sought to be set aside on the ground that the court was without jurisdiction to enter the same. While it may be said that the judgment on its face did not disclose that the corporation was without power to sue or to have suit brought on its behalf, nevertheless jurisdiction thus appearing was only apparent (Bennett v. Wilson, 133 Cal. 379, 65 P. 880, 85 Am. St. Rep. 207), and it may always be shown even collaterally that a corporation had no legal existence when the action was commenced (Crossman v. Vivienda Water Co., supra). The same rule would be applicable where the corporation had, as here under the statute, no power to sue.

[9] It is argued in the briefs of defendants' counsel that even if the disability of the corporation existed at the time the former action was commenced, such disability was removed by restoration to capacity before the issuance of the execution on the judgment and therefore the injunction should not have been granted. There are two answers to this argument: First, there is nothing in the record upon which to base it; and, secondly, if a revival later occurred, such revival would not have the effect of validating the acts attempted during the period of suspension. Ransome-Crummey Co. v. Superior Court, 188 Cal. 393, 205 P. 446.

Other points discussed in the briefs do not merit specific mention.

The judgment is affirmed.

We concur: WASTE, C. J.; RICHARDS, J.; SEAWELL, J.

CURTIS, J. (dissenting).

I am unable to agree with the views expressed in the majority opinion. The judgment in the original action was recovered in a suit instituted by a stockholder against the directors of said corporation for the illegal and unlawful payment of certain assets of the corporation contrary to the provisions of section 309 of the Civil Code. Said action was, therefore, not instituted nor maintained by the corporation but by a stockholder thereof. It is true that the general rule is that stockholders in suit of this nature, brought under section 309 of the Civil Code, can maintain only such actions as the corporation could have maintained and prosecuted. This was so held in the case of Turner v. Markham, 155 Cal. 562, 102 P. 272, 275, cited in the majority opinion and other cases relied upon in the text of 6 California Jurisprudence, 865, also cited. But these cases discussed and they involved merely the nature and character of the liability which the stockholders therein were seeking to enforce, and they do not in any way involve a case like the one now before us in which the nature and character of the action is such that the corporation could in the first instance have instituted the action but thereafter, by reason of its failure to pay its license tax, it was disabled from bringing such or any action whatever. This is made clear from the following language in the opinion of Turner v. Markham, supra:

> "At the threshold of this inquiry, however, it is proper to pause to point out what is the exact nature of the action before us. In its essence it is an action brought by the corporation itself to recover redress for some legal wrong which the corporation itself has suffered. To prevent a failure of justice, as where the governing board of directors or trustees of the corporation refuses to prosecute such an action, the law permits a stockholder to begin and maintain it on behalf of the corporation. But the fact that a stock-

holder is the nominal plaintiff in such an action, whether he prosecutes it as an individual stockholder or as a representative of a class of disaffected stockholders, does not in any manner or to the slightest extent enlarge the rights and remedies of the action. The action must still be founded upon some wrong which the corporation, as a corporation, has suffered, and for which, if itself were plaintiff, it could secure legal or equitable redress. Therefore, if the evidence shall establish that the corporation itself has suffered no wrong, cognizable either at law or in equity, it will matter not how just and how grievous may be the complaint of the individual stockholder, nor how complete may be the proof of his personal loss, damage, or injury. In this action on behalf of the corporation no recovery can be had, and the stockholder will be compelled to proceed by his individual action to obtain a personal recovery."

Nothing is said in the opinion in that case, nor in any of the other cases cited in California Jurisprudence, supra, nor in any case to which our attention has been called, which would justify the holding of the majority opinion that when the facts show that the corporation has sustained a loss under such circumstances that a cause of action to recover such loss is given to the corporation and to stockholders, and the corporation thereafter suffers a disability which would prevent it from recovering for said loss, that said disability to prosecute said action also attaches to the stockholders, and they are thereby prevented from recovering said loss.

The act of 1917 (Stats. 1917, p. 371) requiring domestic corporations to pay an annual license tax, and upon their failure to do so as required therein, providing that the corporation rights, privileges and powers of such corporation shall be suspended and incapable of being exercised for any purpose, except as therein provided, does not purport to suspend or in any manner to deal with the rights of stockholders to act or to institute proper actions for the protection of the property of the corporation. To extend the provisions of this act to stockholders of a corporation whose directors have unlawfully and illegally disposed of corporate property is not warranted by the provisions of said act nor by any rule of statutory construction. On the other hand, such rules of statutory construction hold directly to the contrary. The statute of 1917 above mentioned provides for a forfeiture and is penal in its application. It should, therefore, receive a strict construction and be held to be applicable only to include such subjects as are directly covered thereby.

A somewhat analogous situation was before the court when it was called upon to construe section 2468 of the Civil Code. This section when first enacted provided that no fictitious copartnership failing to comply with its provisions requiring the publication and filing of a certificate stating the name in full of the persons forming said copartnership, shall maintain any action upon or on account of any contract or transaction had in such fictitious name. The inhibition contained in said section did not apply at that time to assignees of such fictitious copartnership and it was held that an action could be maintained by such assignee. Cheney v. Newberry & Co., 67 Cal. 126, 7 P. 445; Wing Ho v. Baldwin, 70 Cal. 194, 11 P. 565; and Quan Wye v. Chin Lin Hee, 123 Cal. 185, 55 P. 783. In the Wing Ho Case the court said: "As the language of the statute [section 2468 of the Civil Code] does not include the latter [the assignees], we do not think it should, by construction, be extended to them." So with the statute of 1917. It does not purport to include stockholders, and to extend it to them would be against settled and approved rules of statutory construction.

I concur: LANGDON, J.

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211 Cal. 192

GILMORE v. LOS ANGELES RY. CORPORATION et al.

L. A. 10360.

Supreme Court of California.
Dec. 29, 1930.

1. Street railroads ⟹98(6).

Respecting contributory negligence of pedestrian, struck by street car while crossing street, test is whether reasonably prudent man would accept hazard proved.

2. Appeal and error ⟹1005(1).

Weighing of probabilities and conflicting inferences is ordinarily for trial court and jury.

3. Street railroads ⟹117(21).

On conflicting evidence, contributory negligence of pedestrian, killed by street car while crossing street *held* for jury.

4. Trial ⟹251(8).

Instructions defining last clear chance doctrine were properly refused; such doctrine not being in issue.

5. Appeal and error ⟹1033(5).

Instruction impliedly requiring more than ordinary care of pedestrian, if crossing

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⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

between intersections, *held* not prejudicial, being favorable to defendant street railway.

> Instruction in question stated that, if pedestrian were crossing at intersection, rules of ordinary care applicable to street intersections would govern, and any instruction on special care required of one crossing between intersections should be disregarded. But instructions elsewhere correctly declared pedestrian was required to exercise care and caution that reasonably prudent and careful man in same or similar circumstances would exercise, whether crossing in middle of block or at intersection.

6. Street railroads 🔑118(11).

Instruction pedestrian had right to expect street car would be operated at customary speed, and give usual warnings, *held* proper against contention customary speed was not proved and pedestrian saw car.

> Evidence showed, notwithstanding defendant company's contention, that street car was being operated at its usual speed, which was from 12 to 15 miles an hour at time of accident. Court also instructed jury that, if pedestrian actually saw car approaching, it was immaterial whether bell was rung.

7. Death 🔑72, 86(2).

For death of husband struck by street car, damages was wife's pecuniary loss by deprivation of right of support, irrespective of financial independence; evidence thereof being inadmissible.

> It was contended that court erred in giving instruction that wife was entitled to support of her husband, regardless of her own financial circumstances.

8. Death 🔑31(5).

Though executor is authorized to sue on behalf of heirs in death action, his default does not prejudice any rights of heirs not served (Code Civ. Proc. § 377).

> This follows because, although executor is authorized to sue, he is not compelled to do so, and the independent right of action for death is in no wise dependent upon whether he does or does not exercise the power given.

9. Action 🔑38(1).

Cause of action for death is joint, single, and indivisible.

10. Death 🔑57.

In death action by widow alone, naming other heirs as defendants, such heirs were in reality plaintiffs, and complaint tendered issue involved on behalf of plaintiff and defendant heirs.

> The complaint averred heirship of both plaintiff and the three daughters of decedent named as defendants, and widow as plaintiff sued upon the whole of the cause of action given by statute for death, praying for judgment on the whole cause of action and for partition or distribution of the lump sum which may be awarded.

11. Judgment 🔑690.

Death action by widow naming other heirs as defendants and praying judgment on whole cause of action foreclosed all heirs from further recovery.

12. Death 🔑79, 81, 88.

In death action, loss of comfort, protection, and society is proper element of injury and not compensable by nominal damages.

13. Death 🔑104(6).

In death action by widow, joining decedent's children as defendants, instructions respecting measure of damages carrying rights of widow and children together but in disjunctive where necessary *held* not error.

> The daughters were named as defendants in the action, but so far as is shown were not served with process. The instruction stated that verdict, if for plaintiff, should be for sum fairly and fully compensating her and each of decedent's daughters for pecuniary loss, if any, sustained by death of decedent, and stated that jury might consider loss of support, if any, which decedent gave each or any of them, and also loss of society, comfort, and care, if any, which plaintiff or any of daughters sustained, considering not only support, comfort, and care which they would have been legally entitled to receive, but also that which they could reasonably except to receive from deceased had he lived.

14. Appeal and error 🔑932(1).

Where pecuniary loss or loss of support was not shown as to certain heirs in death action, it is presumed that no award was made in that behalf.

15. Death 🔑99(4).

$7,500 *held* not excessive for death of 79 year old man, survived by widow and three daughters.

In Bank.

Appeal from Superior Court, Los Angeles County; Walter S. Gates, Judge.

Action by Catherine Gilmore against the Los Angeles Railway Corporation and others.

Judgment for plaintiff, and defendant named appeals.

Judgment affirmed.

Superseding opinion in 290 P. 22.

Gibson, Dunn & Crutcher, Norman S. Sterry, and Philip C. Sterry, all of Los Angeles, for appellant.

Newlin & Ashburn and W. C. Mathes, all of Los Angeles, for respondent.

PRESTON, J.

After a careful reconsideration of this case, we reassert the conclusion heretofore announced in the opinion by Mr. Justice Shenk, and the major portion of said opinion is hereby adopted as a portion of this opinion as follows, to wit:

"This appeal is from a judgment on a verdict in favor of the plaintiff in the sum of $7,500 in an action for damages on account of the death of Charles T. Gilmore, the husband of the plaintiff, alleged to have been caused by the negligence of the defendant railway company, the appellant herein.

"The deceased met his death when a street car operated by the railway company struck him at a point near the intersection of Western avenue and Council street in the city of Los Angeles. It is conceded that the evidence on the issue of the defendant's negligence is conflicting. Contributory negligence was charged against the deceased, which, it is claimed, constituted negligence as matter of law.

[1-3] "Council street runs into Western avenue (a north and south street) from the west. The plaintiff and her husband had their home on Western avenue, and, if Council street extended easterly from Western avenue, it would pass through a portion of their home place. On the evening of February 12, 1924, the plaintiff and her husband left their home together, intending to go to the Wilshire Theatre. They proceeded down their driveway to a point near the easterly curb line of Western avenue and opposite Council street. Automobiles were parked along the curb on either side of their driveway. They paused at this point to permit three or four automobiles running northerly to pass. The deceased saw a car of the defendant company approaching Council street from the north on the westerly track. Council street was a regular stop for the defendant company's cars. The two then started to cross Western avenue. The plaintiff stopped, but deceased proceeded ahead of her across Western avenue. The deceased apparently walked rapidly to escape a north-bound automobile. As he reached the westerly rail of the south-bound track, he was hit by the right front corner of the appellant's car, was thrown to the street, and expired a few moments thereafter. The appellant's car did not stop at Council street, but increased its speed across the intersection and stopped about 200 feet from where the deceased was hit. The foregoing was established by the testimony of the plaintiff. Other evidence tended to prove that the deceased was south of the south line of Council street proceeding easterly when he was struck, but this evidence raised a conflict for the jury to weigh and determine. It is true that the deceased assumed a degree of risk in crossing the street ahead of the street car, but he had a right to do so. The test is whether a reasonably prudent man would accept the hazard under the particular facts and circumstances in evidence. Ross v. Railways Co., 47 Cal. App. 753, 191 P. 703. The weighing of the probabilities and of the conflicting inferences is ordinarily for the trial court and jury, and not for the reviewing court. Hatzakorzian v. Rucker-Fuller Desk Co., 197 Cal. 82, 95, 239 P. 709, 41 A. L. R. 1027. From the record in this case it cannot be said that an honest difference of opinion between men of average intelligence might not exist. 'The burden of proving contributory negligence was on the defendants. "It is very rare that a set of circumstances is presented which enables a court to say, as a matter of law, that negligence has been shown."' Phillips v. Pacific Elec. Ry. Co., 80 Cal. App. 641, 645, 252 P. 628, 629, and cases cited.

[4] "The appellant complains of certain instructions. First, it contends that the court should have given certain requested instructions defining the doctrine of last clear chance. But there is nothing in the record to indicate that last clear chance was an issue, nor was such an issue presented to the jury by the instructions. The requested instructions were therefore properly refused.

[5] "Next, the appellant complains of an instruction wherein the court stated to the jury that, if it should find that Mr. Gilmore was crossing at the intersection, the rules of ordinary care applicable to street intersections would govern his conduct and any instruction given with reference to any special degree of care required of one crossing a public street between intersections must be disregarded, provided the jury find that Mr. Gilmore was crossing at said intersection. The appellant contends, in view of the conflict in the evidence as to whether Mr. Gilmore crossed directly at the intersection or south of it, that the instruction is prejudicially erroneous and misleading, in that it told the jury, so it is claimed, that a less degree of care was required of a pedestrian at street intersections than when crossing between intersections; the law being that ordinary care under the circumstances is the measure at all times. But, inasmuch as the instruction standing alone seemingly charged the jury that more than the required degree of ordi-

nary care should be exercised between intersections, we fail to see how the instruction was anything but favorable to the appellant. The instructions elsewhere directed the jury emphatically and correctly that the decedent was required 'during the entire crossing of the street to exercise the care and caution that a reasonably prudent and careful man in the same or similar circumstances would exercise * * * regardless of whether he was crossing in the middle of the block or at the regular crossing place for pedestrians at the intersection of Council street. * * *'

[6] "The appellant next contends that an instruction which stated that a pedestrian had a right to expect that persons operating street cars and other vehicles would so operate them at the customary speed and give the usual warnings and signals is prejudicially erroneous, when, as it is claimed, there was no evidence of the customary speed of cars at that intersection, and when there was evidence that the decedent knew of the approach of the car, in which event the omission of a signal would not constitute negligence. There is, however, the testimony of the appellant's witnesses that the street car was being operated at its usual rate of speed, and that its speed at the time was 12 to 15 miles an hour. In addition, the court instructed the jury at the request of the appellant that, if it believed that the decedent actually saw and knew of the approach of the car, then whether the bell was rung or was not rung was immaterial. The error in the instruction complained of is not disclosed.

[7] "Nor do we find any error in the instruction that the 'wife is entitled to the support of her husband regardless of her own financial circumstances.' That the measure of damages is the pecuniary loss suffered by the wife by the deprivation of her legally enforceable right of support, irrespective of the question of her dependence on the decedent, evidence as to which is inadmissible, is well settled. See Shebley v. Peters, 53 Cal. App. 288, 200 P. 364; Powers v. Sutherland, etc., Co., 190 Cal. 487, 213 P. 494."

[8-10] A spirited and able discussion is indulged by counsel of certain instructions concerning the measure of damages applicable to the case. The question raised is easily grasped from the following portion of one of the instructions: "If your verdict is for the plaintiff it must be for such a sum as will fairly and fully compensate her and each of decedent's daughters for the pecuniary loss, *if any*, which you may find each of them to have sustained by the death of the said Charles T. Gilmore. In determining that amount you may consider not only the loss of the support, *if any*, which he gave to *each or any* of them, but also the loss of society, comfort and care, *if any*, which the plaintiff or *any* of said daughters have sustained by reason of his death, and you may consider not only the loss of the support, comfort and care which the plaintiff *or any* of said daughters would have been legally entitled to receive from said Charles T. Gilmore had he lived, but also the support, comfort and care which you may find them, *or any* of them, could reasonably expect to receive from the deceased had he lived. * * *"

Appellant insists that in view of the issue framed by the pleadings, prejudicial error has resulted from these instructions, which authorized the jury to give, if so advised, substantial damages to the nonparticipating heirs at law of the decedent. In this connection, we pause to note that the widow alone is the designated plaintiff. The other heirs at law are three daughters, one of whom is a nonresident of the state. These heirs were named as defendants in the action, but so far as is known were not served with process. The executor of the estate of decedent was so served and later defaulted. Although authorized by section 377 of the Code of Civil Procedure to sue on behalf of the heirs of decedent in a case like the present one, we know of no authority for the contention that by his default any rights of the heirs not served are prejudiced. This follows because although he is authorized to sue, he is not compelled to do so and the independent right of action given by the statute is in no wise dependent upon whether he does or does not exercise the power given him. Ruiz v. Santa Barbara G., etc., Co., 164 Cal. 188, 128 P. 330.

We thus have before us a complaint which avers the heirship of both plaintiff and the three daughters of decedent. We find also that the widow as plaintiff sues upon the whole of the cause of action given by the code section. It is also true that she prays for judgment upon the whole cause of action and supplements this with a prayer for a partition or distribution of the lump sum which may be awarded therein. No objection was or is made that a defect in parties existed because of failure to serve process on the alleged nonconsenting heirs.

The anomaly in the situation arises because in the complaint it is alleged that the daughters of decedent suffered no pecuniary injury by reason of his death. This, it is strongly urged, put the daughters out of the case and so reduced and confined the issue to the loss suffered by the plaintiff alone, and that in view of such fact, the instructions as given necessarily encouraged the jury to go far afield and give substantial damages outside the issue thus tendered by the pleadings. As authority for this contention, appellant rests heavily upon the case of Massachusetts Bonding, etc., Co. v. Los Angeles Ry. Corp., 182 Cal. 781, 190 P. 161. But this argument overlooks the fact that, as above noted, the complaint does not purport to restrain or limit the cause of action given by the statute but on the contrary purports to sue to collect the whole of the same. It has been many times held in this state that the cause of action is a joint one, a single one and an indivisible one. Salmon v. Rathjens, 152 Cal. 290, 294, 92 P. 733; Estate of Riccomi, 185 Cal. 458, 197 P. 97, 14 A. L. R. 509; Rabe v. Western Union Tel. Co., 198 Cal. 290, 299, 244 P. 1077.

The allegation of the complaint that no injury has resulted to the nonparticipating heirs by reason of the death of their father, tendered, as to defendant, no issue so long as it is understood that plaintiff is suing upon the one cause of action as a whole. This allegation concerns the defendant only as to the amount of the recovery. The complaint discloses the existence of other heirs and prays that their rights be adjudicated. Had these heirs appeared in this action they could not have altered the issue founded upon the alleged negligence of the defendant. In the trial here being reviewed there was no place for litigation between the heirs themselves as to the strength of their relative claims and the amount that might be awarded each of them. Such a contest would follow the granting of a lump sum award. Again, if these heirs had appeared they could have gone no further than either to join with the plaintiff in the cause of action or to disclaim any benefit under the same. The true fact is that the complaint in reality tendered the issue involved not only on behalf of plaintiff but on behalf of defendant heirs as well. The heirs named as defendants, in other words, are in reality plaintiffs in the case. Donohoe v. Wooster, 163 Cal. 114, 124 P. 730; 20 Cal. Juris. § 14, p. 499.

[11, 12] With this situation before us, it is readily seen that the question is narrowed down to whether or not the insertion of the allegation of no damages above referred to, misled the defendant to its prejudice. It should first be noted that by this action all of the heirs of decedent are foreclosed from further recovery. Salmon v. Rathjens, supra; Rabe v. Western Union, supra. By reason of this fact, defendant is protected against a claim by these nonparticipating heirs.

Again, a reference to the answer shows that the existence of the heirs, here made defendants, was admitted and upon information and belief it was asserted that the heirs named were not the sole heirs. In the answer also may be found allegations upon information and belief that the reason these nonconsenting heirs did not join with the plaintiff was that they realized no actionable negligence could be shown against the appellant. Again, on the trial it was shown that these parties were children of the decedent and while it was shown that decedent did not contribute to their support, there was no showing that the cordial and affectionate relationship usually existing between parent and child did not exist as to them. Loss of comfort, protection, and society is a proper element of injury and is by no means to be classed as compensable by merely nominal damages. Thus it is plain that defendant was not misled or injured by said allegation.

[13, 14] The instructions complained of carried the rights of the widow and children along together but in the disjunctive where necessary for the individual consideration of their claims, and we can see no error in giving them in that form. If pecuniary loss or loss of support was not shown as to certain of the heirs, it is to be presumed that no award was made in that behalf. The instructions in mentioning the various heirs, carried their rights together, as above stated, and the words, "if any," were frequently inserted, thus showing that the court placed before the jury only such matters as the evidence warranted and kept the jury within the proper limits.

In the Massachusetts Bonding Company Case, supra, the complaint tendered and the answer accepted as the sole issue a part only of the statutory cause of action. In other words, by tacit consent of the parties, the cause of action was split and limited alone to the damages suffered by the widow, the defendant accepting such restriction of the issue with knowledge of the existence of other heirs. In view of this fact, it was in that case beyond the realm of the cause to instruct the jury that substantial damages could be given to the nonparticipating heirs. But, as above noted, in the complaint before us, the pleader tendered the whole issue under the code, including the rights not only of plaintiff but of all the other heirs as well, and this situation distinguishes the case above discussed and makes appropriate the instructions which were here given.

[15] Finally, appellant claims the damages were excessive. Even in view of the decedent's age, which was seventy-nine in the month of December preceding the accident, we cannot say that the record discloses that the verdict was provoked by or was the result of passion, prejudice, or corruption on the part of the jury. The oral testimony and the photographs in evidence, taken shortly before his death, show that the decedent was an extraordinarily rugged and healthy man for his age and that he had the appearance of a man much younger in years.

The judgment is affirmed.

We concur: WASTE, C. J.; SHENK, J.; RICHARDS, J.; SEAWELL, J.; CURTIS, J.; LANGDON, J.

111 Cal. App. 131

GRAHAM v. COHEN et al.

Civ. 6283.

District Court of Appeal, Second District, Division 1, California.

Jan. 16, 1931.

1. Evidence 🔑474(19).

Owner is entitled to testify as to worth of article, whether he is generally familiar with such value or not.

2. Appeal and error 🔑1010(1).

Finding of value based on owner's evidence thereof may not be disturbed on appeal.

3. Trover and conversion 🔑40(6).

In action to recover value of stolen diamonds purchased by defendants, owner's testimony as to value of diamonds *held* not to authorize verdict for owner in excess of $750.

Appeal from Superior Court, Los Angeles County; Harry R. Archbald, Judge.

Action by Mamie K. Graham against L. B. Cohen and others. Judgment for plaintiff, and defendants appeal.

Modified and affirmed.

Harry C. Levey and A. G. Alm, both of Los Angeles, for appellants.

George H. Moore and Gerald O'C. Egan, both of Los Angeles, for respondent.

HOLLZER, Justice pro tem.

This is an action brought to recover the value of five diamonds stolen from the plaintiff and later purchased by the defendants, who in turn disposed of the same.

The plaintiff recovered judgment in the sum of $900. The only point involved on this appeal is the contention of the defendants that the evidence is insufficient to sustain the lower court's finding as to the value of said diamonds.

The plaintiff testified that three of the diamonds were worth "approximately around $250 each." With respect to the other two diamonds her testimony was as follows:

"Q. And the two diamonds in the ring which was set with the two diamonds and the ruby, what were they worth each? A. The two diamonds each?

"Q. Yes? A. Well I couldn't say what they were worth each. I should judge the entire ring including the ruby was worth $250.00."

No other evidence was offered touching the question of the value of the jewelry.

[1, 2] There is no doubt under the authorities that the owner of an article, whether he is generally familiar with such value or not, is entitled to testify as to its worth, and that a finding of value based upon such evidence may not be disturbed on appeal. Hood v. Bekins, etc., Co., 178 Cal. 150, 152, 172 P. 594, citing cases, and Wigmore on Evidence, § 716.

Accordingly, we hold that the evidence was sufficient to justify a finding that three of the diamonds were worth $750.

[3] With respect to the remaining two diamonds, while the plaintiff stated that the ring containing these stones together with a ruby was worth $250, it is impossible to determine from such testimony how much of this amount represented the value of the diamonds as distinguished from the value of the ruby and the setting. Hence it is ordered that the amount of the judgment be reduced from $900 to $750, with costs as stated in the judgment. As thus modified, the judgment is affirmed.

We concur: CONREY, P. J.; YORK, J.

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111 Cal. App. 108

In the Matter of the Application of George H. JOHNSTON, Clifford Dowding, and Frank Pimental for Writ of Probable Cause.

Cr. 1608.

District Court of Appeal, First District, Division 1, California.

Jan. 15, 1931.

Application for stay of execution of judgment pending appeal from a judgment of the Superior Court of Alameda County, Fred V. Wood, Judge, of conviction of robbery and burglary of the first degree. Denied.

James Wesolo, of Oakland, for petitioner.

U. S. Webb, Atty. Gen., and Lionel Browne, Deputy Atty. Gen., for respondents.

PER CURIAM.

Application for stay of execution of judgment.

Petitioners were tried and found guilty of robbery and burglary of the first degree. A writ of probable cause was prayed for and denied by the trial court. From an examination of the record we are of the opinion that there is no reason why a stay of execution should be granted.

The petition is denied.

111 Cal. App. 31

STOUT v. FARWELL.

Civ. 5724.

District Court of Appeal, Second District, Division 1, California.

Jan. 6, 1931.

1. Appeal and error 🔑807.

Under statute authorizing relief from judgment taken through mistake or excusable neglect, possible right to move that dismissed appeal be restored to calendar must be asserted within six months (Code Civ. Proc. § 473).

2. Appeal and error 🔑807.

When appellate court erroneously determines it lacks jurisdiction, and order dismissing appeal becomes final, decision is law of case.

3. Appeal and error 🔑807.

Where order dismissing appeal for lack of jurisdiction became final, court could not thereafter cancel order and determine appeal on merits, notwithstanding Supreme Court thereafter held similar order erroneous.

4. Courts 🔑207(4).

Writ of mandate may lie from Supreme Court to Court of Appeal.

Action by James B. Stout against Lyman Farwell. After judgment for plaintiff, defendant appealed, and the appeal was dismissed (285 P. 336), and rehearing denied (286 P. 471). On motion to cancel the order of dismissal and restore the cause to the calendar.

Motion denied.

D. A. Knapp, of Los Angeles, for appellant.

Victor R. Hansen, of Los Angeles, for respondent.

CONREY, P. J.

By decision filed February 6, 1930 (285 P. 336, rehearing denied 286 P. 471), the appeal in this case was dismissed, on the authority of another decision of same date in Berg v. Traeger, 285 P. 332. The ground of decision was that this court did not have jurisdiction of the appeal.

In Berg v. Traeger a hearing before the Supreme Court was granted, and that court sustained the right of appeal, and decided that case on the merits of the appeal.

In this case of Stout v. Farwell there was no application for a hearing in the Supreme Court. The judgment of this court became final, and in due course, on April 7, 1930, the remittitur was sent down to the superior court.

Thereafter, on October 3, 1930, appellant filed his notice of motion for an order canceling, as void, the order of dismissal, and that the records of the action be returned to this court, and that the cause be restored to the calendar of this court for determination on the merits.

[1] In accordance with said notice, the motion was presented to the court on the 27th day of October, 1930. As this was more than six months after the time of the order of dismissal, any possible right of appellant under section 473 of the Code of Civil Procedure may not successfully be asserted. Wheelock v. Superior Court, 67 Cal. App. 601, 227 P. 931. We are thus brought to the only question in the case. That question may be stated thus: When an appellate court erroneously dismisses an appeal, and such dismissal has been ordered upon the sole ground that the court is without jurisdiction of the appeal, is the order void upon its face, and may the court thereafter and at any time, however remote, determine such appeal upon the merits, notwithstanding that the order of dismissal was made, as stated?

[2] We think that when a court of appeal, or the Supreme Court, in an appeal pending before it, judicially determines (however erroneously), that the court is without jurisdiction, and thereupon dismisses the appeal, and such order becomes final by lapse of time, the decision so made becomes the law of the case. In this case if, within the time allowed by law, appellant had applied to the Supreme Court for a hearing, and that court had denied the petition, its decision so made would have been the law of the case; and this result would not be disregarded merely because at a later date and in another action the Supreme Court decided that, under conditions precisely like those upon which this court acted in this case, the court had jurisdiction of the appeal.

[3] If the foregoing conclusion be accepted, as relating to a case in which a hearing was denied by the Supreme Court, the same conclusion should apply where, as in the case at bar, the decision of this court was allowed to become final, to the point where the remittitur was sent down, without any application made for a hearing in the Supreme Court.

[4] It further appears, by suggestion made on the argument of the motion, that appellant made application to the Supreme Court for a writ of mandate to require this court to assume jurisdiction of the appeal in this case, which application was denied. Counsel stated that the refusal was on the ground that a writ of mandate will not lie to a Dis-

trict Court of Appeal. But in this we think that counsel is mistaken; for in at least one instance the Supreme Court issued a writ of prohibition to this court. People v. District Court of Appeal, 193 Cal. 19, 222 P. 353. If prohibition, then why not mandate, in a proper case?

The motion is denied.

We concur: HOUSER, J.; YORK, J.

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111 Cal. App. 59

PEOPLE v. KALPAKOFF.

Cr. 1977.

District Court of Appeal, Second District, Division 1, California.

Jan. 9, 1931.

1. Criminal law 🔑404(3).

In robbery prosecution, admission of gun *held* not error, in view of proofs identifying it as gun used by defendant.

> The prosecuting witness testified that at the time of the robbery he saw a gun in defendant's hands, and identified this gun as being of approximate size and as having certain rust spots which were like rust spots he noticed on another gun in the hands of defendant's associate, which was identified and admitted in evidence without objection. The evidence further disclosed that the gun objected to was found in defendant's automobile, and that cartridges were found in defendant's pocketbook at time of his arrest.

2. Witnesses 🔑387.

Refusal to permit examination of witness concerning conversation *held* not error, where it was not suggested that question was asked for impeachment and at least five persons were present at conversation.

3. Robbery 🔑24(1).

Evidence *held* sufficient to sustain conviction for first-degree robbery.

4. Criminal law 🔑661.

Permitting examination of officer as to conceded fact *held* not error, where defendant's attorney declined to stipulate and stated that officer had better testify.

5. Criminal law 🔑938(1).

Where court found that newly discovered evidence was merely cumulative, and that diligence was not shown, order denying new trial was not abuse of discretion.

Appeal from Superior Court, Los Angeles County; Charles W. Fricke, Judge.

John Kalpakoff was convicted of first degree robbery, and he appeals.

Affirmed.

R. E. Parsons, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and William F. Cleary, Deputy Atty. Gen., for the People.

CONREY, P. J.

Appellant and two others were tried together and convicted of the crime of robbery of the first degree, committed as follows: On the 28th day of December, 1929, in the nighttime, the defendants, in a drug store of one G. H. Brown, forcibly took from the possession of Brown the sum of $79. It was shown that appellant at the time of the commission of the crime was armed with a deadly weapon, a 32-caliber revolver.

The "reasons for reversal" as listed at the beginning of the brief are as follows: That the court erred in admitting gun, Exhibit 1; that the court erred in sustaining objection of district attorney to a question propounded to the witness Paul Kalpakoff, brother of appellant; that the decision is contrary to the law and the evidence; that the court erred in overruling an objection of appellant to a question propounded to the witness Lockhard; that the court erred in denying appellant's motion for a new trial.

[1] A trial by jury having been duly waived, the case was tried before the court without a jury. The witness Brown testified that at the time of the robbery he saw a gun in the hand of appellant. A 32-caliber gun was exhibited to the witness, and he identified it as a gun which he saw in the hands of Stupin, one of the other defendants, and this gun was offered and admitted in evidence without objection. The witness identified this gun as being of the approximate size and as having upon it certain rust spots which were like rust spots he had noticed upon the gun in Stupin's hands. This 32-caliber gun was not the one which the witness saw in the hands of Kalpakoff at the time of the robbery, but it was later found in the automobile of appellant at the time appellant was arrested; and three 32-caliber cartridges were, at the same time of arrest, found in the pocketbook of appellant. The court committed no error in admitting in evidence the said gun, Exhibit 1.

[2] The objection of the district attorney to the question propounded to the witness Paul Kalpakoff, which objection the court sustained, related to an interview between this witness and the witness Brown at Brown's drug store about a month after the time of the robbery. The witness Paul Kalpakoff having testified that he and his moth-

er and two other persons called upon Brown at his drug store, this question was asked: "Now will you tell the court, please, what conversation was then had?" The objection made was that the question called for hearsay evidence. It is now claimed that the court erred in sustaining this objection, and that the question was asked for the purpose of impeaching the witness Brown in relation to testimony given by him. It appears in the record that, on cross-examination of Brown, that witness denied that, on the occasion of the visit to his store of Paul Kalpakoff and his mother and said two other persons, he had stated that appellant was not one of the men in his store at the time of the robbery. Appellant's present contention is that the question asked of Paul Kalpakoff, objection to which was sustained by the court, was a proper question for impeachment of Brown's testimony. The question as propounded asked for the conversation in general, in which conversation at least five persons were present; and the answer presumably would have included statements made by persons other than Brown. As the time when the question was asked and the objection and ruling were made, counsel for appellant did not attempt to reframe his question, and did not suggest to the court that he had any purpose of impeachment in asking the question. The court did not err in sustaining the objection.

[3] There is no merit in the contention that the decision of the court was contrary to the law or the evidence. The facts of the robbery are established without dispute, except that appellant claims that the evidence does not sufficiently identify him as being one of the robbers. The testimony of Brown alone is abundantly sufficient to identify appellant. It is true that Brown admitted that on one occasion, when appellant was brought to him by officers, he was uncertain on the subject. "I wasn't sure of myself when Kalpakoff came down in the machine and I wouldn't commit myself." Nevertheless, at the trial he did fully and positively identify appellant, and separately described the different acts of the three men by whom the robbery was committed, and the appellant and his part therein.

[4] During the examination of the people's witness Lockhard, a police officer, it was shown by the witness that he arrested the defendants on December 31, 1929 (three days after the robbery) and at the time they were riding in a Ford roadster and the appellant was driving the car. At this point the record is as follows:

"Q. Did you make an examination of the car after you arrested the defendants? A. I did.

"Q. What did you find in the car?"

At this point Mr. Bird, attorney for the defendant Stupin, objected that he would first like to ascertain whether or not it was a fact that the witness after arresting the defendants left the car unattended for an hour or an hour and a half. Mr. Laudry, attorney for appellant, said: "I interpose the objection I think it should be asked what he found in the car if the arrest had to do with the particular charge." And also he objected that the matter was too remote in point of time, there being a three-day interval between the time of the robbery and the time of arrest.

"The Court: I am assuming from the fact Mr. Crail (deputy district attorney) took up the question he anticipated the evidence would be the gun was found in the car, perhaps the evidence will disclose it was this Exhibit 1 which was found.

"Mr. Laudry: I think that is the fact.

"The Court: If that is correct, in view of the testimony previously given, I don't think it makes any difference when it was found as far as length of time is concerned.

"Mr. Laudry: Of course, the gun in the evidence previously given has not been clearly identified other than a rusted gun.

"Mr. Crail: Will you stipulate People's Exhibit 1 was found in the car? Are you gentlemen willing to stipulate to that?

"Mr. Laudry: Oh, I think the officer better testify.

"Q. By Mr. Crail: What, if anything, did you find in the car, Officer? A. I found this revolver in the car.

"Q. Referring now to People's Exhibit 1? A. Yes, sir."

Then followed testimony showing that, besides this gun found in the car, there were three 32-caliber cartridges found in the pocketbook of appellant.

On the foregoing record we are of the opinion that the court did not commit any error in overruling the objection to the question asking the officer what he found in the car.

[5] The final point presented by appellant is that the court erred in denying his motion for a new trial. The argument is that appellant was entitled to a new trial by reason of the facts presented by him in affidavits concerning newly discovered evidence of witnesses in further support of the alibi which he had attempted to prove by numerous witnesses during the trial. The court found that the proposed evidence was merely cumulative, and that the proposed additional witnesses could with reasonable diligence have been discovered prior to the trial and produced at the trial. In this ruling there was no abuse of discretion and no error.

The judgment and order are affirmed.

We concur: HOUSER, J.; YORK, J.

111 Cal. App. 52

PEOPLE v. MORENO.

Cr. 38.

District Court of Appeal, Fourth District, California.
Jan. 7, 1931.

1. Homicide 🔑250.

Evidence *held* sufficient to sustain conviction for manslaughter.

2. Criminal law 🔑409.

Evidence that deceased came to his death through unlawful act of some one other than himself established corpus delicti, justifying introduction of defendant's admissions.

3. Criminal law 🔑404(3).

Evidence *held* to sufficiently identify glass with which injury causing death was alleged to have been inflicted, to permit introduction of glass in evidence.

> The witness testified that the deceased left the house to chase disturbers away; that shortly thereafter witness heard a sound which resembled the breaking of a bottle and of glass falling to the ground; and that the glass introduced in evidence was the same as that she saw on the ground near the deceased's house shortly after he was injured.

4. Criminal law 🔑1159(2).

Weight to be given evidence properly introduced *held* for jury and not appellate court.

5. Criminal law 🔑1035(3).

Defendant could not complain of remark made by trial court in presence and hearing of jury for first time in appellate court.

Appeal from Superior Court, Riverside County; O. K. Morton, Judge.

Francisco Moreno was convicted of manslaughter, and he appeals.

Affirmed.

A. D. Trujillo and E. John Ericksson, both of San Bernardino, for appellant.

U. S. Webb, Atty. Gen., and John D. Richer, Deputy Atty. Gen., for the People.

MARKS, J.

Appellant was accused of the crime of murder by an information filed by the district attorney of Riverside county. The jury found him guilty of manslaughter, and after the pronouncement of judgment he prosecuted this appeal.

Appellant relies upon four grounds for a reversal of the judgment as follows: That the evidence is insufficient to support the verdict; that the court erred in permitting the prosecution to introduce a purported confession of the defendant, no corpus delicti having been proven; that the court erred in permitting the prosecution to introduce into evidence parts of a broken bottle; and that a remark by the court, made during the trial, was prejudicial to defendant.

The evidence in this case discloses that the deceased, Bartola Ramirez, an old man of the age of about 80 years, lived with Margarita Perla in the city of Corono. On the evening of August 23, 1930, appellant, Bonifacio Reyes, and several others were engaged in a drinking bout at the home of deceased. They left early in the evening. Between 3:30 and 4 o'clock a. m., August 24th, deceased and Margarita Perla were awakened by persons knocking on the rear door of the house and on the windows. Deceased told those creating the disturbance to go away, but it was continued, and an effort was made to open the rear door. Deceased then arose from his bed, armed himself with a knife, and went out of the rear door of the house, saying he would chase the disturbers away. Shortly after he left the house, Margarita Perla heard sounds which resembled the breaking of a bottle and of glass falling to the ground. Deceased re-entered the house and had a deep wound upon his head. Margarita Perla went to the rear door and saw appellant, Bonifacio Reyes, and others running away. Later she saw pieces of broken glass upon the ground and a broken bottle near the door. Deceased was taken to the county hospital of Riverside county on August 28, 1930, and died on August 30, 1930. One of the attending physicians testified that in his opinion deceased "died from cerebral concussion with compression due to a—following a blow on the top of the head."

Appellant was taken into custody on August 30, 1930, and in the presence of several witnesses stated that he had had a fight with Bartola Ramirez and had hit him over the head with a beer bottle.

[1, 2] We believe that the statement of the facts in this case effectively disposes of the first two assignments of error, namely, that the evidence was insufficient to support the verdict, and that the court erred in permitting the people to introduce the extrajudicial statements of appellant that he had engaged in a fight with the deceased and had struck him over the head with a beer bottle. The evidence shows that the deceased came to his death through an unlawful act of some one other than himself. This sufficiently established the corpus delicti to permit the introduction of the admissions of appellant. People v. Selby, 198 Cal. 426, 245 P. 426. The evidence is sufficient to support the verdict of the jury and the judgment of the court.

[3, 4] Appellant further complains because the court permitted the people to introduce in evidence pieces of the bottle which were picked up near the rear door of the residence of deceased. The witness, Margarita Perla, identified these pieces of glass as the same ones that she saw on the ground near the rear door of deceased's house shortly after he was injured. This sufficiently identified the glass to permit it to be introduced in evidence. The weight and value to be given to this evidence was to be determined by the jury and not by this court.

[5] For the first time appellant now complains of a remark made by the trial court in the presence and hearing of the jury, and maintains that it was prejudicial error. This contention was not made during the trial, nor was the remark assigned as error in the court below. The remark complained of was a question asked by the trial court of a witness whether a certain happening occurred during or after the fight. Appellant maintains that the court assumed in this question that there had been a fight. In cases of this kind a party relying upon alleged misconduct should promptly call it to the attention of the trial court and assign it as error. As appellant failed to do this, he should not be heard to complain of this purported error here. People v. MacDonald, 167 Cal. 545, 140 P. 256; People v. Weeks (Cal. App.) 286 P. 514.

Judgment affirmed.

We concur: BARNARD, P. J.; WARMER, Justice pro tem.

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111 Cal. App. 42

PEOPLE v. DRIGGS.

Cr. 1142.

District Court of Appeal, Third District, California.

Jan. 7, 1931.

1. Criminal law 🔑1134(6).

Where court granted new trial for insufficiency of evidence, court's statements regarding other matters could not be considered on appeal.

This was true, since, when the cause is brought to the appellate court, argument as to what the trial court may have thought as given utterance by the words used before final action is taken cannot be considered, unless directly in mind with subsequent orders made, and hence that trial court was of the opinion that new trial should be granted because prosecution proceeded, with consent of defendant, without presence of twelve jurors after one became too ill to act, did not present question for appellate court.

2. Criminal law 🔑1156(2).

Court's discretion in granting new trial for insufficiency of evidence is conclusive on appellate court, unless abused.

3. Criminal law 🔑935(1).

Under evidence, granting new trial for insufficiency of evidence to support verdict of guilty of assault with deadly weapon *held* not abuse of discretion.

The evidence disclosed that the defendant, as a railroad police officer, fired revolver over heads of persons to cause them to desist from stealing ride on train, and that bullet struck and injured an unobserved man 1,200 feet from defendant.

4. Negligence 🔑144.

To constitute "criminal negligence," there must enter into act some measure of wantonness or flagrant or reckless disregard of safety of others, or willful indifference (Pen. Code, § 20).

[Ed. Note.—For other definitions of "Criminal Negligence," see Words and Phrases.]

Appeal from Superior Court, Butte County; H. D. Gregory, Judge.

F. P. Driggs was charged with the crime of assault with intent to commit murder, and the jury returned a verdict of guilty of assault with a deadly weapon. From an order granting new trial, the People appeal.

Affirmed.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

George F. Jones, of Oroville, for respondent.

Mr. Justice PLUMMER delivered the opinion of the court.

The defendant was charged with the crime of assault with intent to commit murder, in an information filed by the district attorney of the county of Butte. Upon the trial, a verdict of guilty of assault with a deadly weapon was returned by the jury. The defendant thereupon moved for a new trial, which was granted. From the order granting a new trial, the people prosecute this appeal.

The argument of counsel directs our attention, first, to the fact that, while twelve jurors were sworn to try this cause, one of the jurors became too ill to act, and the attorneys, together with the defendant, consented that the trial might proceed with the presence of only eleven jurors, and that the verdict rendered by such a jury is regular and valid.

[1] The contention on the part of the people is advanced that, by the recent amendment to section 7 of article 1 of the Constitution, whereby it is provided that a defendant in a felony case may waive trial by jury, the right and authority is necessarily included to waive trial by a jury of twelve persons. In support of this contention is the case of Patton et al. v. United States, 281 U. S. 276, 50 S. Ct. 253, 74 L. Ed. 854, decided April 14, 1930, where, in a very exhaustive opinion, all the cases from the different states having to do with the question of the waiver of trial by jury, and of the waiver by the defendant to be tried by a less number than twelve, are carefully collected and considered, and the conclusion reached that, as the constitutional provisions with respect to the right of trial by jury are not a part of the frame of government, but only a guarantee to the accused of the right of such trial, it is a right which a defendant may waive either in whole or in part. But, however interesting this question may be, it is not an important factor in this case. The fact that the judge of the trial court gave this question considerable attention, and apparently was of the opinion that a new trial should be granted by reason of the fact that the trial was allowed to proceed without the presence of twelve jurors, it is what the court did, and not what the judge of the court stated during the course of the trial, that determines the course of our inquiry upon this appeal, as there is a vital distinction between what the judge of a trial court may say and what the trial court actually does. In other words, it is the legitimate privilege of a trial court, at the conclusion of an argument upon motion for new trial, to state his views concerning the case, and then, upon fuller and maturer deliberation, come to the conclusion that a different order should be made, and then to enter the same. When the cause is brought to an appellate court, argument as to what the trial court may have thought, as given utterance by the words used before final action is taken, cannot be considered, unless directly in line with the subsequent orders made. Thus, if an order is made granting a new trial on the ground of insufficiency of the evidence, if the opinion of the trial court points out wherein the evidence is insufficient, it is an aid to the appellate court in determining whether or not the discretion of the trial court has or has not been abused. But, if the opinion contains expressions foreign to the order actually entered, the order entered only is controlling here.

By the clerk's transcript of this cause we find that, after the motion for new trial had been definitely submitted, the following order was entered (omitting title of court and cause):

"This case came on for hearing on motion for new trial, before Hon. H. D. Gregory, Judge; Present: Court Reporter McCallum; Assistant District Attorney Rothe, for The People, and George F. Jones, for the defendant. The defendant is present in court with his counsel. Arguments on motion for new trial are resumed by Assistant District Attorney Rothe, followed by Attorney Jones, for the defendant. The court now reviews the points brought out in counsel's arguments, and finds that the evidence is not sufficient to sustain the verdict. The court orders that a new trial be granted. Assistant District Attorney Rothe now makes a motion to appeal from the judgment of the court. The court now sets Monday, September 29, 1930, as the date of the new trial. The defendant to go on a new bail bond.

"Attest: A true copy.

"C. F. Belding, Clerk.

"By Beora Snow, Deputy Clerk."

[2, 3] For the purposes of deciding this case, only one question is left for us to consider, and that is, in making the order set forth, did the trial court abuse its discretion? This court, in People v. Petros, 25 Cal. App. 236, 143 P. 246, 247, used the following language which is pertinent here: "The rule is thoroughly settled that: 'The granting or denying a new trial on the ground that the evidence is insufficient to justify the verdict, where there is a substantial conflict in the evidence, rests so fully in the discretion of the trial court that its action is conclusive upon this court, unless it appears that there has been an abuse of such discretion' "—citing Domico v. Casassa, 101 Cal. 413, 35 P. 1024; Warner v. Thomas, etc., Works, 105 Cal. 411, 38 P. 960, 964; Eidinger v. Sigwart, 13 Cal. App. 667, 110 P. 521, and cases there cited. "Indeed, it has repeatedly been said in the cases that the action of a trial court in granting a new trial upon the ground of the insufficiency of the evidence to justify the decision, 'is so far a matter within its discretion that, if there is any appreciable conflict in the evidence it is not open to review' "—citing a number of cases. See, also, the long list of cases appended to a note to section 1181 of the Penal Code, Kerr's Cyc. Codes of California. The cases there cited are too numerous to be set forth herein. See, also, People v. Ray, 91 Cal. App. 781, 267 P. 593, and cases there cited.

The facts as disclosed by the record are to the effect that the defendant was a railroad police officer in the service of the Western Pacific Railroad Company; that it was his duty to guard trains, and especially freight trains, against all persons attempting to steal rides thereon. In this capacity the defendant was one of the police officers guarding a freight train as it was pulling out of the yards in the city of Oroville; that at the time in question he was riding on top of one of the freight cars, constituting a portion of the train; that he noticed a number of men on the right of way belonging to the railroad company, who started forward as if to board the train, and, in order to warn them and cause them to desist from such act, he drew a revolver and fired over their heads; by some mischance the bullet from the revolver so fired by the defendant, in its course, struck a man by the name of Lake, who was some 1,200 feet away from the defendant, and unobserved and unnoticed by him; the bullet, striking Lake, caused serious, as well as what appears to be permanent, injuries. The whole trial revolved around the question as to whether the shooting of Lake by the defendant was purely accidental, and whether the defendant, by his conduct in shooting over the heads of the few men who were about to board the train, was guilty of criminal negligence in not observing that there were other persons within the possible range of the shot fired by him. The distance of Lake from the defendant would very readily lead to the conclusion that the striking of Lake by the bullet was purely accidental, but the question still remains as to the character of the defendant in firing the shot, which was a question of fact for the jury.

An examination of the testimony shows that two conclusions might readily be reached: One, that there was criminal negligence; the other, that there was no criminal negligence, and that the result of the shooting was purely accidental, and, however civilly liable the defendant might be, there was no criminal responsibility. It is also apparent from a reading of the record that the jury might very readily be influenced by the seriousness of the wound inflicted upon Lake, and brought in a verdict of assault with a deadly weapon, based, in part, upon such considerations.

[4] This short summary of the case shows that this court has no alternative but to affirm the order granting a new trial. As the cause must go back for another hearing, it is incumbent for us to call attention to at least one other point urged by the respondent relative to one of the instructions given to the jury. The record shows that the trial court gave to the jury as one of its instructions section 20 of the Penal Code, reading as follows: "In every crime or public offense there must exist a union, or joint operation of act and intent, or criminal negligence." And then, as a definition of "criminal negligence," the following: "The words 'neglect,' 'negligence,' 'negligent,' and 'negligently' import a want of such attention to the nature or probable consequences of the act or omission, as a prudent man ordinarily bestows in acting in his own concerns." Section 7. Though found in the Penal Code, this definition of "negligence" is only of an act which fixes civil liability; it is the definition of the kind of act which fixes responsibility upon, for instance, drivers of automobiles, where no criminal element whatever is involved. In order to constitute criminal negligence, there must enter into the act some measure of wantonness or flagrant or reckless disregard of the safety of others, or willful indifference. If no one of these elements enter into the act, the person charged cannot be held guilty of criminal negligence.

When the court attempted to instruct the jury on the subject of negligence, the instruction should have been so framed as to advise the jury as to the kind of negligence characterized as "criminal" by section 20 of the Penal Code. As to the use of the term "criminal negligence," and the meaning thereof, as found in different statutes, we may refer to the long list of cases found in volume 2, page 1750, of Words and Phrases, First Series, and volume 1, Second series, page 1153, of Words and Phrases.

As other alleged errors assigned by respondent may not characterize a subsequent trial, we do not deem it necessary to further extend this opinion.

The order of the trial court is affirmed.

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111 Cal. App. 1

In re ALEXANDER'S ESTATE.

ALEXANDER v. KINSEY.

Civ. 4265.

District Court of Appeal, Third District, California.

Jan. 5, 1931.

1. Wills 🔑53(6).

Extreme age, together with mental and physical weakness, may be considered in determining testator's testamentary capacity.

2. Wills 🔑55(1).

Evidence supported findings to effect testator lacked testamentary capacity to execute will.

The evidence disclosed that testator at time of executing will disinheriting relatives was 97 years of age; that he incorrectly signed his name to will. There was no evidence that he understood and appreciated nature, value, or location of his property, or that he knew names or places of residence of his brothers and sisters in Europe on whom he sought to bestow legacies. There was also evidence of uniform course of eccentric and peculiar acts, incoherent language, and peculiar conduct.

3. Evidence 🔑474(4).

Opinions of nonexpert witnesses who are intimate acquaintances are competent regarding sanity of testator, when accompanied with pertinent facts (Code Civ. Proc. § 1870, subd. 10).

4. Appeal and error 🔑971(2).

Trial court's determination of whether witness testifying regarding testator's sanity is intimate acquaintance of testator will not be disturbed on appeal, except for abuse of discretion.

5. Wills 🔑53(2).

Evidence of testator's mental status, together with appearance, conduct, acts, habits, and conversation, before and after execution of will, are admissible, where indicating mental condition when executing will.

6. Wills 53(1).

When testator's sanity is under investigation, broad scope of examination should be allowed.

7. Evidence 🔑474(4).

One whose acquaintance with testator of year and half extended back to within month or two of time of making will could testify regarding testator's sanity.

8. Evidence 🔑474(4).

One living next door to testator more than year could testify regarding testator's sanity.

9. Evidence 🔑474(4).

One who did not see testator for 2 years before execution of will, but who lived near him prior thereto and saw him frequently after making of will, could testify regarding sanity.

10. Evidence 🔑474(4).

One who moved into house owned by testator several months after making of will and saw him almost every day for over a year could testify regarding testator's sanity.

11. Wills 🔑54(1).

On issue of testator's mental condition will contestant could refute charges of cruelty contained in testator's complaint for divorce filed after making of will disinheriting wife.

12. Wills 🔑54(1).

In will contest, complaint for divorce charging cruelty, filed less than year after making of will, *held* admissible to show state of testator's mind.

13. Wills 🔑54(1).

Either oral or written declarations of testator reasonably tending to prove mental status at time of making will are competent evidence for that purpose.

14. Trial 🔑296(2).

Instruction on lack of testamentary capacity, *held* not misleading, in view of other instructions.

The instruction stated that, if jury found testator was of unsound mind upon subject affecting nature and extent of property, or as to consequences of bequeathing his property to a nonrelative, they must then assume he lacked testamentary capacity entitling him to make valid will, even though he might be of sound mind upon other subjects.

15. Wills 🔑50.

If testator did not know nature or extent of property or effect of disinheriting wife, then will was invalid, even if testator were otherwise rational.

16. Wills 🔑330(2).

Instruction that will, which is product of insane delusions regarding testator's wife, is invalid, *held* warranted by evidence.

The evidence disclosed that testator made many unfounded charges of cruelty and oppression against his wife in divorce complaint and otherwise, and that he feared she would poison him.

17. Wills 🔑53(2).

Testator's unsoundness of mind when executing will may be established by evidence of unsound mind existing either before or after execution of will.

18. Evidence 🔑67(2).

Proof of unsound mind emanating from permanent and progressive mental disease such as senile dementia will be presumed to continue, absent evidence to contrary.

19. Wills 🔑330(1).

Instruction, if jury found testator was in such condition either "physically" or mentally that he did not know effect of instrument, will was void, *held* not misleading.

The instruction should not have misled jury, because they were clearly instructed that only issue for them to consider was that of mental soundness of testator, and that it was soundness or unsoundness of mind and not any particular state of bodily health that must control jury's judgment.

20. Trial ⚷235(2).

Instruction that inferences naturally drawn from facts which are actually established by proof are entitled to be considered as part of evidence *held* proper (Code Civ. Proc. § 1958).

21. Wills ⚷53(9).

When soundness of testator's mind is issue in will contest, unreasonableness of provisions of will may be considered.

Appeal from Superior Court, Napa County; Percy S. King, Judge.

Application by N. C. Kinsey for the probate of the will of Barney Alexander, also called B. Alexander, deceased, contested by Pauline Alexander. From an adverse judgment, proponent appeals.

Affirmed.

A. Q. Lomba, of Oakland, and E. L. Webber, of Napa, for appellant.

Leon Samuels, of San Francisco, Thomas C. Anglim, of Napa, and Philip Selig, Jr., of San Francisco, for respondent.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

This is an appeal from a judgment denying the petition to probate a will on the ground of lack of testamentary capacity.

Barney Alexander died February 25, 1929, in Napa county, aged 99 years. He left surviving him a widow 60 years of age and several unnamed heirs who reside in Europe. He was possessed of an estate of small value, consisting entirely of community property. At the time of the marriage of Mr. and Mrs. Alexander, he was without means. She then owned a few hundred dollars. They acquired a small mercantile business which prospered solely through her economy and personal management. In the course of their 30 years of married life they thus accumulated a few thousand dollars. The spouses lived in comparative harmony except for the period of a few months in 1928, during which time they were separated by domestic trouble. At this time Barney Alexander commenced a suit for divorce against his wife on the ground of cruelty. They were soon reconciled, and the action was dismissed. They afterwards lived together until the occasion of his death. Several witnesses testified Mrs. Alexander always treated her husband with kindness and consideration. There were no children as issue of the marriage.

July 22, 1927, Barney Alexander executed a will, by the terms of which he gave the bulk of his estate to the proponent, N. C. Kinsey, of Oakland, who was a mere acquaintance designated as "a friend." The testator and his chief legatee were not intimate friends. For a brief period, some 14 years prior to his death, the testator was employed by the proponent to repair garments sold by him in a secondhand business. No other relationship existed between them. They never visited at the homes of each other. The only other bequests provided for in the will were a gift of $1 to his wife, and the sum of $100 to each of "my relatives who may survive me, namely brothers and sisters now in Europe." Mr. Kinsey was appointed executor and was authorized to serve as such without bonds.

The will was filed for probate. The widow contested it on the grounds of lack of due execution, undue influence, and unsound mind. The cause was tried with a jury. At the close of the evidence, on motion of the proponent, the issue of undue influence and lack of due execution were withdrawn from the jury. A verdict was rendered finding the testator to be of unsound mind at the time of the execution of the will. A judgment was accordingly entered refusing to admit the will to probate. From this judgment the proponent has appealed.

A reversal of the judgment is sought on the grounds that (1) the evidence is insufficient to support the findings and judgment to the effect that the testator was of unsound mind, (2) the court erred in admitting opinion testimony respecting the sanity of the testator by those who were not shown to be intimate acquaintances, and (3) the court erred in giving certain instructions to the jury.

The findings and judgment are abundantly supported by the record. It is quite evident the deceased lacked testamentary capacity. He was 97 years of age when he executed the will. He incorrectly signed his name to the will as "B. Axander." There is no evidence that he understood and appreciated the nature, value, or location of his property or that he even knew the names or places of residence of his brothers and sisters in Europe upon whom he sought to bestow legacies. The evidence with respect to his knowledge of the provisions of his will is very unsatisfactory. The attorney who drew the will and the attesting witnesses testify merely that he answered the inquiries regarding the instrument and his desire to have it signed by the witnesses with his assent, implied from his use of the single word "yes." The will was not read in the presence of the witnesses. The testator made no affirmative statement in regard to the will or its execution from which we may ascertain his mental capacity or determine whether he knew the nature of his act or appreciated the manner of disposing of his property. The provisions of the will were unnatural. He practically disinherited his wife and relatives and gave the bulk of his

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property to a mere acquaintance to whom he was under no obligation, and who, in reply to an alleged statement of the testator that "I will never forget you—what you did for me," said, "I don't know what I did for you." The testator was extremely old, illiterate, enfeebled, and eccentric. He went about bareheaded, disheveled, and filthy, with his shoes unlaced and his trousers unbuttoned. One occasion he was seen walking down the street in this condition carrying a chamber in either hand. In warm weather he sometimes wore several coats at the same time, or an overcoat. He chased his neighbors' poultry. He dug out their shrubbery and transplanted the bushes in his own yard. He broke the pickets from their fences and gates. He recklessly started grass fires in dangerous proximity to buildings. When reproved for such conduct he cunningly claimed he thought it was his own property, mumbled and muttered in a maudlin fashion, or laughed in a defiant and imbecilic way. He was frequently unintelligible in his conversation and impossible to understand. He picked up and smoked cigars stubs taken from the gutter. He gathered and ate refuse from garbage cans. He collected and carried home in sacks entrails from poultry for the purpose of trying out the fat with which to cook his food. He stormed about the store with a stick, threatening the customers and sometimes throwing the merchandise into the street. He refused to eat food prepared or cooked by any one but himself, claiming that he feared his wife and others would poison him. A dozen witnesses testified to facts and circumstances which strongly indicate he was afflicted with senile dementia, and that he lacked testamentary capacity at the time of the execution of his will.

[1, 2] It is true that neither old age nor physical and mental weakness will necessarily invalidate a will. Extreme age, however, together with mental and physical weakness, are circumstances which should be considered together with all other facts surrounding the execution of a will to determine whether the testator possessed testamentary capacity. 1 Alexander on Wills, 481, § 355; 28 R. C. L. 94, § 44. Extreme age of the testator, the unnatural terms of the will, the incorrect spelling of his name, the disinheriting of his wife, the failure to indicate the nature, value, or location of his property, his failure to name or give the places of residence of any of his brothers or sisters, a uniform course of eccentric and peculiar acts, incoherent language, and peculiar conduct furnish ample evidence to support the findings and judgment in this case to the effect that the testator was of unsound mind and lacked testamentary capacity to execute a valid will.

In the course of the trial several witnesses, after relating circumstances similar to some of the foregoing facts upon which they based their opinions, were permitted, over the objections of the proponent, to assert that they considered the testator irrational. It is contended this constituted error for the reasons that the witnesses were not qualified to testify as intimate acquaintances pursuant to section 1870, subdivision 10, of the Code of Civil Procedure, and that the facts upon which their opinions are founded were too remote.

[3] These assignments of error are without merit. The opinions of nonexpert witnesses, regarding the sanity of a testator, who may be classified as intimate acquaintances, are competent when accompanied with pertinent facts or circumstances which are related by the witnesses. Sec. 1870, subd. 10, Code Civ. Proc.; Estate of Baker, 176 Cal. 430, 439, 168 P. 881; 26 Cal. Jur. 747, § 89; 40 Cyc. 1038; 1 Alexander on Wills, 519, § 385; Page on Wills, 464, § 390.

[4] The question as to whether the facts create a relationship between the witness and the testator which would be considered an intimate acquaintance is largely within the discretion of the trial court. The solution of this problem will not be disturbed on appeal except for an abuse of discretion. Estate of McKenna, 143 Cal. 580, 584, 77 P. 461; In re Wax, 106 Cal. 343, 351, 39 P. 624; Page on Wills, 464, § 390.

[5, 6] The proof of the sanity of the testator and of the facts upon which his state of mind depends are not necessarily confined to the exact time of the execution of the will. Evidence of the testator's mental status, together with his appearance, conduct, acts, habits, and conversation, both before and after the execution of the will, are admissible so long as they have a reasonable tendency to indicate his mental condition at the time of the execution of the will. Estate of Baker, 176 Cal. 430, 438, 168 P. 881; 1 Alexander on Wills, 487, § 358; 26 Cal. Jur. 747, § 89. In the text of California Jurisprudence last cited it is said: "An opinion as to the decedent's condition at a time antedating execution is not to be excluded on the ground of remoteness." When the sanity of a testator is under investigation, a broad scope of examination should be allowed, for the reason that the evidence of mental derangement is frequently subtle and exceedingly difficult to prove. This is particularly true when the characteristics of the malady indicate a permanent and progressing mental disease. This is the nature of senile dementia. The weight and sufficiency of such evidence is left entirely with the jury.

[7-10] In the present case the four witnesses whose opinions as to the testator's sanity are assigned as error were sufficiently qualified as intimate acquaintances, and the facts which they related were not too remote to entitle them to be admitted in evidence. Mr. Hudson testified that he knew the testator and his wife at Calistoga "a year and a half"; that he "lived neighbors to them," and that he saw them "practically every day." The will was made in July, 1927. The testator died in February, 1929, just a year and seven months after the execution of his will. The acquaintance of this witness Hudson therefore extended back to within a month or two of the time of the making of the will.

Mrs. Taylor lived next door to the Alexanders in Calistoga. She testified: "I have known them since he moved to Calistoga a year ago in the spring." She says she saw him "every two or three days," during that period.

Sarah Brawner was an attendant for five years at the Napa State Hospital. She testified that she was acquainted with the Alexanders "from 1919 * * * until October before he passed away." For a year and a half prior to July, 1925, she lived within a block of them, and claims that she saw him "practically every day" during that period of time. It is true that for nearly 2 years immediately before the execution of the will, she did not see him. After the making of the will, she saw him frequently to the time of his death.

Emma Pauer moved into one of the houses owned by the Alexanders at Oakland. This was in November, 1927, three or four months after the execution of the will. She testified: "I lived there over a year. * * * I used to see him * * * almost every day."

In holding that these witnesses were qualified to testify as intimate acquaintances regarding the sanity of the testator, and that their evidence was not too remote, the court did not abuse its discretion.

[11-13] It was not error to permit the contestant to refute the charges of cruelty contained in his complaint for divorce which was filed in August, 1928. The complaint was received in evidence by stipulation. It contained many declarations of harsh and cruel treatment on the part of the contestant. The pleading was verified by Mr. Alexander. It was filed less than a year after the execution of the will. Unfounded declarations of cruelty made by a testator about the time of the execution of his will may tend to prove his mental condition. Among the symptoms which indicate a deranged mind are the presence of delusions of oppression and persecution on the part of friends and relatives. The complaint, with its declarations of cruelty, was admissible to show the state of mind of the testator. As proof of the fallacy of these charges, it was also proper to permit the contestant to refute them seriatim. Either oral or written declarations of a testator, which may reasonably tend to prove his mental status at the time of the execution of his will, are competent evidence for that purpose. Estate of Thomas, 155 Cal. 488, 494, 101 P. 798; Estate of Snowball, 157 Cal. 301, 308, 107 P. 598; 28 R. C. L. 92, § 42.

[14-15] The appellant assigns, as error, the giving of half a dozen instructions involving the issue regarding the sanity of the testator. While we are unable to approve the language of some of these challenged instructions, we are of the opinion that they are not prejudicial, since the jury was elsewhere fully and fairly charged regarding the same elements contained therein.

The first of these instructions, in effect, informed the jury that, if they found that Barney Alexander was of unsound mind upon the subject affecting the nature and extent of his property, or as to the consequences of disinheriting his wife and bequeathing his property to a nonrelative, they must then assume he lacked testamentary capacity entitling him to make a valid will, even though he might be of sound mind upon other subjects. It is contended this instruction is "confusing," for the reason that it specifies only two elements affecting the sanity of the testator. The language of this instruction is not as clear as it might have been. In this connection the jury was further instructed that every presumption is in favor of the validity of the will; that the testator is presumed to be of sound mind; that the burden is on the contestant to show that the testator was of unsound mind at the very time of the execution of the will; that the law solemnly assures every one the absolute right to dispose of his property by will; that this is a valuable incident to the ownership of property, and that a person of sound mind has a perfect right to make an unjust, unreasonable, or even a cruel will; that neither the extreme age of the testator nor the fact that he cut off his wife with a bequest of only $1 would alone invalidate the will; that one must possess testamentary capacity and be of sound mind in order to make a valid will; that the possession of testamentary capacity means the maker of a will must comprehend the nature and purpose of the act in which he is about to engage; that he must appreciate the character and extent of the property he proposes to devise; that he must be able to name and identify the individuals and understand the relationship which he bears to those who would naturally become the objects of his bounty.

In view of the numerous clear instructions which were given to the jury with relation to the issue of insanity, we are convinced the jury were not misled or confused by the challenged instructions. It may reasonably be construed to mean that, if the jury found the testator to be of unsound mind to the extent that he did not know the nature or extent of his property, or that he was of unsound mind to the extent that he did not comprehend the effect of disinheriting his wife by giving the bulk of his property to a stranger who would not naturally be entitled to his bounty, then the will would be invalid, even if the testator were sound and rational with respect to other transactions. This is a correct statement of the law.

[16] Evidently the appellant does not place great reliance upon his second challenged instruction. It is not quoted in his brief nor criticized beyond saying: "This instruction is confusing and * * * is too broad in its application to the facts in this case." It is inartistically drawn, but instructs the jury in effect that: "If you believe * * * Barney Alexander was laboring under an insane delusion affecting his wife," his will executed as a result of such false belief would be invalid. This instruction should be construed with relation to the one immediately preceding it, which reads in part: "It is essential that the testator understand fully the nature of the act (of making his will) and its effect, and be able to comprehend and appreciate the claims (upon his bounty) which he should regard. * * * No insane delusion shall influence his will in disposing of his property." These instructions may reasonably be construed to mean that a will which is the product of insane delusions regarding the wife of the testator who would naturally be entitled to his bounty would therefore be invalid. This instruction is warranted on the theory that the record contains evidence that Mr. Alexander made many unfounded charges of cruelty and oppression against his wife in the divorce complaint and otherwise, and for the reason that he feared she would poison him.

[17, 18] The third instruction which is challenged merely informs the jury that it is unnecessary to prove by direct evidence that the testator was of unsound mind at the very time of the execution of the will, provided that fact is established by evidence, of unsound mind existing either before or after the actual execution of the will from which it may be reasonably inferred he was incompetent when he executed the instrument. This is a reasonable construction of the charge. It correctly states the law. It would be unreasonable to require proof of incompetency at the exact time of the execution of a will. Such proof might be impossible to secure. If this were required, and an escaped inmate of an insane asylum were to draw his own holographic will with no one else about, it would be impossible to prove its invalidity. The proof of an unsound mind emanating from a permanent and progressive mental disease such as senile dementia will be presumed to continue in the absence of evidence to the contrary. Proof of the existence of such permanent mental disorder shortly before or after the execution of a will may warrant the inference that the disease existed at the very time of making the will, and that the instrument is therefore invalid.

[19] The fourth instruction advises the jury that, if they find "Barney Alexander was in such condition either physically or mentally that he did not know, realize or understand the purport, meaning, significance or effect of said instrument," the will would then become void. The word "physically," as it appears in the instruction, seems meaningless, and therefore harmless. Physical weakness contributes to mental weakness. The contestant evidently intended to say that, if the testator was ignorant of the nature, meaning, or effect of his will, it would be void, regardless of whether that lack of understanding came from insanity or mental debility resulting from deterioration caused by age and physical infirmity. This instruction should not have misled the jury, for they were clearly instructed that the only issue for them to consider was that of the mental soundness of the testator. The court charged the jury: "You are instructed that it is soundness or unsoundness of mind and not any particular state of bodily health that must control your judgment." We are of the opinion this instruction was therefore not misleading or prejudicial.

[20] The next instruction merely declares the self-evident rule that inferences naturally drawn from facts which are actually established by proof are entitled to be considered as a part of the evidence. Section 1958, Code Civ. Proc. This may not be controverted.

[21] Finally the jury were instructed, in effect, that, if they found the provisions of the will to be unnatural in the disposition of the property, that fact might be considered in determining whether it was the product of an unsound mind.

This instruction is criticized by the appellant in the following language: "This court has * * * held that a person may make an unnatural and cruel will. * * * This instruction is (therefore) erroneous. * * *" It is true that a testator who possesses a sound mind may legally make a cruel or unjust will. The appellant overlooks the fact that the sole issue in this case is the testator's sanity. The rule is firmly established that, when the soundness of the testator's mind is an issue in the contest of a will, the reasonableness or unreasonableness of the provisions of the will may be considered with all the other facts and circumstances of the case in determining the question of testamentary capacity. Estate of Wasserman, 170 Cal.

101, 148 P. 931; Estate of Martin, 170 Cal. 657, 663, 151 P. 138; Estate of Johnson, 72 Cal. App. 663, 237 P. 816; 26 Cal. Jur. 690, § 49; 28 R. C. L. 91, § 40; 1 Alexander on Wills, 481, § 355.

The judgment is affirmed.

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110 Cal. App. 715

COLEMAN v. CITY OF OAKLAND.

Civ. 7172.

District Court of Appeal, First District, Division 1, California.

Dec. 30, 1930.

1. **Statutes** 🔑194.

Doctrine of "ejusdem generis," as used in constructing statute, means that where general and specific words relating to same thing are associated together, general words are restricted to sense analogous to that of less general.

> [Ed. Note.—For other definitions of "Ejusdem Generis," see Words and Phrases.]

2. **Statutes** 🔑194.

Doctrine of ejusdem generis is but rule of construction and may not defeat legislative intent.

3. **Statutes** 🔑209.

When word has been given particular meaning in one part of law, it must be given same meaning in other parts.

4. **Automobiles** 🔑187.

Motortruck *held* included in word "property" as used in statute making municipality liable for injuries resulting from defective condition of property (St. 1923, p. 675, § 2).

> Under St. 1923, p. 675, § 2, municipality is liable for injuries resulting from defective condition of property in all cases where municipality having authority to remedy such condition had knowledge or notice of defect, and failed or neglected for reasonable time after acquiring such knowledge to take action to protect public.
>
> [Ed. Note.—For other definitions of "Property," see Words and Phrases.]

5. **Municipal corporations** 🔑733(1).

Municipality while conducting airport is acting in proprietary capacity and was liable for injuries occasioned in such capacity.

6. **Pleading** 🔑52(2).

That complaint against municipality stated liability for injury caused by defective property and for negligence in proprietary capacity in conducting airport in same count did not render complaint demurrable (Code Civ. Proc. § 426, subd. 2).

> This was true as the accident was single and the recovery sought was single, and the complaint followed the requirements of Code Civ. Proc. § 426, subd. 2.

7. **Pleading** 🔑52(1).

Common-law and statutory negligence need not be pleaded in separate counts.

Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Action by Clifford M. Coleman against the City of Oakland. Judgment for defendant, and plaintiff appeals.

Reversed with directions.

L. L. Steele, of Oakland (Warren H. Pillsbury, of San Francisco, of counsel), for appellant.

Preston Higgins, City Atty., and Homer W. Buckley, Deputy City Atty., both of Oakland, for respondent.

Markell C. Baer, Port Atty., City of Oakland, amicus curiæ.

DOOLING, Justice pro tem.

This is an appeal from a judgment in favor of defendant, city of Oakland, entered after an order sustaining a demurrer to plaintiff's third amended complaint.

The plaintiff sought to recover for personal injuries and property damage alleged to have been caused by a motortruck owned and operated by defendant, city of Oakland. Paragraph IV of the complaint contains an allegation that the collision was caused by a dangerous and defective mechanical condition of said motortruck, to wit, a broken spring, which rendered the truck unmanageable; together with allegations of knowledge for a long time and neglect to remedy such condition within a reasonable time. These allegations are conceded by respondent to be sufficient to bring the case within section 2 of Statutes of 1923, p. 675, if an automobile is within the class of property covered by that section. But it is contended by respondent that under the rule of statutory construction, ejusdem generis, that statute refers only to real property, and cannot include the case of an automobile operated on the public streets.

The section in question reads: "Counties, municipalities and school districts shall be liable for injuries to persons and *property* resulting from the dangerous or defective condition of public streets, highways, buildings, grounds, works and *property* in all cases where the governing or managing board of such county, municipality, school district, or other board, officer or person having authority to remedy such condition, had knowledge or notice of the defective or dangerous condition of any such street, highway, building, grounds, works or *property* and failed or neglected, for a reasonable time after acquiring such knowledge or receiving such notice * * * to take such action as may be reasonably necessary to protect the public against such dangerous or defective condition."

[1-4] It is respondent's contention that the general word "property," following as it does the words "public streets, highways, buildings, grounds, works," must take its color from them, and can only apply to other classes of real property not therein specifically enumerated under the doctrine of ejusdem generis.

"The doctrine of 'ejusdem generis' simply means that where general and specific words relating to the same things are associated together they take color from each other, and the general words are restricted to a sense analogous to that of the less general." 23 Cal. Jur. p. 755. But "the doctrine of ejusdem generis is but a rule of construction to aid in ascertaining the meaning of the legislature, and may be used to carry out but not to defeat the legislative intent." 23 Cal. Jur. p. 756; Matter of La Societe Francaise, 123 Cal. 525, 56 P. 458, 787.

In this case the section above quoted contains within itself a strong indication that the word "property" was not intended to have a restricted meaning. We have intentionally italicized the word "property" in the places in which it occurs in section 2, Statutes of 1923, p. 675. In the first instance its meaning is not restricted. It imposes a liability "for injuries to persons and property." Clearly the liability is for injuries to property of any character, real or personal. Separated from the first place of its occurrence by only fifteen words it is used again. In its second use we are asked to hold that it has an entirely different and more limited meaning. To do so would require some stronger reason than a rule of construction which is merely an aid in ascertaining the legislative intent. It seems unlikely that the legislature would have used the same word in such close juxtaposition with such widely different meanings. "It is a well-established rule of construction that when a word or phrase has been given a particular scope or meaning in one part or portion of a law it shall be given the same scope and meaning in other parts or portions of the law and particularly of the same section thereof." Ransome-Crummey Co. v. Woodhams, 29 Cal. App. 359, 360, 156 P. 62, 64. We are satisfied that the word "property" in this section is broad enough to cover the case of a motor truck in a dangerous or defective condition. Cf. Huff v. Compton City Grammar School District, 92 Cal. App. 44, 267 P. 918; Dawson v. Tulare Union High School, 98 Cal. App. 138, 276 P. 424.

Paragraph V of the complaint reads: "That at all times herein mentioned the City of Oakland, a municipal corporation, was and now is the owner of, maintained and operated a certain municipal air port located within the corporate limits of said city, and in the maintenance of said air port said corporation was accustomed to, and did make a charge for those who used or accepted accommodations therein; that at the time the injury in question was sustained, said defendant, Lawrin Garrett (the driver of the truck) was engaged in the improving, maintaining, building and constructing of the said municipal air port."

[5] By these allegations appellant seeks to hold the city of Oakland under the common-law liability imposed upon a municipal corporation when it is acting in a proprietary, as distinguished from a governmental, capacity. The general distinction between the two functions of a city is thus stated in Chafor v. City of Long Beach, 174 Cal. 478, 487, 488, 163 P. 670, 674, L. R. A. 1917E, 685, Ann. Cas. 1918D, 106:

"Under the theory of the common law, that the municipality is protected from liability only while exercising the delegated functions of sovereignty, the governmental powers of a city are those pertaining to the making and enforcing of police regulations, to prevent crime, to preserve the public health, to prevent fires, the caring for the poor, and the education of the young. And in the performance of these functions all buildings and instrumentalities connected therewith come under the application of the principle. City of Kokomo v. Loy [185 Ind. 18] 112 N. E. 994.

"But it is of course true that modern cities and towns enter upon many forms of activity, operate utilities for the benefit of the inhabitants, and provide many means for the easing or improving of the condition of the people that were never dreamed of at common law. Nevertheless the uniform holding as to all such activities on principles manifestly just to the people themselves is that no matter how beneficial they may be in a general sense to the inhabitants of the municipality, unless they are governmental in their essence, the municipality's conduct in managing them is controlled by the same rules of liability that apply to an individual. Thus, while schoolhouses, city halls, jails, fire houses, are with much uniformity held to be instrumentalities for governmental purposes, no such rule applies to other buildings constructed by a municipality, though for the benefit, convenience, or advantage of its people. * * *

"The cases so holding with reference to municipal water plants and their structures, and gas plants and their structures, are so numerous as not even to call for specific citation. The same rule is universally applied to market houses built by the municipality and maintained for the convenience of the people."

We have no hesitancy in deciding that in the conduct of an airport the municipality is acting in a proprietary capacity. An airport falls naturally into the same classification as such public utilities as electric light, gas, water, and transportation systems, which are universally classed as proprietary. Its nearest analogy is perhaps found in docks and wharves. "An airport with its beacons, landing fields, runways, and hangars is analogous to a harbor with its lights, wharves and docks; the one is the landing place and haven of ships that navigate the water, the other of those that navigate the air." Dysart v. St. Louis, 321 Mo. 514, 11 S.W.(2d) 1045, 1049, 62 A. L. R. 762.

"When a municipal corporation maintains a public wharf, and charges toll or wharfage to the owners of vessels making use of the wharf, it is liable to the same extent as an individual wharf-owner." 19 R. C. L. p. 1134; 43 C. J. p. 1175.

We are satisfied that the allegations of paragraph V above quoted are sufficient, if proved, to establish that in operating the airport the city of Oakland acted in a proprietary capacity. This conclusion is in accord with the only case on the precise question which has been called to our attention. City of Mobile v. Lartigue, 23 Ala. App. 479, 127 So. 257.

[6, 7] Finally respondent insists that its demurrer was properly sustained because there are two causes of action in the complaint which are not separately stated, i. e., a cause of action based on the statute of 1923, and a cause of action for the common-law liability. In support of this claim respondent cites four cases: Matz v. Chicago & A. R. Co. (C. C.) 88 F. 770; McHugh v. St. Louis Transit Co., 190 Mo. 85, 88 S. W. 853; Scott v. Robards, 67 Mo. 289; and Creen v. Mich. C. R. Co., 168 Mich. 104, 133 N. W. 956, Ann. Cas. 1913C, 98. Of these cases the first two state a rule of pleading for the state of Missouri which has since been expressly overruled (White v. St. Louis & M. R. R. Co., 202 Mo. 539, 101 S. W. 14, 20, 21; Clark v. St. Joseph T. R. Co., 242 Mo. 570, 148 S. W. 472, 478); the expression on the subject in the Creen Case was mere dictum since the complaint there passed upon was in two counts, and was held good on that ground; and the Scott Case is not in point and does not deal with the pleading of statutory and common law negligence. In drawing his complaint the pleader has followed the requirement of Code of Civil Procedure, section 426, subdivision 2, and set out "a statement of the facts constituting the cause of action, in ordinary and concise language." The accident was single, and the recovery sought is single. If the facts may entitle plaintiff to recover on two theories that does not render his pleading duplicitous. Mills v. Barney, 22 Cal. 240. It has been too often held to be open to doubt that in this jurisdiction common-law and statutory negligence need not be pleaded in separate counts. Opitz v. Schenck, 178 Cal. 636, 174 P. 40; Martin v. Shea, 182 Cal. 130, 187 P. 23; Scharpf v. Union Oil Co., 19 Cal. App. 100, 124 P. 864.

Judgment reversed, with direction to the trial court to overrule the demurrer.

We concur: TYLER, P. J.; CASHIN, J.

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111 Cal. App. 33

YOUNG v. STATE ATHLETIC COMMISSION et al.

Civ. 7568.

District Court of Appeal, Second District, Division 1, California.

Jan. 6, 1931.

Theaters and shows ⚷3.

Athletic commission did not abuse discretion in denying license to conduct wrestling contests, where applicant's contract for lease was of doubtful validity and was cancelable upon 30-day notice (St. 1925, p. xc § 3).

Applicant did not present to commission any evidence that person with whom he contracted for lease had authority to contract for lessor, and the contract relied on contained reservation of right upon 30-day written notice to cancel contract. State Athletic Act § 3 (St. 1925, p. xc), gives commission discretion to issue licenses to conduct wrestling contests to any organization holding lease for term of at least one year of premises in which contests are proposed to be held.

Appeal from Superior Court, Los Angeles County; Walter Guerin, Judge.

Mandamus proceeding by Fred Young, Jr., against the State Athletic Commission of California and others. From the judgment, petitioner appeals.

Affirmed.

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Elmer J. Walther, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., John W. Maltman, Dep. Atty. Gen., and Warner I. Praul, of Los Angeles, for respondents.

HOUSER, J.

Section 3 of the State Athletic Act (St. 1925, pp. lxxxix, xc), includes the provision that the commission created by such act be given "discretion" to issue licenses to conduct wrestling contests "to any club, corporation, organization or association which holds a lease of a term of at least one year of the premises" in which such contests are proposed to be held. Other rules governing the issuance of a license for the exhibition of athletic contests are either directly provided for by the statute, or, under the powers granted to the commission, are prescribed by such commission.

Acting under assumed compliance with the provisions of the statute, as well as with such regulations as theretofore had been adopted by the commission, the appellant in this proceeding presented his application to said commission for a license by which he would be given the privilege of conducting wrestling bouts at the "Shrine Auditorium" in the city of Los Angeles. The application was denied. Thereupon, through the medium of a writ of mandate issued by the superior court, he sought to compel the commission to issue to him such license. On return of the alternative writ and on hearing of the order to show cause therein, by order of the trial court, the writ was discharged; and the petitioner has appealed to this court from such order or judgment.

Although much argument is presented by respective counsel with reference to the question of the right of the commission to act "arbitrarily" in making its order by which the application of appellant for a license was denied, it is conceded that, under the provisions of the statute, the commission was authorized to act within its "discretion" in the premises. Accordingly, if by considering the terms of the application itself, or by considering any other fact relevant to a determination by the commission as to whether the license should be issued to the applicant, it appear either that the applicant failed to comply with the statutory requirements, or that a discretion free from abuse thereof was or may have been exercised by the commission in reaching its conclusion, it is clear that its action in the premises cannot be reviewed or controlled either by the lower court, or in effect by this tribunal.

To the end that a sufficient reason may be discovered for the order by the commission by which the application for a license was denied, it becomes pertinent to examine such application and a portion of the statute which relates to the issuance of such license. Reverting to the provisions of section 3 of the act to which attention hereinbefore has been directed, it will be noted that, leading to the issuance of a license, one of the requirements is that the applicant "holds a lease of a term of at least one year of the premises" in which the proposed contests are to be held.

The petition for a writ of mandate included the allegation that, with his application to the commission for the license in question, there was filed by the applicant "a contract by and between Al Malaikah Auditorium Company and petitioner, for the rent of the Shrine Civic Auditorium in the city of Los Angeles, * * * for the purpose of conducting wrestling bouts, * * * a true and correct copy of which is attached hereto," etc.

An examination of the copy of the so-called "contract" discloses what purports to be a letter written on the letterhead of the "Shrine Civil Auditorium," addressed to appellant herein, signed "Geo. J. Ramsey, Secretary-Treasurer," and "accepted" by appellant. On the face of the letterhead appears the name of the president and the names of the directors—supposedly of the Al Malaikah Auditorium Company. In part, the instrument is to the effect that "this letter may be used as a contract wherein the Al Malaikah Auditorium Company hereby agrees to rent to you for a period of one year from date the Shrine Civic Auditorium. * * *" But by the closing paragraph of the letter, "Al Malaikah Auditorium Company reserves the right, upon a thirty-day written notice, to cancel this contract."

Aside from any question which properly might have been interposed by the commission relative to the authority of "Geo. J. Ramsey, Secretary-Treasurer," to enter into a binding contract or lease on behalf of the Al Malaikah Auditorium Company, it will be noted that the so-called "contract" was not and does not purport to have been signed by Al Malaikah Auditorium Company; and that said "contract," although in apparent compliance with the statutory requirement of a tenancy by the applicant for a period of "at least one year," in fact was cancelable by "Geo. J. Ramsey, Secretary-Treasurer," or possibly by his supposed principal, Al Malaikah Auditorium Company, "upon a thirty-day written notice." But also of some importance was the failure on the part of the applicant for the license to produce a lease of the premises in which he proposed to conduct wrestling bouts. Although the letter or "contract" was "accepted" by the proposed lessee, it was capable of the construction that as between the interested parties a lease would or might be entered into at a future date on the terms specified in the so-called "contract." At any rate, in form the "contract" was not a lease. If it created an enforceable right to a lease, it was cancelable "upon a thirty-day written notice" by "Geo. J. Ramsey, Secretary-Treasurer," or possibly by the Al Malaikah Auditorium Company. But, assuming the actual authority in Geo. J. Ramsey to enter into a "contract" or lease such as is and was required by the terms of the statute, the record herein fails to disclose that the applicant presented to the commission any tangible evidence of the existence of such authority.

Without reference to other apparent defects either in the application, or in the "contract," but considering such aforementioned conditions only, of which it is not altogether improbable that the commission took notice, the justification as a matter of law of the rejection by the commission of the application for a license becomes apparent. Viewed from the standpoint either that the application failed to comply with statutory requirements, or that the attempted compliance was so questionable that, if the other several defects appearing therein were waived by the commission, the granting of a license in such circumstances might prove an embarrassing precedent—on the one hand, in the faithful performance of its duties, the commission was compelled to deny the application; and, on the other hand, in the exercise of that "discretion" vested in it by the terms of the statute, the commission was authorized to take the action on the application to which appellant herein takes exception.

Each of the several applications by appellant for leave to produce additional evidence relative to the extension of the "contract" here involved is denied. The appeal from each of the several orders specified by appellant in his notice of appeal is dismissed; and the judgment rendered by the trial court is affirmed.

We concur: CONREY, P. J.; YORK, J.

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110 Cal. App. 753

KANE et al. v. EASTMAN et al.

Civ. 7239.

District Court of Appeal, First District, Division 1, California.

Jan. 5, 1931.

1. Bills and notes 🔑430.

In absence of express agreement, new note of either debtor or third party does not extinguish original indebtedness.

2. Bills and notes 🔑527(2).

That original note is surrendered is not sufficient to establish agreement that new note should extinguish original indebtedness.

3. Bills and notes 🔑527(2).

Finding that new note to assignee extinguished original indebtedness, thereby releasing assignor from all liability to assignee, *held* unsupported.

4. Bills and notes 🔑289.

Indorsement of all right, title, and interest of payee in note *held* "qualified indorsement" within statute (Civ. Code, § 3119).

[Ed. Note.—For other definitions of "Qualified Indorsement," see Words and Phrases.]

5. Bills and notes 🔑289.

Indorser of all right, title, and interest in note is mere assignor of title who would not be liable as indorser on maker's default (Civ. Code, § 3119).

6. Bills and notes 🔑396.

Indorser is discharged from obligation by failure to present note or give notice of its dishonor, unless presentment or notice is excused or waived (Civ. Code, § 3170).

7. Bills and notes 🔑394.

Assignor of title of note, not being "indorser" within statute, is not entitled to notice of dishonor (Civ. Code, § 3170).

[Ed. Note.—For other definitions of "Indorser," see Words and Phrases.]

8. Bills and notes 🔑394.

Assignor of title of note can only escape liability for original debt by showing that failure to present for payment or give notice of nonpayment or lack of diligence in collecting note has occasioned him damage.

9. Appeal and error 🔑879.

Parties who have not appealed from judgment cannot attack findings.

10. Bills and notes 🔑398.

Assignor of original note *held* liable to assignee on debtor's default on new note executed to assignee in place of original note, where failure to present note for payment or lack of notice of nonpayment caused no damage to assignor.

Appeal from Superior Court, Los Angeles County; L. T. Price, Judge.

Action by Charles H. Kane and another against George A. Eastman and others to recover the balance of the purchase price of the leasehold of an apartment house. From the judgment, plaintiffs appeal.

Reversed in part, and affirmed in part.

Superseding opinion in 288 P. 819.

W. W. Kaye and Samuel Horowitz, both of Los Angeles, for appellants.

William A. Barnhill and Lewinson & Barnhill, all of Los Angeles, for respondents Eastman.

PER CURIAM.

This action was brought to recover from defendants George A. Eastman and Mildred C. Eastman, his wife, the sum of $10,850, the unpaid balance of the purchase price of the leasehold of an apartment house in Los Angeles called the "Marlborough Apartments," and of the furniture therein. The plaintiffs also sought to recover the same amount from defendant Goldberg on the foreclosure of a chattel mortgage on certain furniture in an apartment house called the "Pickwick Apartments," executed by Goldberg to defendant George A. Eastman, and by him assigned to plaintiff Charles H. Kane.

The court found for defendants Eastman and against defendant Goldberg, and from the judgment entered thereon plaintiffs have appealed.

The facts of the transaction are as follows: On October 1, 1923, plaintiff Charles H. Kane entered into an agreement with defendants Eastman whereby he agreed to sell, and they agreed to buy, the leasehold and furniture of the Marlborough apartment house for the sum of $45,000. The purchasers agreed to pay $13,750 in cash; to indorse to plaintiff Kane a promissory note for $17,500 executed by defendant Goldberg on October 1, 1923, to George A. Eastman, which note was secured by a chattel mortgage on the furniture of the Pickwick apartment house, and to discharge certain obligations of plaintiff Kane amounting to $13,750. The cash payment was made, the obligations were discharged, and the Goldberg note and mortgage were transferred to Kane. No part of this note, which was payable in installments, was paid by the Eastmans, but on May 20, 1925, Goldberg, who was then in default thereunder to the extent of $4,350, had reduced the principal to $10,850. On that date Goldberg was indebted in the same amount, and was also in default to the same extent, on another promissory note executed by him to George A. Eastman and assigned to Mildred C. Eastman, which instrument was also secured by the same chattel mortgage upon the furniture of the Pickwick apartment house. On the date last mentioned the parties entered into a new agreement whereby Goldberg executed two promissory notes, each for $10,850, one payable to plaintiff, the other to Mildred C. Eastman, and secured both by the execution of a new chattel mortgage to the payees. Goldberg paid nothing on either of the new notes and became in default on both; and it further appears that between the time of filing the action and the trial the furniture in the Pickwick Apartments covered by the chattel mortgage was seized under a prior mortgage by the lessor of the apartment house.

Defendants Eastman alleged that the note executed by Goldberg to George A. Eastman and transferred to Kane was accepted by the latter in payment and satisfaction of the purchase price of the leasehold and furniture to the extent of $17,500; but the trial court found that it was accepted with the understanding that it should have that effect only to the extent that payments were made thereon. The court found, however, that the note of May 20, 1925, executed by Goldberg to Kane, was accepted with the intention of extinguishing all obligations under the note first mentioned, and to substitute new parties and a new obligation in lieu thereof, and that by reason thereof defendants Eastman were released from all obligation and liability under the first note and under the contract of purchase.

It is admitted that the note of May 20, 1925, was never presented or demand made for its payment, and that no notice of its dishonor was given to defendants Eastman or either of them. The complaint alleged that George A. Eastman "both before and after default in payment and dishonor of said promissory note * * * waived the presentment for payment of said note to defendant Gabriel Goldberg; said George A. Eastman also waived notice of such dishonor by Gabriel Goldberg of said promissory note"; but the court found that there was no waiver as alleged.

Plaintiffs claim that the two findings last mentioned are unsupported. According to the testimony, when Goldberg became in default under the original notes, it was the opinion of all the parties that the installments which he was obligated to make thereunder were larger than the business justified. Accordingly for Goldberg's benefit, and with the view that new notes in smaller installments would probably be promptly met, and also be more readily marketable, it was agreed that Goldberg should execute such notes to plaintiff and Mrs. Eastman for the unpaid amounts of the notes held by them, payable, however, in smaller installments, and secure the same by a new mortgage upon the same property. Following this agreement the note of May 20, 1925, was executed, and the original note executed by Goldberg was surrendered to him by Kane.

As stated, the court found that the original note was not received by Kane as payment upon the contract; and, with the exception of the fact that this note was surrendered, the record discloses no evidence of any agreement that the original obligations of the defendants were to be extinguished by the second note. Defendants call attention to certain testimony by the agent who acted for the parties in the original transaction in 1923. This witness testified that it was then understood that the original note should be received as payment; but the court found to the contrary, and none of the testimony tends to show any such understanding with respect to the note executed in 1925.

[1-3] It is well settled in this state that, in the absence of an express agreement, a new note of either the debtor or a third person does not extinguish the original indebtedness. Griffith v. Grogan, 12 Cal. 317; Welch v. Allington, 23 Cal. 322; Brown v. Olmsted, 50 Cal. 162; Steinhart v. National Bank, etc., 94 Cal. 362, 29 P. 717, 28 Am. St. Rep. 132; Savings & Loan Society v. Burnett, 106 Cal. 514, 39 P. 922; Dellapiazza v. Foley, 112 Cal. 380, 44 P. 727; Jenne v. Burger, 120 Cal. 444, 52 P. 706; Savings Bank of San Diego County v. Central Market Co., 122 Cal. 28, 54 P. 273; Bonestell v. Bowie, 128 Cal. 511, 61 P. 78; Merchant's etc., Bank v. Bentel, 166 Cal. 473, 137 P. 25.

Nor is the fact that the original note was surrendered sufficient alone to establish such an agreement (Welch v. Allington, supra; Steinhart v. National Bank, etc., supra; Bonestell v. Bowie, supra); and, in view of the evidence and the above authorities, this finding is unsupported.

The finding that there was no waiver of presentment or notice of dishonor appears to be sufficiently supported; but, in view of other undisputed facts, it lacks materiality in the present case. Mrs. Eastman was not a payee of the note transferred to plaintiff Kane by her husband. The complaint alleged, however, that both indorsed the same, and the court so found. But, notwithstanding this finding, the parties admit that there was no indorsement of any kind by Mrs. Eastman, and that nothing was indorsed thereon except the following:

"Date 11—19—23.

"For value received $\genfrac{}{}{0pt}{}{\text{We}}{\text{I}}$ hereby transfer, assign and set over unto Charles H. Kane all $\genfrac{}{}{0pt}{}{\text{my}}{\text{our}}$ right, title, interest in and to the within contract.
note.

"George A. Eastman."

[4-6] Nor was this an unqualified indorsement. Section 3119 of the Civil Code provides that a qualified indorsement may be made by adding to the indorser's signature the words "without recourse" or any words of similar import; and while the authorities are conflicting (8 Cor. Jur. Bills and Notes, § 551, p. 371), it has been held in this and other jurisdictions that an assignment of "all the right, title and interest" of the payee indorsed upon the instrument is equivalent to an indorsement without recourse, and constitutes him a mere assignor of title who will not be liable as an indorser upon the maker's default. Hammond Lumber Co. v. Kearsley, 36 Cal. App. 431, 172 P. 404; Spencer v. Halpern, 62 Ark. 595, 37 S.W. 711, 36 L. R. A. 120; Ellsworth v. Varney, 83 Ill. App. 94; Evans v. Freeman, 142 N. C. 61, 54 S. E. 847; Marion Nat. Bank v. Harden, 83 W. Va. 119, 97 S. E. 600, 6 A. L. R. 240; 3 R. C. L. Bills and Notes, § 371, p. 1155. An indorser is discharged from his obligation by failure to present a note or give notice of its dishonor, unless presentment or notice is excused or waived (Civ. Code, § 3170; 3 R. C. L. Bills and Notes, § 396, p. 1178); and it has been held in some jurisdictions that such failure is prima facie a bar to a suit on the indebtedness for which the note was given as collateral security (Anderson v. Timberlake, 114 Ala. 377, 22 So. 431, 62 Am. St. Rep. 105; Coleman v. Lewis, 183 Mass. 485, 67 N. E. 603, 68 L. R. A. 482, 97 Am. St. Rep. 450), and in others that it is an absolute discharge (Jennison v. Parker, 7 Mich. 355; State Bank v. Parkhurst, 155 Ill. App. 101; Rumsey v. Laidley, 34 W. Va. 721, 12 S. E. 866, 26 Am. St. Rep. 935).

[7-9] But an assignor, not being an indorser within the meaning of the above section (Hammond Lumber Co. v. Kearsley, supra), is not entitled to notice of dishonor, and he can only escape liability for the original debt by showing that the failure to present for payment or give notice of nonpayment, or a lack of diligence in collecting the assigned note, has occasioned him damage (8 Cor. Jur. Bills and Notes, § 899, p. 641; Hutz v. Karthause, Fed. Cas. No. 6, 963, 4 Wash. C. C. 1; Hunter v. Moul, 98 Pa. 13, 42 Am. Rep. 610; Brown v. Craig, 2 N. C. 378; First Nat. Bank of Wellsburg v. Kimberlands, 16 W. Va. 555; 5 Cor. Jur. Assignments, § 168, p. 976). Defendants contend, however, that the finding that the note of October 1, 1923, transferred by Eastman to Kane, was not accepted by the latter as payment, is also unsupported, and suggest that a contrary finding should be made by this court pursuant to the provisions of section 956a of the Code of Civil Procedure. But it is well settled that parties who have not appealed cannot attack the findings; the only objections thereto which can be received being those urged by appellant. Klauber v. San Diego Street Car Co., 98 Cal. 105, 32 P. 876; Trevaskis v. Peard, 111 Cal. 599, 44 P. 246; Garibaldi v. Grillo, 17 Cal. App. 540, 120 P. 425.

[10] There being no allegation or proof that the failure to present the second note for payment, or that the lack of notice of nonpayment, caused damage to defendants Eastman or either of them, and the finding that they

were discharged by agreement from liability for the original debt being unsupported, there are no findings which sustain the judgment in their favor, and to this extent the same must be reversed. The appeal, however, was from the whole judgment, but no ground appears for reversal of that portion thereof entered against defendant Goldberg, and this portion must be affirmed.

Accordingly, that portion of the judgment in favor of defendants George A. Eastman and Mildred C. Eastman is reversed, and that portion thereof entered against defendant Gabriel Goldberg is affirmed.

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111 Cal. App. 26

HASS v. ALPERT.

Civ. 7705.

District Court of Appeal, First District, Division 2, California.

Jan. 6, 1931.

1. Sales 🔑**1(4).**

Contract not showing what merchandise buyer agreed to purchase or price thereof was void for uncertainty, though buyer paid part of purchase price.

> Even though buyer advanced part of the purchase price, contract was incomplete and unenforceable until the prices of the goods were agreed upon, and this could not be done until some effort had been made to select them and invoices had been exchanged.

2. Evidence 🔑**355(3).**

In action for breach of contract, invoices prepared after suit was commenced and not exhibited to defendant *held* properly excluded.

3. Appeal and error 🔑**882(12).**

Appellant *held* not prejudiced by any conflict between instructions, which were at his own invitation.

4. Appeal and error 🔑**1068(3).**

Plaintiff suing for breach of contract *held* not prejudiced by instruction respecting recovery on cross-complaint, where court might have instructed recovery on cross-complaint.

> The instruction complained of was incomplete and open to some criticisms, but the cross-complaint was in the ordinary form of the common count for money had and received, and, in support thereof, defendant proved that contract was void, and that its execution had been procured under false representations.

5. Sales 🔑**391(1).**

Where contract to purchase merchandise was void, buyer was entitled to reimbursement of advance payment.

Appeal from Superior Court, Los Angeles County; Walter Guerin, Judge.

Action by Joseph Hass, doing business under the fictitious name of Plumbing Sheet Metal Product Company against Dave Alpert, in which defendant filed a cross-complaint. Judgment for defendant, and plaintiff appeals.

Affirmed.

Burton Briggs Crane, and Howard Prowse, both of Los Angeles, for appellant.

Willebrandt & Horowitz, Fred Horowitz, and Girard F. Baker, all of Los Angeles, for respondent.

NOURSE, P. J.

Plaintiff sued for damages for breach of contract. Defendant answered setting up fraud in the execution of the contract and filed a cross-complaint seeking $2,500 paid to plaintiff upon the execution of the contract. The cause was tried before a jury which returned a verdict against plaintiff on his complaint and awarded defendant $2,500 on his cross-complaint. Plaintiff appeals on a bill of exceptions.

The contract, which was in writing, undertook to appoint the defendant the sole and exclusive distributor in San Francisco of all merchandise manufactured by plaintiff. It called upon the defendant to "purchase from the party of the first part (plaintiff) merchandise in the sum of five thousand ($5,000) dollars to be delivered to party of the second part when ordered by said party of the second part." The contract was executed May 18, 1926, at which time defendant paid plaintiff $2,500, agreeing to pay the balance of the $5,000 on November 1, 1926.

As an inducement to the execution of the contract, plaintiff promised defendant that he would come to San Francisco and help him learn the business and would advise him as to the merchandise he should purchase and keep on hand. He also told defendant that he manufactured all the merchandise handled by him, that he sold to jobbers exclusively, and that defendant could undersell to the trade because all goods would be billed to him at 33⅓ per cent. off the price to jobbers. Numerous other promises and representations were made by the plaintiff both before and after the execution of the contract. Proof of these was made in support of the special defense of fraud and also as an excuse for defendant's refusal to be bound by the contract.

On the issue of fraud it is not necessary to detail the evidence. It is sufficient to say that upon each and every charge of false representation defendant's proof was clear and overwhelming, and that in many instances there was no denial. Upon the undisputed evidence the transactions of the plaintiff were so reprehensible that the jury could not have returned any other verdict.

[1] The contract was void for uncertainty, because it could not have been ascertained therefrom what merchandise the respondent agreed to purchase or what price he undertook to pay. In this respect the case is in line with Jules Levy & Bro. v. A. Mautz & Co., 16 Cal. App. 666, 117 P. 936. The rule applicable to the case at hand is found on page 669 of 16 Cal. App., 117 P. 936, 937: "It is elementary in law that a contract of sale must be certain as to the thing sold, and designate the price to be paid for it (Civ. Code, § 1727); and it is well settled that if an executory contract of sale is uncertain and incapable of being made certain in the essential particular of the price to be paid for the thing sold, neither of the parties can be held to its terms, nor recover damages for its breach."

To escape the rule the appellant argues that the contract was partially executed through respondent's payment of a part of the purchase price, and that, for that reason, the contract became valid and binding. The answer is found in the Levy Case where, in considering a similar contract, the court said (page 670 of 16 Cal. App., 117 P. 936, 937): "Where, however, the price of the commodity called for, but not delivered, is to be subsequently ascertained and fixed by the valuation of others, or by the agreement of the parties, the contract of sale is incomplete and nonenforceable until the price is so fixed or agreed upon"—citing numerous cases. Thus the contract was incomplete and unenforceable until the prices of the goods were agreed upon, and this could not be done until some effort had been made to select them and invoices had been exchanged. This point had never been reached in the relations of the parties, and, though some shipments had been made prior to the time when the appellant claimed a breach by respondent, a large part of those shipments were made after this action was commenced—and in both cases no invoices had been delivered and no agreement as to quantity, quality, or price had been made.

[2] Criticism is made of the ruling of the trial court refusing the admission in evidence of certain invoices. The order was made after it had become evident that the proposed evidence was fraudulent, and that the invoices had been prepared for the purpose of creating evidence favorable to the appellant, but that they had not been delivered to or exhibited to the respondent. The purpose of the offer was to show that the merchandise had been selected and approved by the respondent, and that the contract had thus become partially executed. But, as these invoices had been prepared after the suit was commenced and had not been exhibited to the respondent, there was no error in refusing their admission as evidence.

[3] It is argued that there is a conflict in the instructions in that the trial court advised the jury that the contract sued on was void and unenforceable, and then, upon request of the appellant, gave instructions covering the measure of damages which appellant might recover for its breach. It is evident that the instructions that the contract was void and unenforceable were correct for the reasons heretofore given. The appellant was not entitled to the instructions he requested covering the issue of damages for breach of this contract. Hence, if there was a conflict between these two lines of instructions, it was at appellant's invitation and no possible prejudice resulted to him because of it.

[4, 5] Criticism is made of the instruction relating to respondent's right to recover on his cross-complaint for the money advanced to the appellant under the contract. The point is that this instruction did not include the element that the false promises were the inducements upon which respondent relied in the execution of the agreement. The instruction complained of is incomplete and is open to some of the criticisms directed against it, but we cannot see that appellant has suffered any prejudice because of it. The cross-complaint was in the ordinary form of the common count for money had and received. In support of the cross-complaint respondent sought to prove that the contract was void, and that its execution had been procured under false representations. He successfully proved both, and the trial court might have instructed the jury that, the contract being void, the respondent was entitled to recover what he had paid under it. Whyte v. Rosencrantz, 123 Cal. 634, 641, 56 P. 436, 69 Am. St. Rep. 90; Blank v. Rodgers, 82 Cal. App. 35, 45, 255 P. 235.

The record is clear that the $2,500 was not paid for goods sold or delivered under the contract, but was an advance payment for goods to be sold and selected under the contract. The contract being void and the consideration for the $2,500 having wholly failed, respondent was entitled to reimbursement on his cross-complaint for money had and received. Whyte v. Rosencrantz, 123 Cal. 638, 56 P. 436, 69 Am. St. Rep. 90; Winkler v. Jerrue, 20 Cal. App. 555, 560, 129 P. 804. The issues were squarely before the court and jury. The evidence was clear, and, upon these issues, was not controverted. The only correct verdict which could have been returned upon the issues and the evidence was the verdict which the jury returned. Briefly, the situation is this—the jury rendered a proper and just verdict after instructions which were more favorable to appellant than he was entitled to have; this verdict was in accordance with the law and the evidence, but the trial court failed to instruct the jury as fully upon the law of the case as the respondent was entitled to have had it instructed. It is possible that the jury knew the law and did not need the instructions, but, in any event, we cannot perceive how appellant suffered prejudice, and certainly there was no miscarriage of justice.

Judgment affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

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111 Cal. App. 48

PEOPLE v. VAN BARON.

Cr. 34.

District Court of Appeal, Fourth District, California.

Jan. 7, 1931.

1. Criminal law 🔑1032(1).

Objection to trial court's granting request to amend information could not be raised for first time on appeal (Pen. Code, § 1008).

> Appellant made no objection to trial court's granting under Pen. Code, § 1008, the district attorney's request to amend the information, and made no request for a continuance after the amendment was made, but proceeded with the trial without objection or protest.

2. Forgery 🔑12(½).

Where evidence sustained conclusion that defendant passed forged check with intention of defrauding, that check was not indorsed by payee *held* immaterial.

3. Forgery 🔑34(2).

In prosecution for forgery, variance between allegation that check was dated May 16, 1930, and proof that check bore date of May 17, 1930, *held* immaterial.

Appeal from Superior Court, Orange County; James A. Allen, Judge.

George Van Baron was convicted of forgery, and he appeals.

Affirmed.

Marks & Klenke, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and John L. Flynn, Deputy Atty. Gen., for the People.

MARKS, J.

Appellant was charged by an information filed by the district attorney of Orange county with uttering, publishing, and passing a forged check. He entered pleas of not guilty, and not guilty by reason of insanity. The jury found him sane, and guilty, and he prosecuted this appeal. He raises no question on the correctness of the proceedings on his plea of not guilty by reason of insanity.

The information charged the uttering, publishing, and passing of a forged check in words and figures as follows:

"Santa Ana Iron Works 924 S. First Street "Voucher Check No. 661 Santa Ana, Calif., "May 16th 1930 Pay to the order of Carl Swartz—*$36.00—Thirty-six and 00 cts—Dollars Santa Ana Iron Works L. A. Turner* 90—190 The Commercial National Bank of Santa Ana."

The information as originally filed did not contain the portion which we have italicized. Before the jury was impaneled the court permitted the district attorney to amend it by the interlineation of the italicized words and figures. The check introduced in evidence was dated May 17, 1930, instead of May 16, 1930, as alleged in the information. It did not bear the indorsement of Carl Swartz, the payee. Appellant has a long list of assignments of error, but they are all based on the amendment of the information, the lack of the indorsement of the check, and the variance in dates. For this reason it will not be necessary to consider all of the assignments of error separately.

It appears from the evidence that on May 17, 1930, appellant visited the store of the Stevens-Van Englen Company at Anaheim, Cal. He was waited upon by H. T. Outland, the store manager, and purchased a hat and tie of the value of $2.44, tendering the check in payment. It was accepted and he departed with the merchandise and $33.56 in money which he had received as change. The check did not bear the genuine signature of either L. A. Turner or the Santa Ana Iron Works, both being forged. He was arrested within thirty minutes with a confederate who was also operating in the city of Anaheim. Appellant had passed other similar checks in Orange county. After his arrest he stated to several officers that he purchased the spurious checks in Los Angeles for ten dollars each from a well-dressed stranger whom he met on the street and whom he could not otherwise identify.

Section 1008 of the Penal Code provides, in part, as follows: "An indictment or information may be amended by the district attorney without leave of court, at any time before the defendant pleads. The court may order its amendment for any defect or insufficiency, at any stage of the proceedings; and the trial shall continue as if it had been originally filed as amended, unless the substantial rights of the defendant would be prejudiced thereby, in which event a reasonable continuance, not longer than the ends of justice require, may be granted."

[1] Appellant made no objection to the trial court's granting the district attorney's request to amend the information. He made no request for a continuance after the amendment was made, but proceeded with the trial without objection or protest. He should not be allowed to complain of this procedure for the first time here.

The cases of People v. Clawson, 82 Cal. App. 422, 255 P. 552, 553, and People v. Winthrop, 88 Cal. App. 591, 264 P. 263, effectually dispose of this contention of appellant. In the Clawson Case the court said: "Section 1008 of the Penal Code permits an amendment to be made to an information after the defendant has pleaded 'in the discretion of the court where it can be done without prejudice to the substantial rights of the defendant.' This section is in accord with section 4½ of article 6 of the Constitution and with the rule of the later decisions that mere technical errors in either pleading or procedure, which do not in any way affect the substantial rights of the parties, are not to be employed to defeat justice, and it would seem to be the clear purpose of the section to permit an amendment of this character to conform to the proof, when that can be done without prejudice to the substantial rights of the defendant. Here the appellant has not suggested how, under any possible conception of the record, he was in any way prejudiced by the amendment."

[2] There is no merit in the contention that the forged check did not bear the endorsement of Carl Swartz, the payee. In this connection it should be remembered that appellant was charged with and convicted of the crime of uttering a forged instrument and not of forging it or of an endorsement upon it. There can be no question that the check bore the forged signature of the maker. There is sufficient evidence to sustain the conclusion that appellant knew that the check was forged and passed it with the intention of defrauding the Stevens-Van Englen Company. He actually passed the forged check and received its face value in merchandise and money. The cases of People v. Sanders, 82 Cal. App. 778, 256 P. 251, and People v. Ryan, 74 Cal. App. 125, 239 P. 419, are authority for holding that it was not necessary to either allege or prove the endorsement of the check by the payee named therein.

[3] The last point made by appellant is that there was a fatal variance between the allegations of the information and the proof in that the check was alleged to have been dated May 16, 1930, while the one introduced in evidence bore the date May 17, 1930. The mistake in the information was undoubtedly a clerical error. We think that the variance was immaterial, as but one check was passed upon the Stevens-Van Englen Company and the one introduced in evidence was thoroughly identified as the check passed. In the case of People v. Freeman, 29 Cal. App. 543, 156 P. 994, 995, the information charged the passing of a check dated "3—2—1915." The evidence showed the check dated "3—12—1915." The court held the variance immaterial and said: "As we view the evidence, there could have been no question but that the check offered in evidence was the one by the use of which the crime charged was perpetrated; and we have no doubt at all but that the appellant would not be embarrassed in making proof under a possible subsequent charge made affecting the same check that he had theretofore been convicted of the crime, and hence had been once in jeopardy. It follows, then, that the variance was immaterial."

The evidence clearly establishes the guilt of appellant and there is no error in the record prejudicial to his substantial rights. After the pronouncement of judgment appellant made motions in arrest of judgment and for a new trial, both of which were denied. As the grounds relied upon by him in making these motions were based upon the three questions we have considered, no purpose could be served by further considering them.

The judgment and orders appealed from are affirmed.

I concur: BARNARD, P. J.

111 Cal. App. 13

MALONE et al. v. CLEMOW et al.
HUTCHESON et al. v. SAME.
HERMANCE v. SAME.

Civ. 7496.

District Court of Appeal, First District, Division 2, California.

Jan. 6, 1931.

Rehearing Denied Feb. 5, 1931.

1. Automobiles 🔑181(1).

"Gross negligence" necessary to render owner or operator of automobile liable for injuries to or death of guest is want of slight diligence (St. 1923, p. 517, § 141¾, as added by St. 1929, p. 1580).

St. 1923, p. 517, § 141¾, as added by St. 1929, p. 1580, renders owner or operator of automobile or person responsible for such operation not liable for injuries to or death of guest, unless injury or death proximately results from intoxication, willful misconduct, or gross negligence of owner, driver, or person responsible for operation, and further provides that in such cases the burden should be on plaintiff to establish that such intoxication, willful misconduct, or gross negligence was the proximate cause of death or injury.

[Ed. Note.—For other definitions of "Gross Negligence," see Words and Phrases.]

2. Automobiles 🔑181(1).

"Gross negligence" and "willful misconduct" necessary to render owner or operator of automobile liable for injuries to or death of guest are clearly distinguishable (St. 1923, p. 517, § 141¾, as added by St. 1929, p. 1580).

[Ed. Note.—For other definitions of "Willful Misconduct," see Words and Phrases.]

3. Automobiles 🔑181(1).

Willfulness or wantonness are not necessary elements of "gross negligence" necessary to render owner or operator of automobile liable for injuries to or death of guest (St. 1923, p. 517, § 141¾, as added by St. 1929, p. 1580).

4. Negligence 🔑136(14).

Generally, degree of care required under given circumstances is question of fact and not of law.

5. Negligence 🔑136(8).

Degree of care required under given circumstances is nevertheless question of fact, though evidence is not conflicting if different conclusions can be rationally drawn therefrom.

6. Negligence 🔑136(8).

Question of negligence is one of fact, if conceded facts are such that reasonable minds might differ on question.

7. Automobiles 🔑245(50).

Driver's gross negligence as proximate cause of injuries to guests resulting in death of one when automobile collided with rear of truck *held*, under evidence, for court sitting without jury (St. 1923, p. 517, § 141¾, as added by St. 1929, p. 1580).

8. Automobiles 🔑224(5).

Guest riding in automobile having no right to exercise any control over driver *held* not required to warn driver of presence of parked truck.

9. Automobiles 🔑245(87).

Fact that guests in automobile were asleep at time of collision with truck *held* not to constitute contributory negligence as matter of law.

Guests were under no obligation to supervise operation of automobile or keep lookout for impending danger. Evidence showed that driver was experienced and that guests had no reason to complain of her driving. Though collision occurred late at night, driver testified that at time of accident she was not tired, but was in fact refreshed by cold air.

10. Negligence 🔑108(1), 112.

General allegation of negligence is sufficient in action for personal injuries whether ordinary or gross negligence is relied on.

11. Negligence 🔑108(1).

Negligence may be pleaded in general terms.

12. Negligence 🔑111(1).

Complaint, in action for personal injuries resulting from negligence, is sufficient if alleging specific acts constituting negligence complained of.

13. Automobiles 🔑238(7).

Amended complaints in actions by guests for personal injuries sustained in automobile collision resulting in death of one *held* to sufficiently state cause of action based on gross negligence (St. 1923, p. 517, § 141¾, as added by St. 1929, p. 1580).

Amended complaints specified particular acts of negligence relied on, and charged that such particular acts were done in a "grossly negligent manner."

Appeals from Superior Court, Alameda County; E. C. Robinson, Judge.

Separate actions by Charles Malone and others, by Ruby Hutcheson and another, and by Juanita Hermance against Florence Clemow and husband, consolidated and tried together. From a judgment for plaintiffs in each case, defendants appeal.

Judgments affirmed.

Dunn, White & Aiken and Hamilton Wright, all of Oakland, for appellants.

Kilpatrick & Goodman, of Oakland, for respondents.

PRESTON, Justice pro tem.

The three above-entitled actions were consolidated and tried together before the court sitting without a jury, and judgment was entered in favor of the plaintiffs in each case. The appeal is from these three judgments. All the proceedings are included in one record.

Florence Clemow and Floyd Clemow are husband and wife, and are the defendants in all the cases. The plaintiffs in the first case are the father, and the brothers and sisters, of the defendant Florence Clemow. These plaintiffs (in the first case) sue for damages for the death of Cora Malone, the wife of one of the plaintiffs, and the mother of the other plaintiffs, and also the mother of the defendant Florence Clemow. In the second action, the plaintiff Ruby Hutcheson is a sister of the defendant Florence Clemow, and the other plaintiff, Leo Hutcheson, is the husband of Ruby Hutcheson. In the third and last action, the plaintiff Juanita Hermance is also a sister of the defendant Florence Clemow.

On the morning of August 16, 1929, the defendant Florence Clemow, together with her two sisters, Ruby Hutcheson and Juanita Hermance, and her mother, Cora Malone, and three small children, left the town of Burbank, in Los Angeles county, in an automobile for Berkeley, Cal. The defendant Florence Clemow drove the entire distance, and at about midnight of the same day the accident or collision, out of which these actions grew, occurred on East Fourteenth street, near Jones avenue, in East Oakland, Cal. The car driven by Mrs. Clemow collided with the rear end of a truck, and as a result of this collision Cora Malone received injuries from which she died, and the plaintiffs Ruby Hutcheson and Juanita Hermance were both seriously injured.

It is admitted in the pleadings that Mrs. Malone, Mrs. Hutcheson, and Mrs. Hermance were, at the time of the accident, guests of Mrs. Clemow, the defendant, and riding with her in her automobile.

These actions are therefore based upon section 141¾ of the California Vehicle Act, which became effective two days before the accident in question occurred (Stats. 1929, p. 1580). It reads in part as follows: "Any person who as a guest accepts a ride in any vehicle, moving upon any of the public highways of the State of California, and while so riding as such guest receives or sustains an injury, shall have no right of recovery against the owner or driver or person responsible for the operation of such vehicle. In the event that such person while so riding as such guest is killed, or dies as a result of injury sustained while so riding as such guest, then neither the estate nor the legal representatives or heirs of such guest shall have any right of recovery against the driver or owner of said vehicle by reason of the death of the said guest. * * * Nothing in this section contained shall be construed as relieving the owner or driver or person responsible for the operation of a vehicle from liability for injury to or death of such guest proximately resulting from the intoxication, wilful misconduct, or gross negligence of such owner, driver or person responsible for the operation of such vehicle; provided, that in any action for death or for injury or damage to person or property by or on behalf of a guest or the estate, heirs or legal representatives of such guest, the burden shall be upon plaintiff to establish that such intoxication, wilful misconduct or gross negligence was the proximate cause of such death or injury or damage. For the purpose of this section the term 'guest' is hereby defined as being a person who accepts a ride in any vehicle without giving compensation therefor."

Appellants first contend that "The finding that the defendant Florence Clemow failed to exercise slight or any care in the operation of said automobile at the time of said collision, and that said collision was proximately caused by the gross negligence of the said Florence Clemow, are without any support in the evidence."

[1] Gross negligence has been defined to be "the want of slight diligence." Redington v. Pacific Postal Telegraph Cable Co., 107 Cal. 317, 40 P. 432, 434, 48 Am. St. Rep. 132; Walther v. Southern Pacific Co., 159 Cal. 775, 116 P. 51, 37 L. R. A. (N. S.) 235; Shearman & Redfield on Negligence, § 49; Krause v. Rarity et al. (Cal. Sup.) 293 P. 62, 66; Coit v. Western Union Telegraph Co., 130 Cal. 657, 63 P. 83, 53 L. R. A. 678, 80 Am. St. Rep. 153; Helme v. Great Western Milling Co., 43 Cal. App. 416, 185 P. 510, 512; 19 Cal. Jur. 554.

In the recent case of Krause v. Rarity, supra, the Supreme Court, in considering the meaning of the phrase "gross negligence" as used in section 141¾ of the California Vehicle Act, said: "In many jurisdictions the division of negligence into degrees is not countenanced (20 R. C. L. 21); the concept being that such phrases as 'gross negligence' and 'slight negligence' are misnomers. In this state the degrees of negligence have been frequently recognized. The term 'gross negligence' has been defined as 'the want of slight diligence,' as 'an entire failure to exercise care, or the exercise of so slight a degree of care as to justify the belief that there was an indifference to the things and welfare of others,' and as 'that want of care which would raise a presumption of the conscious indifference to consequences.'"

[2] We should not confuse "gross negligence" with "willful misconduct," because there is a clear distinction between the two terms.

In Helme v. Great Western Milling Co., supra, the court said: "'Willful misconduct' means something different from and more than negligence, however gross. * * * The mere failure to perform a statutory duty is not, alone, willful misconduct. * * * To constitute 'willful misconduct' there must be actual knowledge, or that which in the law is esteemed to be the equivalent of actual knowledge, of the peril to be apprehended from the failure to act, coupled with a conscious failure to act to the end of averting injury." See, also, Tognazzini v. Freeman, 18 Cal. App. 468, 123 P. 540; Eylenfeldt v. United Railroads of San Francisco, 28 Cal. App. 56, 151 P. 293; Figlietti v. Frick, 203 Cal. 246, 263 P. 534.

[3] Appellants argue that some act of willfulness or wantonness must be shown to constitute gross negligence; or, in other words, that either willfulness or wantonness is a necessary element of gross negligence. It is clear from the foregoing authorities that this is not correct, for, whenever the element of knowledge and willfulness enters into the act, it ceases to be negligence, and becomes at least, "willful misconduct," and this is true no matter what degree of negligence is being considered.

Undoubtedly, respondents in these cases made out at least a prima facie case of gross negligence against the appellant Florence Clemow. The evidence shows without conflict that Florence Clemow, the driver, could have seen said tail-light on the truck upon which it was placed at least two hundred feet to the rear thereof; there was no obstruction to prevent her seeing the truck; the night was clear; the street was artificially lighted; the body of the truck was visible to persons driving up the street; the street was straight for some distance to the rear of the truck; her course was not interfered with by any other obstacle or traffic; on the left rear end of the parked truck was a red lighted tail-light, visible for a distance of at least two hundred feet along the course of travel of appellant's automobile, and that the right front fender, or front part of her automobile, struck the left rear corner of said truck. Mrs. Clemow drove the automobile from Burbank, in Southern California, to Oakland, in one day, and was driving along East Fourteenth street in Oakland, and had been traveling for several blocks at a speed of from thirty to thirty-five miles per hour. No explanation was offered why she did not see the parked truck and its tail-light within about twelve feet distance therefrom.

[4-6] Generally speaking, the degree of care required under any given circumstances is a question of fact for the court or jury, and not a question of law. This is true even where there is no conflict in the evidence if different conclusions upon the subject can be rationally drawn therefrom. If the conceded facts are such that reasonable minds might differ upon the question as to whether or not one was negligent, the question is one of fact for the jury, or the court sitting without a jury. These rules are so well established as to render citation of authority unnecessary.

[7] It would appear from the foregoing facts that there was an utter absence of reasonable or slight care on the part of the defendant Florence Clemow; or, in other words, if she had exercised even slight care or diligence, she would have seen said truck and tail-light within time to have prevented the collision. At any rate, it was a question of fact for the court to determine whether such negligence, under all the facts and circumstances, was gross, ordinary, or slight, and also whether or not such negligence was the proximate cause of the collision and the resulting injuries complained of. The trial court having determined it to be gross negligence, and that such negligence was the proximate cause of the collision, we are powerless to interfere with its conclusions.

Quoting further from the case of Krause v. Rarity, supra, the court said: "Where liability attaches only for gross negligence, it is for the jury, under proper instructions by the court, to pass upon the question whether such negligence exists"—citing Merrill v. Pacific Transfer Co., 131 Cal. 582, 63 P. 915; 19 Cal. Jur. 728.

[8] Appellant Florence Clemow also contends that, as a matter of law, her guests were guilty of contributory negligence. This contention is based upon the fact that Mrs. Hutcheson and Mrs. Hermance testified that they were asleep at the time of the collision. We find no merit in this contention. There is no evidence that Mrs. Malone, who was killed, or either of the other injured parties, exercised, or had the right to exercise, any control over the driver, Mrs. Clemow, and they were under no legal obligation to warn the driver of the presence of the parked truck on the side of the street. Krause v. Rarity et al., supra; Marchetti v. S. P. Co., 204 Cal. 679, 269 P. 529; Irwin v. Golden State Auto Tour Corp., 178 Cal. 10, 171 P. 1059; Nichols v. Pacific Electric Ry. Co., 178 Cal. 630, 174 P. 319;

Bryant v. Pacific Electric Ry. Co., 174 Cal. 737, 164 P. 385; Shields v. King, 207 Cal. 275, 277 P. 1043.

[9] The fact that one or more of the guests was asleep at the time of the collision does not constitute negligence as a matter of law, for, as we have already seen, there was no obligation on the part of the guests to exercise an oversight as to the way in which the automobile was to be operated, or keep a lookout for impending danger. Furthermore, the evidence shows that Mrs. Clemow was an experienced driver, and the guests had no reason to complain of her driving. Mrs. Clemow testified herself that at the time of the accident she was not tired, but was in fact refreshed by the cold air of the bay.

In McDermott v. Sibert, 218 Ala. 670, 119 So. 681, the court used the following language which is particularly appropriate in the cases at bar, "When a guest is asleep it is entirely a question for the jury to determine whether or not he could have done anything if awake; or whether it considered him contributorily negligent in the same regard as if he were not asleep."

[10] Appellants further contend that none of the three amended complaints states facts sufficient to constitute a cause of action for gross negligence. This contention is also without merit.

"Degrees of negligence are matters of proof, and not of averment; and a general allegation of negligence, want of care and skill, etc., is sufficient in an action for injuries caused by such negligence, whether the defendant is liable for ordinary or gross negligence." Sutherland's Code Pleading and Practice, § 4166, p. 2486. See, also, 3 Cal. Jur. pp. 835 and 955.

[11, 12] The rule is also well settled that negligence may be pleaded in general terms, and also that a complaint is sufficient if it alleges the specific acts which constitute the negligence complained of. Dewhirst v. Leopold, 194 Cal. 424, 229 P. 30; Mathes v. Aggeler & Musser Seed Co., 179 Cal. 697, 178 P. 713; 19 Cal. Jur. 674.

[13] In the cases at bar, the amended complaints have specified the particular acts of negligence relied upon, and have charged that these particular acts were done in a grossly negligent manner, which is sufficient under the above-stated rules.

We are of the opinion that each of the amended complaints stated a cause of action, and that the demurrers were properly overruled. Furthermore, appellants answered and went to trial upon the issues thus formed, and there is nothing to indicate that they were misled, in any way as to the issues they were to meet, and, in fact, did meet as best they could, and the cases appear to have been fairly tried upon the merits. Bank of Lemoore v. Fulgham, 151 Cal. 234, 90 P. 936; Irrgang v. Ott, 9 Cal. App. 440, 99 P. 528.

The other contentions made by appellants are without merit, and require no special discussion.

We think the judgment in each of the three cases should be affirmed, and it is so ordered.

We concur: NOURSE, P. J; SPENCE, J.

FLEMING et al. v. DOLFIN et al. (two cases).*

Civ. 5329, 5331.

District Court of Appeal, Second District, Division 2, California.

Jan. 8, 1931.

Rehearing Denied Feb. 6, 1931. Hearing Granted by Supreme Court March 6, 1931.

1. Appeal and error 🔑773(2).

Appeal of appellant filing no brief should be dismissed.

2. Brokers 🔑43(2).

Principal and agent 🔑145(2).

Actual owner of property *held* not liable as undisclosed principal for broker's commission and not estopped to claim protection of statute of frauds, where he did not know of agent's contract with broker.

> One holding the record title to the property as agent of the actual owner gave brokers exclusive agency to sell land. A sale was subsequently made by an agent employed for that purpose by the actual owner. The brokers employed by the agent did not know of the interest of the actual owner, and the actual owner did not know of the contract with the brokers, nor was there any testimony that agent employing brokers was in any way authorized to contract for sale of property.

Appeals from Superior Court, Los Angeles County; Hartley Shaw, Judge.

Actions by R. C. Fleming and another, doing business as Fleming & Davidson, against Jessie Dolfin and others. From a judgment of the Superior Court reversing a judgment of the municipal court, plaintiffs and named defendant appeals.

Defendant's appeal dismissed. Judgment affirmed on plaintiff's appeal.

Superseding opinion 293 P. 874.

See, also, 292 P. 498, 499.

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*Hearing granted 4 P.2d 776.

D. A. Knapp, of Los Angeles, for appellants Fleming and Davidson.

G. C. De Garmo and H. B. Cornell, both of Los Angeles, for appellant Dolfin.

H. B. Cornell, of Los Angeles, for respondent De Garmo.

IRA F. THOMPSON, J.

[1] An action was commenced in the municipal court by the plaintiffs to recover from the defendants a real estate commission. Judgment went for the defendants, whereupon the plaintiffs appealed to the Superior Court. There the judgment was reversed as to the defendant Dolfin, and she has appealed to this court from that part of the judgment, and has also appealed from an order of the Superior Court denying a motion to dismiss the appeal to that court from the municipal court. No brief has been filed on behalf of this appellant, and, of course, the appeal should be dismissed. However, the Superior Court affirmed the judgment as to the defendant De Garmo, and the plaintiffs have appealed from that part of the judgment.

[2] The facts pertinent to the present inquiry are as follows: On December 2, 1925, the defendant Jessie Dolfin gave to the appellants an exclusive agency to sell a parcel of real estate; the agreement containing a provision that it should continue until canceled by a written notice of twenty days. On March 1, 1926, she notified appellants in writing that the agency would terminate on March 21. On March 18, 1926, she entered into an escrow through which a deal was consummated by which the property was sold to Frank H. Cole. The sale was made by an agent named Pair, who had been employed for that purpose by De Garmo, the latter of whom was the actual owner of the property; Dolfin holding the record title thereto as his agent. Plaintiffs did not know of De Garmo's interest in the property, and De Garmo did not know of the contract between the plaintiffs and Dolfin, nor was there any testimony that Dolfin was in any way authorized to contract for its sale or to sell the property. Perhaps it is necessary to add that the deed to Pair was executed by the defendant Jessie Dolfin.

It is the contention of the plaintiffs-appellants that the respondent De Garmo is liable as the undisclosed principal; and that he is estopped to claim the protection of the statute of frauds. They rely, in particular, upon the case of Seymour v. Oelrichs, 156 Cal. 783, 106 P. 88, 92, 134 Am. St. Rep. 154, and assert that it establishes a principle applicable to their situation. We cannot agree, however, that it is helpful to them. In that case the plaintiff relied upon the doctrine of estoppel for the purpose of avoiding the necessity of establishing the agent's authority. The court said: "If Oelrichs had no authority to bind his wife and her sister by a 10-year contract, they could not be estopped by his declaration that they would give Seymour such contract, unless they took some action with notice of the fact that this declaration had been made. Lambert v. Gerner, 142 Cal. 399, 76 P. 53. Without going into a recital of the evidence offered for the purpose of connecting these appellants with the transaction, we may say that there is nothing to show that either of them had knowledge, when Seymour commenced his service, that his employment was other than from month to month. Each of them, when informed of his claim that he had been employed under a contract for 10 years, promptly repudiated the alleged contract. If it could be said that the evidence justifies an inference that Oelrichs had authority to bind one or both of the appellants by some sort of contract, it does not, in the absence of proof of written authority (Civ. Code, § 2309), justify the inference that he had authority to bind them by a contract required to be in writing. Even though they had knowledge that he had made a contract of employment with Seymour on their behalf, their duty to inquire into the terms of such contract did not impute to them notice that he had exceeded his authority and undertaken to bind them by an agreement required to be in writing." Observing that in the instant case there was no testimony that Dolfin was authorized to enter into a contract of agency, and that the proof establishes that the respondent De Garmo had no knowledge of the contract sued upon, it immediately becomes apparent that the claim of estoppel lacks its essential foundation.

Appeal of Dolfin from judgment of reversal dismissed; judgment of affirmance in favor of De Garmo affirmed.

We concur: WORKS P. J.; CRAIG, J.

In re SMITH'S ESTATE.*

McKENNA v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.

Civ. 7515.

District Court of Appeal, Second District, Division 2, California.

Dec. 29, 1930.

Rehearing Denied Jan. 27, 1931. Hearing Granted by Supreme Court Feb. 19, 1931.

1. Appeal and error 🔑77(2).

Order striking will contest without specifying grounds therefor would not constitute final adjudication, where demurrer and motion to strike was based on merits and form of petition.

> Demurrer to and motion to strike amended contest or petition was based on grounds that went to merits as well as to form of petition. Record containing order striking will contest was silent as to grounds on which action was taken.

2. Wills 🔑277.

If will contest was stricken on demurrer because of defect in form of petition, reasonable time to amend not exceeding ten days should have been given (Code Civ. Proc. § 1312).

3. Wills 🔑277.

Notice of hearing on demurrer to amended will contest and motion to strike out petition, though not given by clerk of Superior Court, *held* sufficient (Superior Court Rules 10, 19, 20, 27).

> Copy of motion to strike will contest was served on contestant's attorney and notice given reciting that motion to strike and demurrer to amended contest served therewith would be brought on for hearing in Superior Court on designated date. Copy of such notice was served on attorney for contestant.

4. Wills 🔑384.

Error, if any, in sustaining demurrer to will contest or striking out petition, can only be reached by appeal from order probating will (Code Civ. Proc. § 963(3).

5. Wills 🔑277.

Notice of motion to vacate order sustaining demurrer to petition in will contest and striking out same should specify grounds and papers supporting motion (Code Civ. Proc. § 1010).

6. Wills 🔑277.

Order vacating order sustaining demurrer and striking out petition in will contest, based on defective motion, would be ineffective (Code Civ. Proc. § 1010).

7. Wills 🔑370.

Recitals in order striking out petition in will contest are conclusive on appellate court, where record is incomplete.

8. Wills 🔑260.

Petition to revoke probate of olographic will more than year after admission to probate *held* barred (Code Civ. Proc. § 1333).

9. Wills 🔑225.

Parties who filed contest before probate and were unsuccessful cannot subsequent to probate again file contest (Code Civ. Proc. § 1312, as amended by St. 1929, p. 859, § 1).

In the matter of the estate of J. H. Smith, deceased. Application by Catherine A. McKenna for a writ of prohibition to restrain the Superior Court of Los Angeles County and Hon. Charles S. Crail, a Judge thereof, from proceeding with the contest of a will after probate, instituted by J. Truitt Bustamente and another.

Peremptory writ issued.

Catherine A. McKenna and J. Everett Brown, both of Los Angeles, for petitioner.

H. L. Pratt, of Los Angeles (Woodruff, Musick & Hartke, of Los Angeles, of counsel), for respondents.

ARCHIBALD, Justice pro tem.

Petitioner is applying for a writ of prohibition to restrain the superior court of Los Angeles county and the honorable Charles S. Crail, a judge thereof, from proceeding with the contest of a will after probate.

The testator died in Los Angeles county August 9, 1924, leaving real and personal property therein and also a will dated July 26, 1924, in which J. Truitt (now J. Truitt Bustamente) and Annie Dupea were named as legatees, which will was admitted to probate November 30, 1925. This will was unsuccessfully contested by the four adult children of decedent, who appealed from the order admitting the document to probate; the appeal being dismissed January 7, 1929. October 26, 1928, petitioner here, Catherine McKenna, filed a petition in said estate for the probate of an olographic will dated September 22, 1924, and claimed to have been executed by decedent, in which the four children of decedent were named as legatees to the extent of $500 each and petitioner was given the residue of the estate. Thereafter, and on November 20, 1928, said Bustamente and Dupea filed a contest and objections to the probate of such olographic will through their attorneys, Randall J. Hood and W. J. Clark, and for grounds of contest alleged that the latter will was not the will of decedent, that it was executed by reason of the undue influence of said petitioner, and that decedent was of unsound mind at the time of its execution. Petitioner demurred to the contest and objections so filed, and also moved to strike and dismiss the same, generally on the ground of lack of interest in contestants by reason of the alleged invalidity of the bequests to them in the will under which they were claiming, due to uncertainty and lack of complete description of the property mentioned. The matter was continued from time to time until January 18, 1929, contestants not appearing at any time, and petitioner being present at all times, and the demurrer was sustained, fifteen days to amend being given, and the petition for revocation of the first will and for probate of the olographic will was continued to February 8, 1929. On the same day, January 18, Bustamente and Dupea filed an amended contest setting up the same grounds as the first contest, and also that the olographic will was not in the handwriting of the deceased and that it was a false, fraudulent, and forged instrument. To said amended contest petitioner filed a general and special demurrer to each ground of contest and also a motion to strike and dismiss the same on the grounds of lack of interest, that the allegations of the first and second grounds of contest were conclusions of law, and that one ground of contest contradicted the other. The motion to strike bears the following indorsement: "Received copy of the within motion this 28th day of January, 1929. Randall J. Hood by Secy." (Exhibit A.) Exhibit B, a copy of the demurrer, does not bear any indorsement of service accepted, but exhibit C addressed to contestants "and their attorneys," recites that the motion to strike and demurrer to the amended contest "herewith served on you" will be brought on for hearing in said Superior Court on February 8, 1929, at 10 a. m. The proof of service attached to said notice recites that a true copy of the same was served on the attorneys for contestants January 29, 1929, by leaving a copy thereof with Randall J. Hood at his office, "and that said notice was handed by Randall J. Hood back to the affiant, with request that said affiant take same to the office of Wm. J. Clark," and that affiant did so immediately, and left same "at the office of the said Clark, with the person then in charge of said office." Contestants do not deny that the hearing of the motion was noticed for February 8, 1929, at 10 a. m., in said court, but they allege that the "clerk of said superior court did not fix the 8th day of February, 1929, or any other day" for the hearing of said demurrer and motion, and that neither contestants nor their attorneys "ever received any notice from the clerk of said court" fixing said date or any other date for said hearing; and they also allege in their answer that there was a rule of the Superior Court in force and effect at the time requiring the notice to be so fixed and given. On February 8th petitioner appeared at the time and place fixed in said notice, but no one appeared for contestants. The court called and disposed of all other matters on the calendar, and, the contestants not then appearing, proceeded to hear the demurrer and motion to strike. It is admitted that the court had the first will before it at the time of said hearing, and that it granted the motion to strike, sustained the demurrer, and proceeded to hear proofs on the petition to revoke the first will and admit the olographic instrument to probate; also that the court made its order revoking the first will and admitting the latter will to probate, as well as ordering that letters testamentary issue to petitioner. Such letters were issued to her February 9, 1929.

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*Hearing granted 3 P.2d 921.

On April 2, 1929, attorneys for contestants served on petitioner and filed a notice that on April 5 counsel would "move to vacate and set aside each of the following proceedings: Contest and opposition to probate of will dated September 22, 1924, denied. Amended contest to probate of will, denied. Motion to strike contest of will dated September 22, 1924, granted. Demurrer to amended contest of will sustained. Will admitted to probate. Certificate of proof of will filed." The record before us does not show that any grounds were stated in the motion or that it referred to anything upon which it would be based, and the language above used is practically a copy of the clerk's minutes of February 8 relative to the action of the court on the various matters before it that day in said estate of J. H. Smith, deceased. On April 9 the motion was heard, over petitioner's objection thereto, all parties being present, and was granted "as prayed for in said motion." There were two written orders made, based on the motion, one on April 24th, in practically the language of the motion in its reference to what was vacated, and a nunc pro tunc order dated June 6th, which recites that it is made "so that the records may show the true decision made by the court" and describes the orders sought to be vacated. Petitioner moved to strike the order of April 24th, and it was stipulated by counsel that such order might be stricken. Thereafter the nunc pro tunc order of June 6 was made by the court, which petitioner moved to strike as soon as she learned thereof, as well as all other orders made by the court based on said motion heard April 9, 1929, on the ground, among others, that the court was without jurisdiction to make any order except to "dismiss said motion of April 2nd." Such motion came on for hearing on

November 15, 1929, both sides being represented by counsel, and was granted, and a written order was made on November 19th vacating all orders made on said motion of April 9th and also providing "that all of the orders made herein on the 8th day of February, 1929, shall be in force and remain as made of that date."

Thereafter, and on February 7, 1930, the contestant J. Truitt Bustamente, appearing for herself, filed another contest to or petition to revoke the will of September 22, 1924, on the same grounds mentioned in the first contest filed, which contest was stricken on motion of petitioner on March 3, 1930, the order reciting that notice of the hearing "was regularly given to the said Mrs. J. Bustamente, in the manner provided by law."

On May 14, 1930, said J. Truitt Bustamente and Annie Dupea filed another contest to or petition to revoke the will of September 22, 1924, on the same grounds as the amended contest filed by them on January 18, 1929, and stricken by the order of February 8th. The hearing on such contest was noticed for June 20, 1930. On May 24th petitioner McKenna moved to dismiss and strike such contest or petition on the ground that the matters of contest alleged had been adjudicated adversely to the claims of contestants on the several prior contests filed, and on the further grounds that it was filed too late, and that, under section 1327 of the Code of Civil Procedure, having filed a contest before probate, they were not entitled to file a contest thereafter.

The above proceedings were had before various judges of the Superior Court. The motion last referred to was the first proceeding in said matter to come on for hearing before the honorable Charles S. Crail, judge of said court, and on July 1, 1930, he denied said motion and fixed the 22d day of September, 1930, for the hearing of said contest, whereupon petitioner instituted the proceedings now before us.

It is contended by petitioner that the order of February 8th striking the contest then pending was a final adjudication of all matters alleged therein by contestants, that, having contested the will prior to probate, the latter cannot contest it on the same grounds after probate, and that the contest of May 14, 1930, is barred by the terms of section 1333 of the Code of Civil Procedure. Respondents on the other hand urge that the contest prior to probate was not determined on the merits, and was therefore no bar to a contest after probate on the same grounds, and that, the order of November 19, 1929, being a nunc pro tunc order finally admitting the olographic will to probate, contestants could at any time within six months from that date file a new contest.

[1, 2] From the record before us it would seem that the amended contest filed January 18, 1929, alleged the same grounds as the contest or petition for revocation filed May 14, 1930. The demurrer to and motion to strike the amended contest, or petition, filed January 18, 1929, was based on grounds that went to the merits as well as to the form of the petition. The record is silent as to the grounds upon which action was taken by the court, and ordinarily in such a case no bar could arise. Kirsch v. Kirsch, 113 Cal. 56, 61, 45 P. 164. In the present case, however, the court proceeded, after sustaining the demurrer and granting the motion, to take proof on the petition to revoke the first will and to probate the olographic will, and made its order revoking the former and admitting the latter to probate. In the face of that action, we must presume that the court sustained the demurrer and granted the motion to strike on the jurisdictional grounds urged, or else presume that it erred in proceeding as it did instead of granting a reasonable time, not exceeding ten days, to amend, as it should have done under section 1312, Code of Civil Procedure, as it existed at that time, if the orders made were based on the grounds going to matters of form only.

[3] Respondents admit that notice of hearing of the motion to strike and demurrer to the amended contest was given, but claim that under section XX of the rules adopted by the judicial council regulating the business of the superior court the time of hearing both demurrer and motion could only be fixed by the clerk of the court, upon whom the duty also devolved of mailing a notice of the date so fixed to counsel; and, that not having been done, the court had no jurisdiction to act on either the demurrer or motion on February 8th. Rule XX so referred to appears in the rules adopted by the judicial council on May 5, 1928, effective August 1, 1928. On December 19, 1928, the judicial council adopted a new set of rules, effective January 1, 1929, providing a different method. Rule XIX thereof provides for the filing of a memorandum of points and authorities relied on with each demurrer and motion, and, if a demurrer is filed without such memorandum, the clerk is required to place it for hearing on the next succeeding law and motion calendar; and in counties having nine or more judges, where the memorandum accompanies the demurrer, the hearing is automatically had on the law and motion calendar the fourth day thereafter. The scheme adopted is so in conflict with the former rules that there would seem to be no question but that they supersede the rules of May 5, 1928, and rule XXVII so provides. Rule X of the rules adopted by the Superior Court provides: "1. All demurrers and motions made on notice

shall, except as herein otherwise provided, be heard and determined in one department to be designated, from time to time, by the court. When so designated such department shall be known as the Law and Motion Department. * * * The provisions of this rule shall not apply to the following proceedings, which shall be had in the several departments to which the cases shall have been assigned as provided elsewhere in these rules, to-wit: * * * (4) demurrers, orders to show cause, motions and other matters in probate * * * proceedings." This rule would not seem to be in conflict with rule XIX of the judicial council, at least so far as the noticing of motions is concerned, and the notice given of the hearing of the motion on February 8, 1929, appears to comply with it. Under the record before us the notice would seem to have been properly made.

[4] No appeal was taken from the order revoking the first will and admitting the later will to probate, and there would seem to be no way to determine in this proceeding whether or not the court erred in ruling as it did on the motion to strike. Mooney v. Superior Court, 183 Cal. 705, 192 P. 542. It would seem that error in judgment in sustaining a demurrer to a will contest or in granting a motion to strike can only be reached by an appeal from the order admitting the will to probate, made after such rulings. Section 963(3), Code Civ. Proc.; Estate of Stierlen, 199 Cal. 140, 142, 248 P. 509.

[5, 6] The notice of motion by contestants Bustamente and Dupea to vacate and set aside all orders made on February 8, 1929, appears not to have specified any grounds upon which it would be made or papers on which it would be based, and that would seem to be a necessary requisite to the hearing of such a motion. Section 1010, Code Civ. Proc.; Ross v. San Diego Glazed C. P. Co., 50 Cal. App. 170, 194 P. 1059; Mojave, etc., R. Co. v. Cuddeback, 28 Cal. App. 439, 442, 152 P. 943. The court therefore did the only possible thing when it vacated all orders based on such motion. The validity of the orders of February 8, 1929, did not depend upon the nunc pro tunc order of November 19, 1929. On principle, it would seem that the orders based on the defective motion to vacate had no effect at all, but, assuming they did, their vacation would simply leave the proceedings where they were before such orders were made, and the date of the probate of the olographic will would not be changed. Estate of Mitchell, 126 Cal. 248, 58 P. 549.

[7] The grounds of petitioner's motion to strike the contest or petition to revoke filed February 7, 1930, by J. Truitt Bustamente appear from the record to have been all directed to the merits. Respondents claim that no notice of the hearing of this motion was given, but the record does not show what was done and the recital in the order is conclusive on us. Estate of Parsons, 159 Cal. 425, 114 P. 570.

[8] The next petition to revoke was filed by both Bustamente and Dupea on May 14, 1930, more than a year after the admission of the olographic will to probate; and, even if new grounds of contest had been alleged, section 1333 of the Code of Civil Procedure would seem to be a bar to proceeding with a hearing thereon in the face of a motion to strike based on that ground.

[9] Another ground mentioned in the motion to strike said petition was that contestants, having filed a contest before probate. were not entitled to contest the will after probate. Section 1327, Code of Civil Procedure, as amended May 25, 1929 (St. 1929, p. 860, § 2), provides: "When a will has been admitted to probate, any interested person, *other than a party to a contest filed before probate* pursuant to section 1312 of this code * * * may, at any time within six months * * * contest the same or the validity of the will." (Italics ours.) The contestants above mentioned would seem to be expressly excepted by such section from the right to contest after probate, particularly in view of the fact that their contest before probate of the same will on the same grounds was determined adversely to them.

We are heartily in accord with the very just rule of having all cases decided on the merits after a full hearing of the evidence, but in the face of the record before us we see no way that the same can be done in this case. The court below should have granted the motion to strike filed by petitioner to the above-named contestants' contest or petition to revoke on May 14, 1930.

Let a peremptory writ of prohibition issue as prayed.

We concur: WORKS, P. J.; IRA F. THOMPSON, J.

110 Cal. App. 750

SHIBLEY v. HART.

Civ. 7348.

District Court of Appeal, First District,
Division 2, California.

Jan. 5, 1931.

Rehearing Denied Feb. 4, 1931.

Mandamus 🔑169.

Where alternative writ in mandamus proceeding was granted, but petitioner, notwithstanding several continuances, failed to appear, proceeding was dismissed for lack of prosecution.

Original application by Kenneth Shibley for a writ of mandamus prayed to be directed to Harold H. Hart, as phonographic reporter of the Superior Court for the City and County of San Francisco, requiring him to prepare and certify a transcript.

Proceedings dismissed, and the alternative writ discharged.

Milton T. U'Ren, of San Francisco, for petitioner.

Livingston & Livingston, of San Francisco, for respondent.

PER CURIAM.

An application for a writ of mandamus in the above-entitled matter was filed February 6, 1930, and an alternative writ of mandate was granted and made returnable for March 10, 1930. No showing was made on that day, and since that date numerous continuances have been granted upon the request of the petitioner, but to this date the petitioner has failed to appear and has failed to make any showing why a peremptory writ should issue.

It is therefore ordered that for lack of prosecution the proceedings are dismissed, and the alternative writ is discharged.

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111 Cal. App. 64

CONSOLIDATED NAT. BANK OF TUCSON, ARIZ., v. REINIGER MINING & SMELTING CO. et al.

Civ. 5960.

District Court of Appeal, Second District,
Division 2, California.

Jan. 9, 1931.

Rehearing Denied Feb. 7, 1931. Hearing Denied by Supreme Court March 9, 1931.

1. Garnishment 🔑230.

If garnishee satisfied primary judgment against defendants, it would be voluntary payment, and garnishee could not compel contribution by defendants.

2. Garnishment 🔑235(1).

Judgment against garnishee, though estopping garnishee from denying as against creditor that it had no funds of debtor, did not make garnishee jointly or severally liable to creditor on same obligation with debtor.

3. Garnishment 🔑235(2).

Garnishee, though not entitled to pay primary judgment against debtor and compel contribution, could pay judgment inadvertently rendered against it and take assignment of judgment against debtor.

4. Garnishment 🔑1.

"Garnishment" is in effect suit against debtor whereby plaintiff is subrogated to rights of original creditor.

[Ed. Note.—For other definitions of "Garnishment," see Words and Phrases.]

5. Garnishment 🔑235(2).

Where garnishee paid judgment against it, debtor not paying primary judgment against it could not object to assignment thereof to garnishee.

6. Judgment 🔑956(2).

In action on foreign judgment assigned to garnishee, satisfying garnishment, evidence of records in foreign actions not showing garnishee's indebtedness to judgment debtor offered on plea of res judicata was properly excluded as not supporting plea.

7. Appeal and error 🔑1040(6).

Defendants not offering evidence on valid defense in answer *held* not prejudiced by ruling that answer did not state defense (Code Civ. Proc. § 475).

8. Appeal and error 🔑110.

Order denying new trial is not appealable (Code Civ. Proc. § 963).

Appeal from Superior Court, Los Angeles County; Frank H. Dunne, Judge.

Action by the Consolidated National Bank of Tucson, Ariz., against the Reiniger Mining & Smelting Company and another. Judgment for plaintiff, and defendants appeal.

Affirmed, and appeal from order denying new trial dismissed.

Clyde C. Shoemaker, of Los Angeles, for appellants.

W. I. Gilbert, of Los Angeles, for respondent.

ARCHIBALD, Justice pro tem.

This is an appeal by defendants from a judgment entered by the trial court against them in favor of the plaintiff in the sum of $1,464.45.

Plaintiff brought its action in the court below to recover upon a judgment rendered the 29th day of March, 1920, in the superior court of the county of Maricopa, state of Arizona, in an action entitled George A. Kennedy, plaintiff, v. The Reiniger Mining & Smelting Company, a corporation, and Charles P. Reiniger, defendants. In said action the plaintiff caused a writ of garnishment to be issued and served on the Consolidated National Bank of Tucson, Ariz., the plaintiff in the present case. The bank failed to answer said writ, and, after judgment was rendered against the defendants in said action and on the same day, the plaintiff entered a judgment by default against said garnishee for the same amount as the primary judgment. The defendants in their answer to plaintiff's complaint admit that, at the time said writ of garnishment was served on said Consolidated National Bank, it was not indebted to defendants or either of them, and that it had no money or other property of either of the defendants. Both judgments were rendered March 29, 1920, and were final judgments on May 16, 1921, when said Kennedy assigned said primary judgment to said bank, and satisfied the judgment against the bank upon receipt from said bank of the amount of the judgment so taken against it by default. The facts above stated clearly appear from the evidence introduced, even without the documentary evidence, objection to the introduction of which was sustained by the trial court.

Appellant contends that the payment to Kennedy by the bank of the judgment against it was a satisfaction of the primary judgment as well as the one against the garnishee, and that the assignment of such primary judgment was wholly ineffective to prevent such satisfaction.

[1-3] There is no question but that, if the bank had satisfied the judgment against the defendants, it would have been a voluntary payment and the bank could not have compelled contribution. Segog v. Engle, 43 Minn. 191, 45 N. W. 427. The record is clear, however, that such was not attempted to be done by either party to the transaction. The witness Steinfield, who was the president of the bank at the time of the transaction with Kennedy, was asked regarding the payment made to Kennedy: "It was in full settlement of both transactions?" To which he answered: "No, it was settlement of the garnishment against the bank and an assignment of the claim upon which this was based." On direct examination said witness testified relative to the settlement as follows: "Q. What did the bank pay that $1,566.93 to Kennedy for? A. It paid it for the judgment that Kennedy obtained against Reiniger in an action which he brought against Reiniger and the garnishee judgment that the bank had entered against it because it inadvertently had forgotten to file an answer." There is nothing in the record to contradict such testimony. While it is true that the judgment against the bank effectually estopped it from denying as against the plaintiff, Kennedy, that it had no funds or property of the defendants in the action, and was not indebted to them, it did not make the bank jointly or severally liable to Kennedy on the same obligation with the defendants, nor did it create any relation at all with the defendants. As to them the bank remained as it was before, a stranger, and as such stranger, while it did not have the right, by paying the primary judgment and satisfying it, to compel contribution, as we have said, it certainly had the right to protect itself by paying the judgment so inadvertently rendered against it, and taking an assignment of the judgment against the defendants.

[4, 5] A garnishment proceeding is in effect a suit by the defendant against the debtor, by which plaintiff is subrogated to the rights of the original creditor. Huntington v. Risdon, 43 Iowa, 517. Here the defendants had no rights to which Kennedy could become subrogated, and, defendants not having been prejudiced by the assignment which Kennedy had the right to make and the bank to take, and not having paid the judgment against them, we do not see where they have any reason to complain.

[6] Defendants offered in evidence the complaint, answer, and transcript of minute orders of November 18, 1922, and December 30, 1922, in the case of Kennedy v. Charles P. Reiniger and Frank W. Leslie, in the superior court of the state of Arizona in and for Pima county, and also exemplified copies of the complaint, answer, first amended answer on motion to bring in additional parties defendant of the Consolidated National Bank of Tucson, supplemental answer of the same defendant, second supplemental amended answer of said bank, verdict of the jury, and transcript of minutes entered, particularly of October 11, 1921, and October 13, 1922, and to and including the minute entry of Friday, November 18, 1921, all in that certain action in the superior court of the state of Arizona in and for the county of Pima, entitled Selim M. Franklin v. Consolidated National Bank of Tucson, Ariz., to all of which plaintiff's objections to such introduction were sustained by the court. It is appellant's contention that the documents so offered show that the action of the Arizona court, in each case, bars plaintiff's action in the present case, and that the court committed prejudicial error in sustaining such objections.

The complaint in the first case, i. e., that of Kennedy v. Reiniger and Leslie, alleges the making and docketing of the judgment sued on here, the issuance of a writ of execution directed to the plaintiff in Pima county, Ariz. and its return unsatisfied. That the defendant Reiniger in 1919 purchased from certain parties an undivided one-half interest in and to certain mining claims, the deed for which he caused to be made to the defendant Leslie; that the purchase price was paid by Reiniger and title taken by said Leslie for his benefit, and for the purpose of hindering, delaying, and defrauding the creditors of said Reiniger, and that Leslie had notice of such intent, and the complaint prayed that it be decreed that Reiniger was the real owner of said interest, and that the same be sold to pay plaintiff's judgment. The complaint was filed December 5, 1921, and after the assignment to the bank by Kennedy of the judgment sued on. The defendants in their answer set up a plea in bar, alleging substantially that the plaintiff had no real interest in the judgment set out in the complaint, for the reason that the same had been satisfied and discharged by the plaintiff in this action, and that said bank was the real party plaintiff, "wherefore, defendants plead in bar to this action that the plaintiff is not the real party in interest and that the same should be dismissed."

There seems to be but the one plea in bar in the answer in said case, as distinguished from the usual denials and allegations making up the answer, and which set up the defense of payment by reason of the payment and satisfaction of the judgment against the garnishee bank, and also that the claim of the bank under the assignment of the primary judgment to it by the plaintiff, Kennedy, had been adjudicated adversely in the said case of Franklin v. Consolidated National Bank, and, the bank being the real party in interest in said case of Kennedy v. Reiniger and Leslie, such adjudication was res adjudicata in the latter case. The defendants in such case offered in evidence in support of such plea in bar the judgment, assignment to the bank, and release of the garnishee judgment in the case of Kennedy v. Reiniger Mining and Smelting Co. et al., and on December 30, 1922, the court made an order sustaining said plea in bar. Counsel for defendants urges that, inasmuch as the assignment to the bank authorized it to take in the name of Kennedy "all lawful ways and means for the recovery of the money due or to become due on the judgment," and also gave the bank the power to take in Kennedy's name or otherwise "all lawful ways and means for the recovery of the money due or to become due on said judgment," and as there was no doubt but what the suit was being prosecuted in Kennedy's name for the benefit of the bank, the facts pleaded in bar were not that Kennedy had assigned the judgment to the bank, but that the judgment "had been paid in full, satisfied and discharged by the Consolidated National Bank of Arizona," and, the court having so decided, the judgment in that case is a bar to the action here. Unfortunately, the defendants in such case did not so frame their plea in bar, but based it on the clause that "the plaintiff is not the real party in interest and that the same should be dismissed." That would seem to be the only question raised by the so-called plea in bar, and would seem to be the only question the court had power to decide in disposing of the plea. The defense of payment is fully set up in the answer apart from the plea.

The documents in the case of Franklin v. Consolidated National Bank so offered in evidence show that the plaintiff in that case sued the bank for the sum of $1,806.03 which the complaint alleged the bank had agreed to pay to one L. E. Jettinghoff, and which claim was assigned by Jettinghoff to plaintiff. The answer of the bank sets out that one Laughlin purchased from one Anderson and said Reiniger a certain truck, for which he gave them two promissory notes in the sum of $1,750, and that thereafter Reiniger became the owner and holder of the notes; that thereafter, and on or about July 3, 1919, Laughlin placed in escrow the sum of $1,806.03, with instructions to pay the same to Reiniger for account of said Laughlin upon receipt of said promissory notes and bill of sale for said truck. On February 3, 1921, the bank, by one D. Bush, wrote a letter to said Reiniger, acknowledging receipt of the bill of sale and promissory note, which also provided: "I agree not to deliver above bill of sale and above notes to W. C. Laughlin until I have paid said L. E. Jettinghoff lawful money of the United States in full for the J. E. Anderson note for $1,750.00 and interest and protest charges." The answer then sets up the proceedings in the case of Kennedy v. Reiniger Smelting Co. et al., resulting in the assignment of the judgment in that case to the bank, including the service of the writ of garnishment on the bank, December 15, 1919. The answer then alleges that, at the time of the service of the writ on it, said sum of $1,806.03 was in the possession of the bank, "and that on or about March 19, 1921, one H. V. Anaya as assignee of said Anderson instituted a suit in said Arizona court to recover a sum of money alleged to be due, and caused a writ of garnishment to issue out of said court in said action and to be served on the bank."

The answer also alleges that said Jettinghoff was an employee of said Reiniger during all of the times mentioned, and that said Franklin was his attorney, that the receipt for the bill of sale was wrongfully and fraudulently obtained by said Jettinghoff from the defendants' clerk, D. Bush, who had no authority to issue the same, all of which was known to said Franklin, and that said Reiniger prepared said instrument. The answer then prays that Reiniger, Jettinghoff, Anaya, Laughlin, and Anderson be made parties to said action, and that plaintiff take nothing by his action, and that the $1,806.03 be adjudged to have been the property of said Reiniger and subject to the Kennedy garnishment, and that it be decreed that the bank be entitled to reimburse itself therefrom, and that it be adjudged that said Franklin and the other parties named have no right whatever to said $1,806.03. The judgment in said action recites that a jury was empanelled and sworn and that plaintiff and defendant each offered certain oral and documentary evidence and rested, after which the both parties made a motion for an instructed verdict, and that the court instructed the jury to return a verdict for the plaintiff, on which verdict judgment was rendered for the plaintiff and against the defendant in said sum of $1,806.03. The bank's motion to bring in the additional parties was denied except as to said Anaya. The minute orders offered show that the plaintiff offered in evidence the letter referred to executed by "D. Bush" for the bank; that the defendant offered in evidence the original writ of garnishment in the case of Kennedy v. Reiniger Smelting Co. et al., plaintiff objecting thereto, and which objection was sustained. The offer of the assignment (evidently assignment of judgment to the bank) was also objected to by plaintiff, and the objection was sustained. The answer of the bank does not deny that Jettinghoff assigned his interest in said sum of money to Franklin, and consequently it admitted that the assignment was made, but alleges that it was "a purported transfer of assignment." It appears, however, that, at the time of the levy of the writ of garnishment in the bank, the $1,806.03 deposited with the bank by Laughlin was still his money, and that the conditions that would have given Reiniger or his assignee the right to claim it had not been performed, i. e., the promissory notes and bill of sale had not been deposited, and from the record offered apparently were not deposited until on or about February 3, 1921, so there would seem to be no merit in the contention of the bank in such case that said sum of money was subject to the lien of the garnishment on which judgment was rendered against it, as no relation of debtor and creditor existed at such time as between it and said Reiniger, and as against the claim of Reiniger's assignee, on the showing made, it had no right to set off said sum of $1,806.03 or any part of it (Aigeltinger Co. v. Healy-Tibbitts Const. Co., 23 Cal. App. 608, 139 P. 436, 438), and the assignment of the fund to Franklin carried the title to it, so the court evidently decided that there was no evidence of fraud in the transaction, and we fail to see how the evidence offered was competent to show that the question here was adjudicated by the court in that case, and no error was committed in sustaining such objections.

[7] Appellant further contends that the court erred in ruling that the answer of the defendants did not state a defense. In this connection counsel for defendants points out that the facts alleged in defendants' fourth and separate defense show a former adverse adjudication by the superior court of Maricopa county, Ariz., of the rights of plaintiff, and implies that defendants were prevented from introducing evidence in support of such defense by the ruling of the court. We would quite agree with counsel if we could find anything in the record showing that defendants had been prevented by such ruling from so introducing evidence on such fourth ground of defense.

The findings of fact of the trial court recite that no evidence was offered by the defendants, or either of them, on said fourth and separate defense, and such finding is supported by the record before us.

[8] After the documents mentioned above were offered in evidence the record shows the following colloquy between counsel:

"Mr. Gilbert: I would like to know if the testimony is all in.

"Mr. Veitch: No.

"Mr. Gilbert: Well, let us finish the testimony first; we have stipulated that all these objections were to be passed upon by the court, and held in abeyance.

"Mr. Veitch: To the end of the case.

"Mr. Gilbert: Yes sir.

"Mr. Veitch: Very well."

The record does not show any further offer of evidence by either party, and it shows that after argument the court made its ruling sustaining the objections theretofore made to the documents offered, and also that the court "also ordered that the objections of counsel for plaintiff to the effect that the answer of the defendants herein does not state sufficient to constitute a defense, be sustained." No evidence already introduced was stricken, however. It is true that the court made findings of fact, which could only be justified on the theory that some of the documentary evidence so offered (and objections to the introduction of which were sustained), was before the court, but the same result necessarily followed from the exclusion of such evidence, and we fail to see where any prejudice resulted therefrom. Code Civ. Proc. § 475. The notice of appeal recites that it is taken from the order denying a motion for a new trial in said action. Such an order is not appealable. Section 963, Code Civ. Proc.

Judgment affirmed. Appeal from order dismissed.

We concur: CRAIG, Acting P. J.; IRA F. THOMPSON, J.

111 Cal. App. 38

In re BRANNON'S ESTATE.

Civ. 7558.

District Court of Appeal, Second District, Division 2, California.

Jan. 7, 1931.

Rehearing Denied Feb. 5, 1931.

1. Wills ⟹290.

In appropriate case, it will be presumed that altered intention arises from change of circumstances, so that, had will been made under altered conditions, testator would have made different disposition of estate.

2. Wills ⟹193.

Divorce decree does not create altered condition affecting validity of husband's prior testamentary disposition.

3. Constitutional law ⟹70(1).

Court may not read into statute an exception not incorporated therein by Legislature.

4. Wills ⟹190.

Will may not be revoked by implication.

5. Wills ⟹191.

Where, after making of will, testator's wife obtained divorce decree which awarded her property bequeathed to her, and parties subsequently remarried, and property willed was sold and proceeds invested by wife in another home, and wife survived testator, will was not revoked (Civ. Code, §§ 1299, 1304).

6. Wills ⟹435.

Courts in interpreting wills are not concerned with amount of testator's bounty.

7. Wills ⟹191.

Wife may be "mentioned" in will within meaning of statute respecting testator's marriage after making will by any description that would include her (Civ. Code, § 1299).

Civ. Code, § 1299, provides that, if after making will testator dies and wife survives testator, will is revoked, unless provision has been made for her by marriage contract, or unless she is provided for in will, or in such way "mentioned" therein as to show intention not to make such provision.

[Ed. Note.—For other definitions of "Mention," see Words and Phrases.]

Appeal from Superior Court, Los Angeles County; Harry A. Hollzer, Judge.

In the matter of the estate of C. M. Brannon, deceased. Mrs. Lillian Brannon filed petition for appointment as executrix, and for probate of will, and Jennie Lee Brannon contested the will and filed a petition for letters of administration. From an order and judgment admitting the will to probate and appointing Mrs. Lillian Brannon executrix, and from an order and judgment denying Jennie Lee Branon's petition for letters of administration, the latter appeals.

Affirmed.

Andreani, Haines, Bisher & Carrey, of Los Angeles, for appellant.

Call & Murphey, of Los Angeles, for respondent.

CRAIG, J.

On December 30, 1920, C. M. Brannon made his last will and testament, by which he gave, devised, and bequeathed to Jennie Lee Brannon, his wife, and to Mrs. Lillian Brannon, a former wife, his entire estate, real and personal, designating the latter as executrix. The widow appeals from an order and judgment admitting said will to probate and appointing the executrix so designated, and from an order and judgment denying her own petition for letters of administration.

While living with the contestant, the decedent executed his will, the material parts of which provided as follows: "I give, bequeath and devise to Jennie L. Brannon, my present wife, in fee simple, all that certain lot, tract or parcel of land," which they then occupied as a residence. "I give, bequeath and devise to Mrs. Lillian Brannon, my former wife, all the residue of my estate, whether real or personal." "Should either of the beneficiaries under this my will, object to the probate thereof, or in anywise, directly or indirectly, contest or aid in contesting the same, or any of the provisions thereof, or the distribution of my estate thereunder, then and in that event I annul any bequest herein made to such beneficiary, and it is my will that such beneficiary shall be absolutely barred and cut off from any share in my estate, and in such event, I hereby give, bequeath and devise all of my estate to the beneficiary above named who does not contest this will." About four months thereafter the testator's wife obtained a decree of divorce which, pursuant to a mutual property settlement, awarded to her the property devised and bequeathed to her by the testamentary disposition. In July, 1923, the parties remarried, said property was sold, the proceeds therefrom were invested by Jennie Lee Brannon in another home which she purchased in the name of herself and her husband as joint tenants, and they resided thereon until his demise. It is contended that, since the testator "married, and the wife survives the testator, the will is revoked" by the provisions of section 1299 of the Civil Code. Said section reads as follows: "If, after making a will, the testator marries, and the wife survives the testator, the will is revoked, unless (1) provision has been made for her by marriage contract, or (2) unless she is provided for in the will, or (3) in such way mentioned therein as to show an intention not to make such provision; and no other evidence to rebut the presumption of revocation must be received."

[1-6] The purpose and effect of these provisions was to dispense with the doctrine of an implied revocation. In an appropriate case it will be presumed that an altered intention arises from a change of circumstances, so that, had the will been made under altered conditions, the testator would have made a different disposition of his estate. In re Comassi's Estate, 107 Cal. 4, 40 P. 15, 16, 28 L. R. A. 414; In re Meyer's Estate, 44 Cal. App. 289, 186 P. 393. The question then suggests itself: For what new condition or relationship must it be said that the testator might have intended to provide? In what did the resumed marital obligations of C. M. Brannon at the time of his death at the residence which appellant received differ from conditions existing at the date of his will, or from conditions which we must assume that he would have provided for had he made a subsequent will? We think merely to recite them is to state one and the same thing. A judicial severance of the marital relations by decree of divorce does not create an altered condition affecting the validity of prior testamentary dispositions. In re Patterson's Estate, 64 Cal. App. 643, 222 P. 374. We may not read into the statute an exception not incorporated therein by the Legislature, nor may a will be revoked by implication. In re Appenfelder's Estate, 99 Cal. App. 330, 278 P. 473. The implied construction of appellant that if, after making a will, the testator remarries his spouse and the wife survives him, the will is revoked notwithstanding that she is provided for therein, then falls of its own weight. And the contestant is not aided by argument that her sale of the property willed to her was inconsistent with the devise thereof, within the interpretation of section 1304 of the Civil Code by Estate of Benner, 155 Cal. 153, 99 P. 715, and like cases. It cannot be said that her acceptance and conveyance of the property intended for her and investment of the proceeds for her own benefit was inconsistent with the presumed intention of her husband as indicated by the terms of his will. Courts in interpreting a will are not concerned with the amount of the testator's bounty. In re Appenfelder's Estate, supra. He is not legally required to include a relative or friend, nor to make a just or a natural will. Estate of McDevitt, 95 Cal. 17, 30 P. 101; Estate of Langford, 108 Cal. 608, 41 P. 701; Estate of Wilson, 117 Cal. 262, 49 P. 172, 711. Appellant was "provided for in the will" under conditions unchanged by marriage and of which C. M. Brannon expressly stated that he was cognizant when it was executed, and she cannot be heard to complain of a provision deemed inadequate.

[7] The only remaining question of importance which is presented is as to whether or not, if intentionally disinherited, appellant was "in such way mentioned therein as to show an intention not to make such provision" for her. We think this is answered affirmatively by the rule announced in Re Kurtz's Estate, 190 Cal. 146, 210 P. 959, that the wife may be "mentioned" by any description that would include her, but, in view of the conclusion reached herein, further discussion of the point becomes unnecessary.

The orders and judgments from which appeals are taken are affirmed.

We concur: WORKS, P. J.; IRA F. THOMPSON, J.

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111 Cal. App. 55

PEOPLE v. CHEANEY.

Cr. 2030.

District Court of Appeal, Second District, Division 2, California.

Jan. 8, 1931.

1. Criminal law ⚷155.

Where information was filed 3 years, 62 days after crime, but defendant was outside state from July 8 to October 11, 3-year limitation had not run.

2. Criminal law ⚷511(3).

Circumstantial evidence, in addition to testimony of accomplice, *held* to sustain conviction of theft.

3. Larceny ⚷64(7).

Recent unexplained possession of stolen property, with slight corroboration by other inculpatory circumstances, is sufficient to justify conviction of larceny.

Appeal from Superior Court, Los Angeles County; J. C. Needham, Judge.

Elbert L. Cheaney was convicted of an offense, and he appeals.

Affirmed.

Joseph Rosenthal, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Ralph O. Marron, Deputy. Atty. Gen., for the People.

CRAIG, J.

At about 9 o'clock at night on June 12, 1927, the occupants of an automobile were accosted by a highwayman on the public streets of the city of Los Angeles, who deprived them of a watch, a diamond ring, about $10 in money, and their car. About three years thereafter the appellant was apprehended and charged by information with the theft of the watch and the ring, of which a jury found him guilty. He has appealed from the judgment and from an order denying a motion for a new trial.

It appears that on the evening mentioned a lady and her escort were sitting in a black Auburn sedan in front of her residence on St. Andrews place, in said city, when a man appeared, pointed a revolver at them, and demanded that they "drive on"; that he entered the rear seat, menacing them with the weapon, ejected them from the car, and drove away. The automobile, watch, and ring were recovered, and the jewelry was identified by the owners during the trial. They testified that their assailant was of medium height, wore a light overcoat, Panama hat, and had a mustache, but were unable to swear that the defendant was the same person. A Mrs. Mae Dye, who testified that she had known the defendant for a period of about three years, received the ring, which consisted of three large diamonds and several small ones, from one Henderson, pawned it in the city of Pomona, and thereafter accompanied one Hatfield to the pawnshop where the latter purchased the same, and he subsequently delivered it to the officers. Henderson testified that on the evening of the robbery he was riding with the defendant in the vicinity of St. Andrews place, and that Cheaney was armed; that appellant had previously stated that he was going "out and hold somebody up," and that as they neared St. Andrews place he called the witness' attention to an automobile standing to the rear, and alighted, stating that he was "going back to the car"; that in about twenty minutes he returned with a black machine, which he parked, entered his own car with Henderson, and directed him to proceed; that, when Cheaney returned, he wore a false mustache, had in his possession a fur coat and the ring above described, remarking that he had taken them together with a watch from the occupants of the other machine, but that he had lost the watch. This witness also testified that Cheaney gave him the ring; that he left it at Pomona for sale, and later, accompanied by Mrs. Dye, he went again to that city where he withdrew the ring and delivered it to her prior to its hypothecation by the latter as heretofore observed. She corroborated this last statement. A physician, Dr. William R. McDaniels, admitted that appellant or some one who accompanied him to the witness' office deposited the watch with him as security for appellant's indebtedness to him for professional services, and that he (the witness) delivered the same to an officer. The doctor at about the same time also received a fur coat from the same source for a like purpose.

[1] The grounds of appeal consist of an asserted insufficiency of the evidence to support the judgment, and that the three-year statutory period of limitation had expired between the date of the alleged offense and the filing of the information. Although the trial court permitted the interposition of a demurrer at the close of the people's evidence upon this latter ground, and a motion for a directed verdict of acquittal was then made upon both grounds, conceding for the purposes of this decision only that the demurrer was presented in time, we think the ruling of the trial court in that behalf was not error. While the information was filed about three years and sixty-two days after the commission of the crime, it was pleaded and stipulated that the defendant was absent from and outside the boundaries of the state from July 8, 1928, to October 11, 1928, or a period of more than three months. The claim that the statute of limitations had run against the charge is without foundation. People v. Newell, 192 Cal. 659, 221 P. 622.

[2, 3] Criticism of the evidence goes principally to its weight and to the lack of proof as to the origin of the coat, as to the defendant's possession of the watch, or of evidence other than the testimony of Henderson, an accomplice, as to Cheaney's presence at the scene of the crime. Witnesses called by the defendant testified to facts and circumstances which, if believed by the jury, might have led them to view his participation in the offense as an impossibility. But, resolving all intendments in favor of the defendant in these respects until the rendition of the verdicts, the commission of the offense, the departure of the defendant from the state, recovery of the jewelry from and through the instrumentality of persons well known to him, together with other circumstantial evidence heretofore recited, of which the jury were cognizant, it does not lie within the province of courts to question their verdicts. All were factors which the jury were bound to consider. There was substantial circumstantial evidence of defendant's participation in the crime even without Henderson's testimony. This may have been deemed as conclusive in its convincing force as testimony of direct witnesses, and sufficient to justify a conviction, excluding any other reasonable theory than that of the guilt of the accused. People v. Nagy, 199 Cal. 235, 248 P. 906. If the jury believed that the property was stolen, and that it was seen in the defendant's possession shortly after being stolen, they were entitled to a satisfactory explanation of its innocent possession in order to remove the effect of possession as a circum-

stance to be considered in connection with such other suspicious facts, if any, as may have been disclosed. People v. Stennett, 51 Cal. App. 370, 197 P. 372. While recent unexplained possession of stolen property, standing alone, does not justify a conviction of larceny, such possession with slight corroboration by other inculpatory circumstances tending to show guilt is sufficient. People v. Farrell, 67 Cal. App. 128, 227 P. 210.

The judgments and orders appealed from are affirmed.

We concur: WORKS, P. J.; IRA F. THOMPSON, J.

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110 Cal. App. 685

O'DONNELL v. EXCELSIOR AMUSEMENT CO. et al.

No. 7408.

District Court of Appeal, First District, Division 1, California.

Jan. 28, 1931.

Hearing Denied by Supreme Court Feb. 19, 1931.

Appeal and error ⚷172(3).

Appellate court could not consider plaintiff's right to punitive damages urged for first time on petition for rehearing to sustain verdict.

Plaintiff in his complaint did not claim punitive damages nor allege any facts or circumstances warranting trial court in submitting such issue to jury, and during trial no such damages were claimed and court specifically instructed jury that case was not one for punitive or exemplary damages.

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

On petition for rehearing.

Petition denied.

For former opinion, see 294 P. 737.

L. S. Hamm, J. G. Moser, and B. E. Kragen, all of San Francisco, for appellants.

Ford & Johnson, of San Francisco, for respondent.

PER CURIAM.

In his petition for rehearing, respondent urges for the first time that he is entitled to punitive damages, and that consequently even though the jury went beyond the limits of the rule of compensatory damages and included in its verdict an allowance to him of punitive damages, the verdict should be allowed to stand. The contention is based upon certain evidence adduced at the trial. It may be conceded that under some circumstances, where the act complained of was done with the authority, either express or implied, of the employer, or was subsequently adopted by him, he may be held liable for punitive damages. But as pointed out in the main opinion 294 P. 737, respondent in his complaint did not claim punitive damages, nor did he allege any facts or circumstances which would have warranted the trial court in submitting such an issue to the jury. Furthermore, throughout the trial of the action no such damages were claimed, and the court instructed the jury that "this is not a case for punitive or exemplary damages. * * *" It is evident, therefore, that the position respondent now assumes is not only at complete variance with the one taken by him throughout the trial of the action and on the appeal from the judgment, but the effect thereof is to ask this court to approve an award of damages having no foundation whatever in the allegations or prayer of the complaint, and which the trial court expressly instructed the jury respondent was not entitled to. Obviously, in the state of the record above described, and aside from any question of whether the evidence relied upon is even sufficient to support an award for punitive damages, respondent's contention that he is entitled to the same cannot be entertained. Furthermore, counsel for respondent are doubtless mistaken in their assertion that "the beating administered to (respondent) occurred while the show was in progress in the theatre and in the presence of numerous patrons, among them being his own daughter. * * *" According to respondent's own testimony, the assault for which he seeks redress took place after Murphy shoved him into the room and closed the door, at which time no one else was present.

The petition for rehearing is denied.

111 Cal. App. 90

PEOPLE v. BLACK.

Cr. 37.

District Court of Appeal, Fourth District, California.

Jan. 13, 1931.

Rehearing Denied Jan 26, 1931. Hearing Denied by Supreme Court Feb. 9, 1931.

1. Automobiles 🔑355(13).

Evidence in manslaughter trial *held* to sustain jury's finding that defendant drove automobile at unlawful speed and without due caution.

2. Automobiles 🔑353.

Prosecution proving, in manslaughter trial, that defendant negligently drove automobile, *held* not required to negative deceased's contributory negligence.

3. Automobiles 🔑355(13).

Evidence in manslaughter trial *held* to sustain jury's finding that defendant's negligent operation of automobile proximately caused death.

4. Automobiles 🔑355(13).

Possibility that deceased purposely threw herself in front of automobile *held* insufficient to create reasonable doubt of driver's guilt of manslaughter.

5. Automobiles 🔑355(13).

Evidence in manslaughter trial *held* sufficient to identify defendant as driver of automobile which struck deceased.

6. Criminal law 🔑680(2).

Prima facie proof of corpus delicti in trial for manslaughter by automobile *held* sufficient to render admissible testimony as to conversation with defendant concerning accident and failure to stop.

7. Criminal law 🔑823(6).

Instructions in trial for manslaughter by automobile *held* not erroneous as ignoring questions of contributory negligence and proximate cause, in view of other instructions.

The instructions complained of required conviction, and forbade acquittal on ground of unavoidable accident or contributory negligence, if defendant drove automobile so negligently as to indicate willful or wanton disregard of safety of persons or property, but jury was also instructed to acquit, if deceased's negligence was proximate cause of death or jury had reasonable doubt as to such fact, and that mere fact that defendant caused death of human being while committing unlawful act not amounting to felony is insufficient to sustain charge of manslaughter, in absence of causal connection between such act and death.

Appeal from Superior Court, San Bernardino County; Benjamin F. Warmer, Judge.

W. C. Black was convicted of manslaughter, and he appeals.

Affirmed.

Raymond E. Hodge, of San Bernardino, for appellant.

U. S. Webb, Atty. Gen., and Alberta Belford, of Los Angeles, for the People.

BARNARD, P. J.

The defendant was found guilty of the crime of manslaughter. The evidence discloses that on the evening of June 7, 1930, at about 8:30 p. m. at the intersection of Mt. Vernon and Rialto avenues in the city of San Bernardino, one Mrs. Minear was struck and killed by an automobile. Mt. Vernon avenue is a main highway and Rialto avenue is 54 feet wide from curb to curb. The corner was poorly lighted, and the intersection was a blind intersection within the meaning of the California Vehicle Act. The only eyewitness was sitting in his parked machine at a service station on this corner and was facing the intersection. He testified that a man in a Graham-Paige sedan, traveling north on Mt. Vernon avenue, approached the intersection at a speed of about 35 miles per hour. His attention was first attracted to the car by the speed at which it was coming. He first saw the car when it was 10 or 15 feet from the south line of the intersection. In a small fraction of a second thereafter, and when the car was about entering the intersection, the brakes on the car were applied. He heard the noise of the tires skidding on the pavement, and continued to watch the car, which went in a northeasterly direction for approximately 10 feet, straightened up, and continued in the same direction for almost 45 feet, then turned sharply to the left. About 10 feet north of the north curb line of Rialto avenue the car struck a woman and threw her a distance of about 30 feet. As her body was going through the air, the car was swinging around to face a westerly direction. The car stopped for about 10 seconds, and then immediately started up and sped westerly on Rialto avenue. Other witnesses testified as to the screeching of the brakes, the skid marks on the pavement, and other matters observed immediately after the collision. The car skidded about 64 feet in a northerly direction, and either came to a stop or practically to a stop, facing almost west. Broken glass and a rim from one of the headlights were found near the point of collision. The only eyewitness saw the deceased just before she was struck by the car, but did not see which way she was walking.

[1-4] Appellant's first and principal contention is that, assuming that he was the driver of the car in question, the evidence is not sufficient either to show the commission of an unlawful act not amounting to a felony, or to show that the automobile was driven without due caution and circumspection. In particular, it is urged that it was incumbent upon the prosecution to show that the manner in which the car was driven was the proximate cause of the injuries to the decedent, and to show affirmatively that her injuries were not caused by her own negligence. In our opinion, the facts here shown are sufficient to sustain the finding of the jury that the accident was due to the negligence of the driver of the car in question. The testimony as to the speed at which the car entered the intersection, the distance and manner in which it skidded, and the distance it knocked the deceased, are sufficient to sustain the finding of the jury that the car was traversing the intersection at a speed greater than 15 miles per hour, and that it was not being driven with due caution and circumspection.

The law is settled that the prosecution, under such circumstances as existed here, is not required to negative contributory negligence on the part of the deceased. People v. Halbert, 78 Cal. App. 598, 248 P. 969, 970; People v. McKee, 80 Cal. App. 200, 251 P. 675. There is nothing in the evidence to show that the deceased was guilty of any negligence. The evidence shows negligence on the part of the driver of the car, and this evidence is sufficient to sustain the finding of the jury that such negligence was the proximate cause of the injuries to deceased. It is difficult to imagine any negligence of which the deceased might have been guilty which would have, under these circumstances, constituted the sole proximate cause of the injuries she received, as distinguished from contributory negligence. If she crossed at the wrong place, or in attempting to escape turned back in her tracks, either would not be the sole cause of the accident under the conditions here appearing. While it is possible, as suggested by appellant, that the deceased may have purposely thrown herself in front of the car for the purpose of being killed, such an act would have been willful, and not merely negligent, and such a possibility is not sufficient to create a reasonable doubt. In a prosecution for manslaughter involving a bullet fired from a gun, we apprehend the prosecution would not be required to establish affirmatively that the deceased did not move a few inches into the pathway of the bullet, in order to commit suicide. While it was incumbent upon the prosecution in this case to show that the proximate cause of the accident was the manner in which the car was driven, we think this burden was met, and that it was no more the people's duty to negative this unreasonable possibility than it was to make such additional proof as to the actions of the deceased in the case of People v. Halbert, just cited.

[5] It is next argued that the appellant was not identified as the driver of the car in question. The car which struck deceased was a Graham-Paige sedan. As it sped away, it was observed to bear a dealer's license, No. 2455. Appellant was an automobile dealer. He was known to have driven prior to the accident a car similar to the one which struck the decedent, and he had been seen in such a sedan, bearing dealer's license No. 2455. Later that night a Graham-Paige sedan answering the description of the car seen at the place of the accident was found abandoned about four or five miles north of Colton, a city which almost adjoins San Bernardino. It bore the same license number. The glass and a metal rim were gone from the headlight. The rim found at the scene of the accident fitted the abandoned car. The shutters on the front of the radiator were caved in close to the right headlight. Later, appellant claimed this car and wanted it returned to him. A witness, a salesman formerly employed by appellant, testified that on the day following the accident he received a phone call from appellant asking him to meet him on the outskirts of San Bernardino, and that the following conversation there took place between them: "I said, 'Black, I understand the police are looking for you. I have heard that there was an accident' and I said 'It seems that you are very much wanted' and he made no reply just at that moment. Later on he said 'Well, I have had an accident' but he said 'I am in very much of a turmoil and I need help' and I said 'The best thing for you to do is to get yourself a good attorney and go right down to the police department and turn yourself over to them and explain to them the conditions,' and I says 'That would be the fair way to do it.' I asked him at the time if he was in the accident and I could get no direct reply and I asked him why he did not stop. Well, he said 'I had had a drink before the accident and I was afraid they would accuse me of being intoxicated.' * * * Black said that he needed assistance at the time and I said 'Black, if you did have this accident I don't want to be a party to it before or after.' In fact, I said 'it is a serious offense if you did have this accident relative to the woman that was killed the night before.' Well, he said 'I need a lot of help right at this time,' so my advice was to him to get an attorney which I repeated again. So he said that he would get an attorney and I asked him to turn himself over to the police to eliminate any further bother to them and I said 'if you did have the accident, it was a case of excitement, and explain it

thoroughly.' * * * I said 'Even under those conditions, why didn't you stop?' He said 'I was panicky at the time, that is the reason I did not stop.' * * * I said 'Where did you leave your car?' He said he drove it back towards Colton; that was as much information as I remember that he gave me at that time about that. I said 'How did you get over in San Bernardino?' He said he walked over." We think this evidence is sufficient to identify appellant as the driver of the car in question.

[6] Appellant's next contention is that the above conversation was not admissible, for the reason that at the time it was received in evidence there had been no proof of the corpus delicti. This argument is based upon the claim that it had not been shown that the manner in which the car was driven was the proximate cause of the accident, in that it had not been shown that it was not due to the negligence of the deceased. Not only is this contention covered by what we have already said on that subject, but prima facie proof of the corpus delicti was sufficient to make this evidence admissible. In People v. Selby, 198 Cal. 426, 245 P. 426, 429, the court said: "Concerning the admissibility of extrajudicial statements, admissions, or confessions, it has been correctly declared that: 'Proof of the corpus delicti of the conclusive and convincing character required to support a conviction of the crime charged was not a prerequisite to the reception in evidence of the extrajudicial statements of the defendant that he had killed the deceased. Prima facie proof of the corpus delicti was sufficient for that purpose; and it was not essential to the proof and purpose to show that the crime charged was committed by the defendant.' "

And then, after reviewing the authorities, the court added: "It is apparent from this review of the cases that the general trend of authority has been to hold that, upon prima facie proof of the corpus delicti, the extrajudicial statements, admissions, or confessions of the accused may be admitted in evidence, and, having been so properly admitted, they may, with the evidence aliunde, be considered by the jury in its determination whether or not all the elements of the crime and the connection therewith of the accused have been established to a moral certainty and beyond all reasonable doubt."

In commenting upon a state of facts somewhat similar to those appearing in this case, and where the presence of the defendant's automobile upon the wrong side of the road was held sufficient evidence that he was driving without due caution and circumspection, the court in People v. Halbert, supra, said: "The foregoing statement of facts shows that the evidence was sufficient to prove that the driver of the Ford coupe was guilty of involuntary manslaughter. The only additional fact necessary to sustain the conviction would be the fact that the defendant was the driver of the Ford coupe. The corpus delicti having been established by evidence apart from any admission or confession made by defendant, there remains no doubt that the fact that the defendant was the driver of the offending machine may be established by admission made by him of that fact."

And also: "It follows also that the corpus delicti, consisting of a crime committed by the driver of appellant's automobile, was established by competent evidence exclusive of any confession or admission made by the defendant. We thus arrive at the conclusion, applicable to the third count as well as to the first count of the information, that there is no merit in appellant's contention (based upon the claimed absence of competent proof of the corpus delicti) that the court erred in receiving evidence of his admission that he was in fact the driver of his automobile at the time of the collision."

We think the conversation was properly admitted in evidence, that the appellant was sufficiently identified as the driver of the car, and that the question of proximate cause was correctly submitted to the jury.

[7] Appellant next complains of certain instructions given to the jury. The first is instruction No. 7, which reads as follows:

"You are instructed that section 121 of the California Vehicle Act, as amended in 1929 (St. 1929, p. 539, § 49) defines 'reckless driving' as follows: 'any person who drives a vehicle upon a public highway in so negligent a manner as to indicate either a wilful or wanton disregard of the safety of persons or property, shall be guilty of reckless driving,' and upon conviction shall be fined, etc. * * *

"And in this connection you are instructed that if the jury believe from the evidence in this case, beyond a reasonable doubt, that the defendant, W. C. Black, on or about the 7th day of June, 1930, in the said County of San Bernardino, State of California, did drive a motor vehicle upon a public street or highway, to-wit: Mt. Vernon Avenue, at or near the intersection of said Mt. Vernon Avenue with Rialto Avenue, in said City of San Bernardino, in so negligent a manner as to indicate a wilful or wanton disregard of the safety of persons or property and while so driving said automobile did drive the same upon and against one Florence Minear with such force and violence as to cause the death of said Florence Minear, then you must find the defendant guilty as charged in the information."

This is objected to as instructing the jury that they might leave out of consideration the negligence of the deceased; in other words, that it left out the question of proximate cause. A similar question was raised in the case of People v. McKee, 80 Cal. App. 200, 251

P. 675, 677, where a similar instruction was given, although based upon a different violation of the California Vehicle Act. In commenting upon this contention, the court said: "Appellant's next assault upon this instruction is based upon his contention that the jury were permitted by it to find the defendant guilty, though the intoxication was not the proximate cause of the accident. The jury were told in other instructions that the gross or culpable negligence or the operation of the machine with a reckless disregard for the safety of others must be the cause of death, and instruction No. 14 stated to them that death must proximately result from such operation. Taken as a whole, we think they correctly stated the law in this particular. However, relating to this point, appellant urges that the instruction permitted the jury to disregard the contributory negligence of the deceased. They were told, and correctly so, in another instruction, that it was no defense."

In the instant case, the jury was fully instructed as to the matter of proximate cause and as to the necessity of finding that the accident occurred because of the unlawful driving of the car in question, and not because of any negligent act of the deceased, in the following two instructions:

"No. 2. You are instructed that contributory negligence, that is negligence on the part of the person injured, which contributed to the injury, is no defense. You are instructed, however, that if you believe that the person injured in this case was injured and killed as a result of her own negligence, that is to say, that her own negligence was the proximate cause of her death, or if you have any reasonable doubt whether such is the case or not, you must acquit the defendant."

"No. 3. You are instructed that the killing of a human being in the commission of an unlawful act not amounting to a felony is manslaughter, where a causal connection exists between the unlawful act and the death. You are instructed in this connection, however, that the mere fact that you may believe from the evidence beyond a reasonable doubt that the defendant committed an unlawful act, not amounting to a felony, and that while committing such unlawful act, the defendant caused the death of a human being, such is not sufficient to sustain a charge of manslaughter. There must be, in addition, a causal connection between the commission of the unlawful act and the death."

Appellant also complains of instruction No. 17, which reads as follows:

"You are instructed that a person who drives an automobile upon a public highway or street in so negligent a manner as to indicate either a wilful or wanton disregard of the safety of persons or property is guilty of a misdemeanor.

"And in this connection you are instructed that if you believe, beyond a reasonable doubt, that the defendant did operate an automobile upon a public street or highway at the time and place alleged in the information in so negligent a manner as to indicate either a wilful or wanton disregard of the safety of persons or property, and that while so operating said automobile he struck and killed the deceased, Florence Minear, then you will find him guilty, and you cannot excuse or acquit him of the crime on the ground of an unavoidable accident or on the theory of misfortune, neither can you acquit him on the grounds that said Florence Minear may have been guilty of negligence, which contributed to the accident under such circumstances."

In this instruction the jury were, in effect, told that, if the defendant was operating his car in an unlawful manner, and while so doing struck the deceased, such an event would not constitute an unavoidable accident; and also that any contributory negligence of the deceased would not be a defense. While neither of the instructions complained of contains all of the law, neither is erroneous upon the points covered, and all of the instructions, taken together, disclose that the jury was fully and completely instructed that they could not find the defendant guilty unless his negligence was the proximate cause of the accident, nor in the event they found the accident was caused by the negligence of the deceased.

The only other point raised by the appellant is that the district attorney was guilty of misconduct in a certain remark made in his argument to the jury. Not only was this not repeated and fully covered by an instruction of the court, but appellant admits that, in itself, it would not be sufficient to constitute reversible error.

The judgment is affirmed.

I concur: MARKS, J.

ANCHESTER v. KECK et al. (SCOTT et al., Interveners).*

Civ. 7704.

District Court of Appeal, First District, Division 2, California.

Jan. 15, 1931.

Rehearing Denied Feb. 14, 1931. Hearing Granted by Supreme Court March 16, 1931.

1. Estoppel 🔑58.

Optionee *held* not misled, so as to estop optionor from relying on option to buy stock, by negotiations for new option.

Plaintiff testified that he stated frequently during negotiations for new option that he was waiving no rights under original contract. Defendant wrote plaintiff a letter, stating that said contract was still in force, and proposed new agreement simply tentative, and proposed agreement did not purport to modify original option, which was not mentioned therein.

2. Equity 🔑66.

He who seeks equity should do equity.

3. Corporations 🔑116.

Optionee, not tendering agreed price and asking equitable relief after failure of negotiations for new option to buy stock, *held* not entitled to recover deposit.

4. Appeal and error 🔑213.

Plaintiff not pleading facts, but setting up common counts for money loaned and received, and not complaining of motions for nonsuit as too general when made cannot make such complaint on appeal.

Appeal from Superior Court, Los Angeles County; Charles C. Montgomery, Judge.

Action by Henry Anchester against W. M. Keck and others, in which Joseph Scott and another, as receivers of the California-Eastern Oil Company and the Julian Petroleum Corporation, intervened. From a judgment of nonsuit, plaintiff and interveners appeal.

Affirmed.

A. G. Ritter, Anderson & Anderson, Frank P. Doherty, M. Eleanor Mack, and William R. Gallagher, all of Los Angeles, for appellants.

Chandler, Wright & Ward and H. T. Morrow, all of Los Angeles, for respondents.

STURTEVANT, J.

The plaintiff commenced an action against the defendant to recover a deposit made under a contract of option. The defendant answered. The receivers of the California-Eastern Oil Company and Julian Petroleum Corporation filed a complaint in intervention. The defendant answered the complaint in intervention. On the issues so framed, a trial was had before the court sitting with a jury. At the end of the plaintiff's case, the trial court granted defendant's motions for nonsuits. The plaintiff and the interveners have appealed, have brought up typewritten transcripts, and have filed one set of briefs. Hereinafter we will refer to both parties as the plaintiff.

On the 2d of October, 1926, the plaintiff and defendant executed a contract under the terms of which the plaintiff was given an option to buy a block of stock in the Superior Oil Company at $1 per share. He paid down $100,000, and under the terms of that agreement it was further provided that: "Henry Anchester shall have to and including the 1st day of November, 1926, in which to elect whether or not he will exercise this option. If Henry Anchester elects to exercise this option, he shall, on or before said date, deposit with the Farmers and Merchants National Bank of Los Angeles, the sum of two million dollars ($2,000,000) in cash with instructions to said bank to pay such cash to W. M. Keck or order, and will at the same time deliver to W. M. Keck a written notice of the exercise of this option, whereupon the said Henry Anchester shall be obligated to purchase, and W. M. Keck will be obliged to sell, * * * and in the event of the failure of Henry Anchester to make any of the payments hereinabove provided for at the times herein stated, all previous payments made by him shall be forfeited as agreed and liquidated damages for his breach of the agreement, and this agreement shall be terminated and he shall have no right, title, or interest of any kind or character in and to any of the stock of the Superior Oil Company so deposited or any claim or right of any kind against W. M. Keck or any other person. * * * Time is hereby declared to be of the essence of this agreement." On October 26, 1926, the plaintiff and defendant commenced a discussion of the terms of a new contract of option, not the modification of the existing option. Some of the terms of that proposed contract were to the effect that the plaintiff should have an option extending to the 27th day of December, 1926, at the same price per share, but the plaintiff was to pay $250,000 on the execution of the new option, and there was to be released to the defendant certain equipment then owned by the Superior Oil Company. Said negotiations continued from the 26th day of October until late in the afternoon on November 3, 1926. At that time the negotiations were broken off. No paper or papers were signed evidencing the new agreement, and we do not understand either party to contend that the inchoate transactions ever culminated in a contract.

The plaintiff did not plead the facts, but he pleaded two counts. He set up a common

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Hearing granted 4 P.2d 934.

count as for money loaned, and he set up a common count as for moneys had and received. The complaint in intervention set up one count only, and that was a common count as for moneys had and received. In the defendant's answers he denied the material allegations contained in the plaintiff's complaint and in the complaint in intervention. Each party made an opening statement. Many witnesses were called and examined. No one of them testified to any fact or facts showing rescission, abandonment, or estoppel excepting as the negotiations for a new option may be evidence thereof.

[1] The plaintiff contends that the defendant, by entering into negotiations with plaintiff looking toward the execution of a new option, estopped himself from relying on the contract of October 2, 1926, that he misled the plaintiff to his injury, and that the defendant therefore breached and abandoned said contract. He does not claim that the defendant, or any one of his agents, made any declaration or promise which lulled him to sleep. He relies solely on conduct. But, in that connection, the plaintiff testified that during those negotiations he stated "every fifteen minutes" that he was not to be understood as waiving any rights under the contract of October 2, 1926. The defendant stated his position in writing. He caused to be delivered to the plaintiff on October 30, 1926, a letter which states: "We understand that your option agreement with Mr. Keck dated Oct. 2, 1926, is still in full force and effect and that this other proposed agreement is simply tentative and not binding on either party and either party has the right to refuse to enter into any additional agreements other than the agreement of Oct. 2, 1926." Giving the plaintiff the benefit of every right to which he was entitled on the presentation of a motion for a nonsuit (Hoff v. Los Angeles Pacific Co., 158 Cal. 599, 112 P. 53), it is patent that the plaintiff, under such a set of facts, may not claim that he was misled. This conclusion is re-enforced by a consideration of the terms of the proposed agreement dated November 3, 1926. Had it been executed, the plaintiff would not have been entitled to the repayment of his $100,000 nor for a credit as for a payment on account. It does not purport to be a modification of the option dated October 2, 1926. It does not mention that option nor the said $100,000. It is a wholly new and independent instrument.

[2, 3] Examined as an action in equity, the result is the same. If it be claimed that the plaintiff was misled, still it does not follow that he was wholly excused from performance. But, by proper pleadings and proof, he was entitled to apply to a court of equity to be given relief. Glock v. Howard, 123 Cal. 1, 9, 55 P. 713, 43 L. R. A. 199, 69 Am. St. Rep. 17. But he who seeks equity should do equity. If, as claimed, the plaintiff was ready, anxious, and willing on November 1, 1926, to elect to take up the option dated October 2, 1926, except for the wrong impression he formed as to the defendant's intentions as to a sale, then his remedy was to make a belated tender, and ask a court of equity to approve it and relieve him from his forfeiture. However, the plaintiff has never made a tender nor an offer to perform, and does not now do so. November 3, 1926, it became clear that the defendant was not willing to give another option under the terms of the inchoate agreement of that date. The plaintiff's rights, if any, depended, therefore, on the contract of October 2, 1926, and the duty rested on him of serving a written notice of his election and of tendering $2,000,000 as provided in that instrument. But this he has wholly failed to do.

The facts which we have already set forth show that the defendant at no time abandoned his contract dated October 2, 1926, but at all times relied thereon.

There is no evidence that at any time the defendant was ever in default nor that at any time he departed from his contract nor that he rescinded it in any respect.

The plaintiff cites and relies on Hulen v. Stuart, 191 Cal. 562, 217 P. 750. That case is not in point, because it involved very different facts. In that case the defendant Stuart made certain positive statements that he would later perform the existing contract. In the instant case a proposed agreement was merely being discussed, and the defendant made no promises as to the existing contract.

[4] The plaintiff complains because the defendant did not in his motions for nonsuits state specifically the defects in the proof that had been made by the plaintiff. The defendant replies that, when a motion for a nonsuit has been granted, a court of review will uphold the judgment of nonsuit if it can be upheld under any possible theory whether such theory was or was not specified in the motion. Miller v. Wade, 87 Cal. 410, 412, 25 P. 487. Moreover, the plaintiff pleaded his case by adopting (1) a common count for money loaned and (2) a common count for money had and received. He did not plead the facts. In stating his motion for a nonsuit, the defendant was fully as exact and as specific as was possible under the allegations of the complaint. In his brief, the plaintiff states for the first time the circumstances under which he claims the courts should ignore the terms contained in his written contract. Until that brief was filed, the defendant could only guess the plaintiff's theory. The plaintiff heard the motion when it was made, but he did not then complain because it was too general and not specific, and thereafter the motions were argued at length in the trial court. We think the point is not well taken.

We find no error in the record. The judgment is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

111 Cal. App. 148

BALDWIN v. BALDWIN.

Civ. 4236.

District Court of Appeal, Third District, California.

Jan. 16, 1931.

1. Divorce 🔑312.

Order directing change in custody of children of divorced parents should be upheld, where bill of exceptions failed to contain evidence and affidavits were conflicting.

2. Divorce 🔑303(2).

Trial court retains full jurisdiction to modify divorce decree as to children's custody, on account of changed circumstances vitally affecting welfare of children.

3. Divorce 🔑298(1).

Interest of children is paramount consideration in passing on contest between divorced parents for custody of minor children.

4. Divorce 🔑296, 312.

Trial court in divorce case has wide discretion in awarding custody of children, and its decision will not be altered, unless discretion has been abused.

Appeal from Superior Court, Los Angeles County; Daniel Beecher, Judge.

Grace L. Baldwin was granted an interlocutory decree of divorce from Percy L. Baldwin, and awarded custody of their minor children. After the divorce was made final, defendant filed a motion to modify the decree by awarding custody of the minors to him. The trial court granted the motion, and plaintiff appeals.

Affirmed.

Andreani & Haines, of Los Angeles, for appellant.

Tanner, Odell & Taft, of Los Angeles, for respondent.

Mr. Justice Pro Tem. JAMISON delivered the opinion of the court.

On December 10, 1925, an interlocutory decree of divorce was granted appellant against respondent, and she was awarded the custody of their two minor children, Robert and Owen Baldwin; the respondent being required to pay appellant $17.50 per week for their support. This divorce was made final on December 18, 1926, and in November, 1927, appellant married one Sidney Garcia. Thereafter, in January, 1928, respondent filed a motion to modify said decree by reducing said allowance for the support of said minors to $10 per week, and also a motion to modify said decree by changing the order therein awarding the custody of said minors to appellant and substituting therefor an order awarding their custody to respondent. On the 26th day of January, 1928, by stipulation of the parties made in open court, Mary A. Maxwell was appointed referee to take testimony regarding the custody of said minors, with direction to submit findings of fact and recommendation to the court concerning the custody of said minors.

On February 23, 1928, the said referee filed her report, and stated therein that since the marriage of appellant to Garcia in 1927, conditions surrounding the minors had materially changed for the worse, that the home was congested, the food supplied them was insufficient, their clothing neglected, and the minors generally uncared for, that the defendant resides with his mother, the grandmother of these minors, and that this home is entirely suitable for the residence of said minors. The referee recommended that the care, custody, and control of the minors be given to respondent, their father, Percy L. Baldwin. The said Robert Baldwin is now of the age of ten years and Owen Baldwin is now of the age of eight years.

On March 1, 1928, when the report of the referee came on for consideration before the court, appellant requested leave to file a supplemental affidavit, which was granted and the matter continued to March 9, 1928. The appellant filed her supplemental affidavit and respondent filed a counteraffidavit, and on March 8, 1928, the court made an order modifying the decree by giving the custody of said minors to respondent, and from this order the appellant prosecutes this appeal.

[1] Appellant's only contentions are that the evidence does not support the order and that the best interests of said minors will be served by leaving them with appellant.

The bill of exceptions does not contain the evidence taken before the referee, and, as the affidavit of appellant contained in the bill of exceptions is controverted by the counteraffidavit of respondent, we find no merit in appellant's contentions that the order is not supported by the evidence.

[2] The court retains full jurisdiction to modify its decree where such modification is rendered expedient because of circumstances arising since the rendition of the decree which vitally affect the welfare of the children. Swenson v. Swenson, 101 Cal. App. 440, 281 P. 674; In re Wood (Cal. App.) 285 P. 323; Olson v. Olson, 95 Cal. App. 594, 272 P. 1113.

[3, 4] In passing upon a contest between divorced parents for the custody of minor children, the interest of the children is the

paramount question to be considered. Olson v. Olson, supra. The trial court has a wide discretion in awarding the custody of children, and, unless it clearly appears that this discretion has been abused, its decision cannot be altered by the appellate court. Bancroft v. Bancroft, 178 Cal. 352, 173 P. 582; Cammack v. Cammack, 205 Cal. 674, 272 P. 288; Brown v. Brown, 92 Cal. App. 276, 268 P. 401.

We fail to find in the record any evidence of abuse of discretion by the trial court in awarding to defendant the custody of said minor children, nor has appellant pointed to anything therein which tends to support such contention.

The order is affirmed.

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111 Cal. App. 173

PEOPLE v. CLEMENTS.

Cr. 33.

District Court of Appeal, Fourth District, California.

Jan. 16, 1931.

Rehearing Denied Jan. 29, 1931. Hearing Denied by Supreme Court Feb. 11, 1931.

1. Rape 🔑52(1).

Evidence *held* to sustain conviction of attempt to commit rape upon sixteen year old prosecutrix.

2. Rape 🔑59(18).

In prosecution for rape, submitting question of attempted rape to jury *held* proper in view of evidence for defendant, tending to disprove penetration.

3. Criminal law 🔑1169(11).

Under circumstances, admitting, in prosecution for rape, evidence of defendant's and companion's possession and drinking of wine *held* not prejudicial.

> State's evidence disclosed there was jug of wine in defendant's automobile in which he and others rode to scene of alleged crime, and that wine was consumed by defendant and male companions prior to assault on prosecutrix.

4. Criminal law 🔑730(1).

Judge's promptly striking out objectionable remarks of district attorney cured error.

5. Criminal law 🔑1163(1).

Appellant must show error prejudicial to his rights.

6. Criminal law 🔑1144(10).

Record not showing that arguments not transcribed by reporter, notwithstanding defendant's request, contained anything prejudicial or objected to or assigned as error, appellate court could not assume error or prejudice.

Appeal from Superior Court, San Bernardino County; Charles L. Allison, Judge.

Hays Clements was convicted of an attempt to commit rape, and he appeals.

Affirmed.

Raymond E. Hodge, of San Bernardino, for appellant.

U. S. Webb, Atty. Gen., John L. Flynn, Deputy Atty. Gen., and George H. Johnson, Dist. Atty., and C. O. Thompson, Deputy Dist. Atty., both of San Bernardino, for the People.

MARKS, J.

Appellant was charged with the crime of rape upon a female under the age of eighteen years, not his wife. He was found guilty of an attempt to commit rape and was sentenced to the penitentiary. He maintains that the evidence offered by the people was so inherently improbable that it will not support the verdict and judgment.

[1] No good purpose could be served by reviewing the testimony here in all its sordid and revolting details. It will suffice to state that it shows a bestial attack upon the prosecutrix, a girl of the age of sixteen years, by appellant. The crime was committed near a byroad about six miles north of the city of San Bernardino during a stop in an automobile ride following a dance. There were three girls in the party who were of the ages of fifteen, sixteen, and eighteen years respectively, and four boys who were of the ages of sixteen, eighteen, twenty, and twenty-one years respectively. The testimony of the prosecutrix would have supported a verdict of guilty as charged. It showed that the appellant accomplished his purpose by the use of force and that his victim resisted to the extent of her strength and ability and repeatedly called her companions to come to her aid. Her testimony is amply corroborated by her girl companions and other evidence. It is also corroborated in many particulars by the testimony of appellant and the boys of the party. That appellant attempted to, or did, commit the actual rape, and that the prosecutrix cried out for help, are the only particulars in which appellant contradicted the story of his victim. The evidence is amply sufficient and is not inherently improbable. We are satisfied that under its oath and the evidence before it, the only other verdict which the jury could have consistently re-

turned was one finding the defendant guilty of rape.

[2] Appellant complains of the instructions given to the jury as well as of the refusal of the court to give certain instructions proposed by him. We have gone over all instructions carefully and can find no error of law therein prejudicial to the appellant. He particularly complains because the court submitted the question of attempt to commit rape to the jury, contending that the evidence clearly showed the appellant either guilty of rape or not guilty. In this we cannot agree with him. He produced an expert witness who testified at length. The sole purpose of this evidence was to disprove the prosecutrix's charge of penetration. This evidence presented an issue of fact which the court correctly submitted to the jury.

[3] The evidence discloses that there was a half-gallon jug half full of wine in appellant's car in which the seven young people rode to the scene of the crime. The wine was consumed by appellant and one or more of his male companions prior to the assault on the prosecutrix. Appellant objected to the introduction of evidence concerning the wine on the ground that it was irrelevant, incompetent, and immaterial, which objection was overruled by the court. He now maintains that this ruling was erroneous because the evidence tended to show appellant guilty of the possession and transportation of liquor. Under the following authorities, we are of the opinion that this ruling of the trial court was not prejudicial to appellant under the facts of this case: People v. Hickman, 113 Cal. 80, 45 P. 175; People v. Owens, 123 Cal. 482, 56 P. 251; People v. Ellis, 188 Cal. 683, 206 P. 753; People v. Piero, 79 Cal. App. 357, 249 P. 541.

[4] Appellant complains of remarks made by the district attorney during his closing argument to the jury. Upon his objection being made the trial judge promptly struck out the objectionable remarks which cured the error.

[5, 6] Appellant further contends that he was denied due process of law for the reason that the reporter did not take down in shorthand the arguments of the district attorney. In his request for the preparation of the record on appeal he stated that he desired the transcription of the arguments of the district attorney and the trial court ordered the reporter to transcribe them. Only one paragraph of such argument appears in the record, together with appellant's objection thereto, and the court's order striking it out. The record contains no reason why the balance of the arguments were not incorporated, nor does it appear whether or not the reporter took down the arguments in shorthand. There was no request made for a diminution of the record. It is incumbent upon appellant to show error and that such error was prejudicial to his rights. There is no showing in the record that any portion of the arguments not transcribed contained anything prejudicial to appellant or anything to which he objected or assigned as error. We cannot assume error or prejudice to appellant. People v. Casey, 79 Cal. App. 295, 249 P. 525.

Judgment affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

111 Cal. App. 115

LITTLEJOHNS et al. v. HENDERSON et al.

Civ. 4230.

District Court of Appeal, Third District, California.

Jan. 15, 1931.

1. Covenants 🔑1.

Agreement whereby parties bound themselves not to permit their respective lots to be occupied by persons of certain races and to incorporate restrictions in deeds *held* valid.

2. Injunction 🔑62(1).

Personal covenants imposing restrictions upon use of land may be enforced in equity, where subsequent purchaser from covenantor takes with notice.

3. Covenants 🔑49.

Negroes purchasing property with knowledge of agreement between lot owners not to permit lots to be used by negroes, could not occupy premises purchased.

Appeal from Superior Court, Los Angeles County; Leon R. Yankwich, Judge.

Action by Thomas S. Littlejohns and others against Francis Henderson and others. From a judgment for defendants, plaintiffs appeal. Reversed, with instructions.

G. C. Watson and H. R. Collins, both of Los Angeles, for appellants.

Willis O. Tyler, of Los Angeles, for respondents.

JAMISON, Justice pro tem.

In this case a demurrer to the complaint was interposed upon the ground that the facts stated did not constitute a cause of action and was sustained without leave to amend and judgment was rendered in favor of the defendants. From this judgment plaintiffs have appealed.

The complaint sets forth in substance that on the 7th day of June, 1923, some 125 owners of lots in the city of Los Angeles, including plaintiffs, entered into an agreement, by the terms of which they mutually agreed that they and each of them, would not permit the said property to ever be used or occupied by persons of either the negro, African or Asiatic race, whether as owner or tenant and that upon any transfer, sale, assignment, or conveyance of said property said transfer, sale, assignment, or conveyance of said property should be subject to the covenants and conditions of this contract, and that upon the execution of any deed or conveyance would incorporate in said deed or conveyance an express covenant that the grantee of the said deed or conveyance, his heirs, assigns, and successors would not permit said property to be used or occupied by any person other than of the white or Caucasian race; that this covenant was executed in accord with a general plan for the purpose of making and maintaining the said property as desirable residence property and for the mutual benefit of said lots; that the said covenant should be construed to be a covenant running with the land for the benefit of all parties to the agreement and each and all of the several parcels of land; that upon a breach of the agreement or said covenant the continuance of such breach might be enjoined by any of the other owners, their heirs or assigns; that said agreement was duly recorded in the official records of Los Angeles county, Cal., on September 23, 1923; that thereafter three of the signers of said agreement conveyed the land owned by them and contained in the agreement to Lydia G. Montgomery and to Albert W. and Pinkie Wilson, the three last named being negroes; that the defendants Lydia G. Montgomery, Albert W. and Pinkie Wilson, Francis Henderson, C. A. Williams and Mrs. C. H. Williams, and C. Parker are of the negro race, and are in the use, occupation, and possession of parcels of land described in said agreement; that at the time of the purchase of said parcels and occupation of the same defendants had actual knowledge of the existence of said agreement and of the terms thereof; that the parties to said agreement are numerous and it is impracticable to bring them before the court; that their interests are identical with that of the plaintiffs, and this action is brought for and on behalf of all such persons. Then follow allegations of irreparable loss that will result to said owners by the continued occupation of the premises by defendants.

[1, 2] Appellant contends that the agreement is purely personal and that if it could be construed to be a covenant it does not run with the land and would not be binding on the grantee. And it must have been upon this theory that the lower court sustained the demurrer without leave to amend.

We deem it unnecessary to call attention to the numerous authorities which are adverse to respondents' contention in view of a recent decision of the Supreme Court, namely, the decision set forth in the case of Wayt v. Patee, 205 Cal. 46, 269 P. 660, 661. This decision cites many of the authorities bearing upon the question under consideration and fully sustains plaintiffs' claim that the lower court erred in sustaining the demurrer. That was a case where the some sixty owners entered into a written agreement not to permit occupancy of the land owned by them by any person other than of the Caucasian race and that the restriction should be incorporated in all deeds or transfers of the property. It further provided that the covenant should run with the land until January, 1950. There the court said:

"The sole question presented on this appeal relates to the construction and legal effect of the instrument or agreement of the parties above set forth, whereby they sought to confine the occupancy of lots in said tract to persons of the Caucasian race. Since the decision by this court of the case of Los Angeles Investment Co. v. Gary, 181 Cal. 680, 9 A. L. R. 115, 186 P. 596, it has been the settled law of this state that there is a material difference between a condition in a deed or other instrument whereby the owner of real property binds himself not to transfer or convey said real property to a certain class of individuals and a condition whereby the owner binds himself not to permit said real property to be occupied by the same class of individuals. The first condition is held to be in restraint of alienation, and thereby void under the terms of section 711 of the Civil Code. But a condition in a deed or other instrument against the occupancy of real property by persons of a certain class, as, for instance, those not of the Caucasian race, is valid and binding.

"The agreement, therefore, in the present action, whereby the parties thereto bound themselves not to permit their respective lots in said subdivision to be occupied by any persons other than those of the Caucasian race, and to incorporate such a restriction in all deeds of transfer of their respective lots was a valid covenant, and binding upon the parties thereto."

Further along in said opinion at page 51 thereof (269 P. 660, 662), the court further said:

"There can be no doubt of the proposition that personal covenants or agreements bestowing benefits and imposing restrictions upon the use of land may be enforced in equity, where a subsequent purchaser from the covenantor takes with notice of an existing equitable claim or interest in favor of another," citing Hunt v. Jones, 149 Cal. 297, 86 P. 686; McBride v. Freeman, 191 Cal. 152, 215 P. 678; Martin v. Holm, 197 Cal. 733, 242 P. 718.

[3] While the conveyance under which defendants acquired title to the land is not invalidated nor impaired, it does, however, prevent them from occupying or residing upon said property, even though the legal title thereto is in them. Los Angeles Investment Co. v. Gary, supra; Wayt v. Patee, supra.

The complaint alleges that when the defendants purchased the property and entered into the possession and occupancy thereof, they did so with actual knowledge of said agreement. This being true, they are bound by the restricting covenant, and being members of the negro race, they cannot occupy or reside upon the premises so restricted.

The judgment of the trial court is reversed, with instructions to overrule the demurrer, and giving the defendants a reasonable time to answer the complaint.

All concur.

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111 Cal. App. 136

SCHNERR v. SUPERIOR COURT IN AND FOR CITY AND COUNTY OF SAN FRANCISCO et al.

Civ. 7848.

District Court of Appeal, First District, Division 1, California.

Jan. 16, 1931.

Certiorari 🔑5(1).

Certiorari to review order of superior court would be denied, where petitioner had ample remedy by appeal.

Certiorari to Superior Court, City and County of San Francisco; Isador Harris, Judge.

Application by Joseph J. Schnerr for certiorari to review an order of the Superior Court in and for the City and County of San Francisco.

Application denied.

Edmund Gerald Brown, of San Francisco, for petitioner.

PER CURIAM.

The application is denied for the reason that petitioner has ample remedy by appeal. Hellbush v. Superior Court, 99 Cal. App. 501, 278 P. 1062.

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111 Cal. App. 187

TYNER v. AXT.

Civ. 336.

District Court of Appeal, Fourth District, California.

Jan. 16, 1931.

Appeal and error 🔑773(2).

Delay of over month in filing brief after time expired *held* not to warrant dismissal of appeal, in view of counsel's showing.

> Appellant's attorney presented and filed an affidavit from which it appeared that during the period of delay he was diligently employed in the trial of various cases. It further appeared that the appeal was taken in good faith, and that the delay had not appreciably postponed hearing on merits.

Appeal from Superior Court, Fresno County; Denver S. Church, Judge.

Action by Josephine Tyner against Rudolph Axt. From the judgment, defendant appeals. On motion to dismiss the appeal.

Motion denied.

Chester O. Hansen, of Fresno, for appellant.

David E. Peckinpah and Bert Green, both of Fresno, for respondent.

JENNINGS, J.

This is a motion to dismiss an appeal. The motion is based on the ground that the appellant did not file his brief within the time permitted by the rules of the court. The transcript was filed on October 6, 1930. The time for appellant to file his opening brief expired, therefore, on November 5, 1930. Notice of the presentation of this motion was served and filed December 10, 1930. The motion was noticed for presentation on January 13, 1931, and was presented on that date. On December 12, 1930, appellant's brief was filed. Appellant's attorney has presented and filed an affidavit from which it appears that during the period of his apparent delay he was diligently employed in the trial of various cases. Furthermore, the affidavit shows that the appeal has been taken and presented in good faith, and that the delay has not appreciably postponed the hearing of the appeal on its merits. Fishman v. Silva (Cal. App.) 291 P. 430; Righetti v. Monroe, etc., Inc. (Cal. App.) 289 P. 650.

The motion should be denied, and it is so ordered.

We concur: BARNARD, P. J.; MARKS, J.

🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

CATE v. FRESNO TRACTION CO. et al.*

Civ. 7034.

District Court of Appeal, First District,
Division 1, California.

Dec. 29, 1930.

Rehearing Denied Jan. 28, 1931. Hearing Granted by Supreme Court Feb. 19, 1931.

1. Railroads 🔑327(1).

That one drove automobile on trolley car tracks outside city limits, without first looking and listening, showed driver was contributorily negligent.

2. Railroads 🔑301.

Action for death of occupant of automobile colliding with street car outside city was governed by rules of law applicable to steam railways.

3. Railroads 🔑320.

Motorman of street car who observed automobile proceeding at ordinary speed could presume driver would perform duty and stop at rural crossing.

4. Railroads 🔑348(8).

In action against trolley company for death of occupant of automobile in rural crossing collision, testimony of automobile driver that he did not see car plainly visible nor hear warning was immaterial.

5. Railroads 🔑327(1), 330(3).

Person approaching track must look and listen, and cannot depend on custom or duty to warn of train's approach.

6. Railroads 🔑320.

Trolley car motorman striking automobile outside city could presume driver would stop and turn aside, until driver's conduct reasonably indicated contrary.

7. Negligence 🔑93(1).
Railroads 🔑350(21).

Question of contributory negligence of passenger in automobile is ordinarily for jury, and passenger is not chargeable with driver's contributory negligence.

8. Railroads 🔑327(12).

Guest in automobile who looked at approaching trolley car when 60 feet away from rural crossing, but failed to call it to automobile driver's attention, *held* guilty of contributory negligence as matter of law.

9. Death 🔑58(1).

Presumption that deceased did what reasonable and prudent person would do is disputable.

10. Negligence 🔑67.

Failure to attempt to extricate oneself from position of peril constitutes want of ordinary care.

11. Railroads 🔑327(12).

Passenger in vehicle operated by another may be required to take steps for his safety when aware that operator is carelessly rushing into danger.

12. Negligence 🔑117.

Contributory negligence, shown by plaintiff's evidence, *held* available to defendant, though not pleaded.

13. Death 🔑101.

Jury should not have been permitted to divide damages for death among deceased's heirs (Code Civ. Proc. § 377).

Appeal from Superior Court, Fresno County; Charles R. Barnard, Judge.

Action by Clyde E. Cate, as administrator of the estate of Genevieve Brennan, deceased, against the Fresno Traction Company and others, in which defendant Bruce filed a cross-complaint. Judgment for plaintiff, and defendants appeal.

Reversed.

Superseding former opinion, 291 P. 215.

Conley, Conley & Conley, of Fresno, for appellant William H. Bruce.

Everts, Ewing, Wild & Everts, and Dan F. Conway, all of Fresno, for appellants Fresno Traction Co. and W. E. Gash.

George R. Lovejoy and Ray W. Hays, both of Fresno, for respondent.

CAMPBELL, Justice pro tem.

This is an action brought by Clyde E. Cate, as administrator of the estate of Genevieve Brennan, deceased, against the Fresno Traction Company and its motorman, W. E. Gash, and also against William H. Bruce, the driver of the automobile in which Genevieve Brennan, deceased, and her minor son were riding at the time of the collision which occurred at a railroad crossing on September 20, 1928. The case was tried before a jury, and resulted in a verdict against all of the defendants for $20,001; also a verdict in favor of the Fresno Traction Company and W. E. Gash as against the cross-complainant on the cross-complaint of William H. Bruce. All of the defendants have appealed.

The Fresno Traction Company operates its electric trolley line on regular schedule between the city of Fresno and the town of Pinedale, which is situated some 9 miles north of Fresno, and has been operating such line for a number of years. The line runs

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*Hearing granted 2 P.2d 364.

approximately north and south between Fresno and Pinedale, and is a single track line where it crosses Shaw avenue, which is a paved highway and runs approximately east and west. The paved portion of the highway is 24 feet in width, and crosses the tracks of the Fresno Traction Company at a right angle. This intersection is about 5 miles from the city of Fresno in a level and sparsely settled country.

The deceased, Genevieve Brennan, a woman of thirty-five years of age at the time of the accident, was employed by defendant William H. Bruce, a man of thirty-seven years of age, to do general housework on a ranch upon which he was living and was leasing, which is located about 11 miles north of Madera. Some two weeks prior to the accident Bruce had taken Mrs. Brennan and her small boy to visit her mother, and on the date of the accident had gone for them and was returning them to his ranch. Bruce drove his automobile in a westerly direction along Shaw avenue. The trolley car involved in the collision approached Shaw avenue from Bruce's right, and was traveling in a southerly direction towards Fresno. For 637 feet along Shaw avenue before reaching the car tracks, and on Bruce's right as he approached the crossing and in the direction from which the electric car was approaching, there was nothing to obscure Bruce's nor Mrs. Brennan's vision of the electric car; the ground was level, no foliage, house, or other obstructions of any kind were in the open country on their right as they proceeded towards the rails of the Fresno Traction Company; 307 feet from the tracks facing east and in the direction from which Bruce and the deceased approached the tracks was a standard California State Automobile Association railroad sign. The property lines extend 18 feet both north and south of the paved portion of Shaw avenue; 12 feet 6 inches from the rail, and facing the direction from which the automobile was approaching, and 13 feet north of the paved portion of the highway, stood a standard railroad crossing sign. The automobile in which Bruce, Mrs. Brenan, and the child were riding was an open Ford. Mrs. Brennan sat next to Bruce in the front seat, and the boy was sitting at the right of his mother. From defendant Bruce's testimony, it appears that he and Mrs. Brennan were discussing what he had done while she had been away and a dance he attended. As they approached the tracks, and at a distance of about 60 or 80 feet therefrom, they both looked to the right and then he looked to the left. He further testified that he saw nothing; that Mrs. Brennan said nothing until just before the crash, when she said: "Lord! There is a car"; that he did not slow the speed of his automobile at any time during his approach to or while he was upon the tracks.

As to the motorman giving a warning signal, there is some conflict. Both the motorman and Robert Morris Hogan—the only passenger on the electric car at the time of the accident—testified that the motorman sounded a warning gong, the motorman stating: "Somewhere within about sixty feet of the edge of the paved portion of the highway, and I rang my gong * * * and he didn't check his speed any, and they were looking right at me, and I thought he was going on through, or he might have been aiming to stop; I can't say but he didn't check his speed * * * I went over and got a little air. Taken just enough air through my air valve to pull the car down so it would give him plenty of time for clearance on through. * * * Well, he didn't check his speed. I got up within—something about ten or twelve feet of the edge of the paved portion of the highway and he was anywhere from about seven to nine feet east of the street car rail and all of a sudden he slammed on his brakes and swayed just a little to the left, and I had taken all the air I had, then at that time, and I realized there was going to be an accident." The passenger, Hogan, stated that the motorman rang his gong "ten or fifteen feet before we hit the crossing. I couldn't say just exactly how far." Defendant Bruce testified that he heard no such gong sounded, and Floyd Lawden, a youth of thirteen years of age, who was walking along Shaw avenue and when about 100 feet west of the car tracks his attention was attracted by the crash of the collision, testified that he did not hear a gong or bell ring. When the motorman first observed the automobile, the electric car was traveling at 18 or 19 miles an hour, and when it approached the crossing it had been slowed down to 17 miles per hour. The speed of the automobile, according to defendant Bruce, was from 18 to 22 miles an hour. The automobile was struck about the center of the highway, shoved along and across the same and up to a telephone pole which stood 18 feet south of the southerly edge of the paved portion of the highway and a few feet west of the electric car tracks. Mrs. Brennan and her son sustained injuries from which they both died the next day.

[1-6] The facts clearly show the driver of the automobile to be guilty of contributory negligence as a matter of law in driving his automobile upon a railroad track, which is itself a sign of danger, without first looking and listening. Giannini v. Southern Pacific Co., 98 Cal. App. 126, 276 P. 618, and cases collated. Shaw avenue is outside the limits of any incorporated city, and, there being no ordinance compelling the motorman to stop at the intersection, the action is governed by different rules of law than those which arise within the corporate limits of a municipality, coming under the same rules of law applicable to steam railways. New York Lubricat-

ing Oil Co. v. United Railroads, 191 Cal. 96, 215 P. 72; Billig v. Southern Pacific Co., 192 Cal. 357, 362, 219 P. 992, 995. The evidence discloses that the motorman observed the automobile proceeding at an ordinary rate of speed, and therefore had a right to rely upon the presumption that the driver would perform his duty and stop at the intersection. And this is especially true where, as here, the driver was looking directly at the electric car. His view was clear and unobstructed, and the fact that he testified that he did not see the car nor hear the warning gong is immaterial, as "the law presumes that a person possessing normal faculties of sight and hearing must have seen and heard that which was within the range of his sight and hearing." Young v. Southern Pacific Co., 189 Cal. 746, 754, 210 P. 259, 262. Furthermore, a person approaching a railroad track, which is itself a warning of danger, must take advantage of every reasonable opportunity to look and listen, and a traveler may not depend upon a custom or even a duty enjoined by law to give appropriate signals of the approach of trains, and has no right, because he heard no such signals, not to look and listen. Griffin v. San Pedro, L. A. & S. L. R. R. Co., 170 Cal. 776, 151 P. 282, L. R. A. 1916A, 842. Vaca v. Southern Pacific Co., 91 Cal. App. 470, 475, 267 P. 346. The motorman had the right to presume that the driver of the automobile would stop or turn aside until his conduct was such as should reasonably have led him to apprehend the contrary. So long as it appeared that the driver, "with reasonable care, could stop his automobile, or turn it to one side or the other, so as to avoid a collision, and there were no obvious indications that he might not do so, the motorman had the right to assume that he would do so and upon that assumption to proceed along the track." Arnold v. San Francisco-Oakland Railway Co., 175 Cal. 1, 164 P. 798, 800. "The operator of such train or car was not bound to check the otherwise rightful speed of his train or car in approaching and passing such crossing until at least he has reason to believe that such person so approaching such crossing is not performing, or is not likely to perform, his duty in the foregoing regard." Billig v. Southern Pacific Co., supra.

In the present case the testimony shows that the motorman was not aware of any danger until his car was approximately 10 or 12 feet from Shaw avenue. Up to that time he believed—as under the law he had a right to believe—that the driver of the automobile would obey the law and either stop his automobile or speed up and go by, and this especially in view of the fact that, when he first looked, the occupants of the automobile were looking at him. In fact, the testimony of Bruce was that when he was 80 feet back from the track both he and the deceased looked in the direction of the oncoming car, and the testimony further establishes the fact that Bruce could easily have stopped his automobile before reaching the intersection. From a point 10 or 12 feet from Shaw avenue, where the motorman first became cognizant that a collision would occur or first realized there was imminent danger, he did everything within his power to stop the car; he gave it all the air he had, and did his utmost to prevent the accident.

Respondent urges that the question of the contributory negligence of the deceased is one of fact for the jury, and cites Parker v. Southern Pacific Co., 204 Cal. 609, 615, 269 P. 622, 624, wherein it is said: "It is impossible to lay down a general rule as a test of a passenger's responsibility under such circumstances. At times it might be highly improper to suggest any course of action on the part of the driver. At other times the circumstances might be such as to charge the passenger with some duty to suggest caution or otherwise endeavor to protect himself. See Parmenter v. McDougall, 172 Cal. 306, 156 P. 460; Stewart v. San Joaquin L. & P. Corp., 44 Cal. App. 202, 186 P. 160. Each case must rest upon its own set of facts, and the determination of those facts, as a general rule, is one for the jury."

[7, 8] We concede that the question of a passenger's contributory negligence is ordinarily a question for the jury, and, further, that the contributory negligence of the driver cannot be imputed to a passenger. Bryant v. Pacific Electric Ry. Co., 174 Cal. 737, 164 P. 385; Irwin v. Golden State Auto Tour Corp., 178 Cal. 10, 171 P. 1059; Nichols v. Pacific Electric Ry. Co., 178 Cal. 630, 174 P. 319; Marchetti v. Southern Pacific Co., 204 Cal. 679, 269 P. 529, 531. We do not, however, agree with respondent that the facts in Marchetti v. Southern Pacific Co., supra, upon which he principally relies, are analogous to those in the present case. In that case the facts, and we think the law applicable here, are stated in the following quotation: "Respondents contend that under the authority of Thompson v. Los Angeles, etc., Ry. Co., 165 Cal. 748, 134 P. 709, and Parmenter v. McDougall, 172 Cal. 306, 156 P. 460, that a passenger in a vehicle operated by another is bound to exercise ordinary care for his own safety, and that, if such passenger is aware that the operator is carelessly rushing into danger, it may be incumbent upon him to take steps for his safety. These cases undoubtedly contain a correct statement of the law upon the subject of a passenger's duty in case of known danger. They have little or no application to the present case, for the reason that it does not appear that there was anything that could have been done by the deceased which would have averted the collision. Had he looked in the direction the train was approaching, he could not, owing to the obstructions between him and the rail-

road right of way, have seen it until it had almost reached the street upon which he was traveling. Furthermore had he seen it in time to have warned the driver, there is no assurance that the latter could have brought his machine to a stop before reaching the railroad track."

In the present case the deceased's view of the approaching car was unobstructed; the ground was level; no foliage, house, or obstruction of any kind were in the open country as the driver and passenger proceeded toward the crossing. The passenger at a distance of from 60 to 80 feet from the crossing—according to the testimony of all of the witnesses—looked directly at the car, and, as it was within the range of her vision, she saw it. Young v. Southern Pacific Co., supra. There was but slight variation between the rate of speed of the electric car and the automobile when the automobile was from 60 to 80 feet from the crossing. The driver maintained his same rate of speed, and evidently through mental abstraction—his mind being on a dance he was telling the deceased about which he had attended while she was away—failed to observe the close proximity of the electric car and to realize that he was driving into danger, and drove his automobile directly into the path of the on-coming car. Had the deceased called the attention of the driver to the electric car, at the rate of speed he was driving he could easily have stopped the automobile and averted the collision.

[9-11] While it is true that the deceased is presumed to have done what a reasonable and prudent person could or would have done for his or her own safety, such presumption is disputable, and the undisputed evidence here refutes such presumption. While the question of the contributory negligence of the passenger, as a rule, is one for the jury (Parker v. Southern Pacific Co., supra), we think the facts as disclosed by the record are such that reasonable persons could draw but one conclusion, and therefore the question of contributory negligence in the present case is one of law. When one finds himself in a position of peril and makes no attempt whatever to extricate himself from such position, such lack of action on his part constitutes want of ordinary care (Giannini v. Southern Pacific Co., supra). We think the facts here bring the case under the rule announced in Thompson v. Los Angeles etc., Ry. Co., 165 Cal. 748, 134 P. 709, and Parmenter v. McDougall, 172 Cal. 306, 156 P. 460, and reaffirmed in Marchetti v. Southern Pacific Co., 204 Cal. 679, 683, 269 P. 529, 531, "that a passenger in a vehicle operated by another is bound to exercise ordinary care for his own safety, and that, if such passenger is aware that the operator is carelessly rushing into danger, it may be incumbent upon him to take steps for his safety." In other words, that it was incumbent upon the deceased to call the attention of the driver to the danger into which he was blindly driving.

[12] There is no merit in respondent's contention that the defense of contributory negligence is not available to defendant Gash, as contributory negligence is not pleaded by him. While it is generally true that contributory negligence of the plaintiff must be pleaded by defendant in order that he may rely upon it as a defense, it is available if the evidence of the plaintiff affirmatively shows such contributory negligence. 19 Cal. Jur. 681, 698; Robinson v. Western Pacific R. R. Co., 48 Cal. 426; Green v. Southern Pacific Co., 132 Cal. 254, 64 P. 255; Kenny v. Kennedy, 9 Cal. App. 350, 99 P. 384.

The depositions of defendants Bruce and Gash were read in evidence by the plaintiff, from which it affirmatively appears that the deceased was guilty of contributory negligence.

[13] As what we have said disposes of the case upon its merits, it becomes unnecessary to discuss the points urged by appellants that the court should not have permitted the jury to find specially the amount each particular heir was entitled to receive from the total damage found, and that the court erred in refusing to give certain instructions. We might, however, say that, while such fact might not call for a reversal, the jury should not have been permitted to divide the total amount found between the heirs, fixing the loss of Frank Brennan at $1 and the other four heirs at $5,000 each. Under section 377 of the Code of Civil Procedure it is not intended that the amount recovered shall be divided into integral or proportional parts. Robinson v. Western States Gas Co., 184 Cal. 410, 194 P. 39.

As to the point urged that the court erred in refusing certain instructions, we may say that in our opinion the instructions correctly state the law, and should have been given, unless the principles they announce are embodied in other instructions. There is no claim that the instructions refused are covered by others with the exception of defendants' instruction No. 4, which deals with the prudence and care a guest in an automobile must exercise, and we think the instruction quoted by respondent as given by the court is sufficient on this question.

The judgment is reversed.

I concur: TYLER, P. J.

111 Cal. App. 72

WHEAT v. McNEILL.

Civ. 4228.

District Court of Appeal, Third District, California.

Jan. 12, 1931.

1. Judgment 🔑143(6).

That defendant believed he had not been properly served with summons did not constitute mistake authorizing vacation of default judgment (Code Civ. Proc. §§ 410, 411).

2. Judgment 🔑143(6).

That defendant believed that summons had to be served by sheriff did not constitute mistake authorizing vacation of default judgment (Code Civ. Proc. §§ 410, 411).

3. Judgment 🔑153(2).

Motion to vacate default judgment for mistake, not filed within six months from judgment, *held* too late.

4. Judgment 🔑17(10).

Where affidavit showed service of summons, court could render default judgment, although affidavit was erroneous as to place of service.

> Facts disclosed that the person making the return of the service of summons was mistaken as to the county in which the service was made, but no default was entered against the defendant in the action until more than 30 days had elapsed after the service of summons.

5. Fraud 🔑3.

For "fraud" there must be representation of material fact made falsely, recklessly or without reasonable ground for believing it true, to induce party to act and damages through reliance thereon.

> [Ed. Note.—For other definitions of "Fraud," see Words and Phrases.]

Appeal from Superior Court, Los Angeles County; Leon R. Yankwich, Judge.

Action by Carl O. Wheat against D. A. McNeill. Judgment for defendant, and plaintiff appeals.

Affirmed.

See, also, 295 P. 105.

Burr A. Brown, of Long Beach, for appellant.

Willis I. Morrison, of Los Angeles, for respondent.

PLUMMER, J.

Plaintiff prosecutes this appeal from a judgment entered after order sustaining without leave to amend a general and special demurrer to the plaintiff's second amended complaint. The action was brought to have set aside and vacated a judgment theretofore recovered by the respondent against the plaintiff in the superior court of the state of California, in and for the county of Los Angeles, wherein the respondent D. A. McNeill was plaintiff and the appellant Carl O. Wheat was defendant.

The record before us shows the following:

That on August 14, 1925, respondent was injured by an automobile operated by the appellant; that on August 12, 1926, the respondent began an action to recover damages against the appellant herein for the personal injuries above referred to. On August 17, 1926, the appellant was personally served with summons in said action, by a person duly qualified to make service thereof, the service being made in the county of Orange. On August 19, 1926, the summons was filed, together with a return of service alleging service to have been made in the county of Los Angeles instead of in the county of Orange. On September 20, 1926, no appearance having been made by the appellant in said action, and more than thirty days after the service above mentioned, the default of appellant in the action referred to was duly entered. Thereafter, on April 5, 1927, after hearing by the court, judgment was entered in said action for personal damages in favor of the respondent and against the appellant, in the sum of $3,000 damages and $12 costs. On November 8, 1926, the appellant was served with an order to appear for examination on supplementary proceedings. On November 25, 1926, the appellant filed a notice of motion in said action, prosecuted by the respondent to obtain damages for personal injuries, as above stated, to vacate said judgment on the grounds that said judgment was taken through mistake, inadvertence, surprise, or excusable neglect of appellant, and that said judgment was procured by extrinsic fraud on the part of the respondent.

The points made by the appellant in the case now before us are to the effect that the affidavit of service and the recitation contained in the judgment that personal service of summons and complaint was made in the county of Los Angeles, state of California, when in truth and in fact such personal service was made in the county of Orange, state of California; that the default judgment was obtained through appellant's mistake, inadvertence, surprise, or neglect; and that the default judgment against the appellant was procured by extrinsic fraud. The allegations of the complaint relative to the service of summons, mistake, fraud, etc., are shown by the following excerpts therefrom: "That the plaintiff is further informed and believes and upon such information and belief alleges that said Robert C. Fonda was not at the times hereinafter mentioned, an officer of the law, authorized to make the service of a summons in an action in the manner as prescribed by statute, and that said Robert C. Fonda, as an individual, and as the authorized agent and under the direction of the said D. A. McNeill and the said California Casualty Indemnity Exchange, made the service of the summons and complaint in the action aforesaid, entitled D. A. McNeill, plaintiff, v. Carl O. Wheat, defendant, and made return thereon that he served said Carl O. Wheat, as defendant in said action in the County of Los Angeles, State of California, on the 17th day of August, 1926, when in truth and in fact said defendant, the plaintiff herein, was served, if regularly served at all, with process in said action, at his residence in the County of Orange, State of California; that judgment by the Court in said action rendered on the 5th day of April, 1927, also recites that said defendant, plaintiff herein, Carl O. Wheat, was regularly served with process within said County of Los Angeles, and that such return of service and such judgment by the Court, for the reasons aforesaid, were not regularly made and as in such cases by law provided. That the plaintiff is further informed and believes, and therefore alleges that the default of the defendant, the plaintiff herein, Carl O. Wheat, in said case No. 202988, in said Superior Court of the County of Los Angeles, was entered and ordered filed on September 20th, 1926; that judgment was rendered upon the hearing of such default in department 3 of said Court on April 5th, 1927, wherein said D. A. McNeill was given judgment for $3000.00 against the plaintiff herein, with his costs and disbursements, taxed at the sum of $12.00; that such judgment so rendered by the court was filed on April 5th, 1927, and docketed on April 7th, 1927, in Book 640 at page 207 of Judgments; and that said default and said judgment were taken against this plaintiff through mistake, inadvertence, surprise or excusable neglect, and that said default judgment was further procured by extrinsic fraud, as is more fully hereinafter set forth. That on or about the 14th day of August, 1925, the said Robert C. Fonda called upon this plaintiff Carl O. Wheat, and represented that he was the agent, investigator and adjuster of said California Casualty Indemnity Exchange, and that his said Company was paying to the said D. A. McNeill certain insurance by way of compensation and medical expense as a result of said alleged accident; that he was authorized by said Insurance Company, and under the terms of its policy, by the said D. A. McNeill, to effect a settlement and adjustment of said purported claim for damages; that his Company had not expended to exceed $750.00 by way of compensation and medical expense, as a result of said accident; that he was authorized, under the terms of said policy of insurance, to compromise the claim of said D. A. McNeill for that amount; that further, if the said Carl O. Wheat would furnish said Fonda the dates when the plaintiff's existing insurance would expire, and would place such insurance with his, Fonda's Company, the whole matter could be settled and would be adjusted to the satisfaction of his said Company and the said D. A. McNeill; that the said plaintiff, Carl O. Wheat, so agreed to place his insurance with said Company, in full settlement of such alleged and purported claim for damages and as consideration for a full release from said D. A. McNeill for any and all claims for damages; that said plaintiff, Carl O. Wheat, as he had agreed to do, furnished the expiration dates of the insurance which he was carrying and relied upon the representations of said Fonda, and is now, and at all times herein mentioned, has been ready to place his said insurance with said Company, in accordance with the terms of the aforesaid agreement of settlement and compromise."

The complaint likewise further alleges that on the 25th day of November, 1927, the appellant in this action duly served and filed a notice of motion in the superior court of the county of Los Angeles, in the personal injury action to which we have referrred, to set aside such judgment upon the ground that said judgment had been taken against the appellant herein through mistake, inadvertence, surprise, or excusable neglect, and upon the further ground that said judgment was procured by extrinsic fraud, and without setting forth in the complaint what action, if any, was taken by the trial court upon the motion just referred to, the complaint in this action further alleges that the plaintiff has exhausted his rights at law to have such judgment set aside on motion, and has no sufficient and adequate remedy at law, in that the time for appeal from said judgment has passed. This, of course, does not set forth the fact that any hearing has been had upon said motion, and that if said motion had been denied by the trial court, the time for appealing from the order denying such motion had expired prior to the filing of this complaint.

[1, 2] As to the mistake, inadvertence, etc., alleged in the complaint, and the fraud in relation thereto, the following excerpt from the complaint may be recited as a complete answer to any grounds for relief: The complaint uses the following language: "That the plaintiff was at such time (referring to the service of summons), of the opinion and belief that such summons and complaint, in order to be legal, had to be served upon him by a sheriff or an officer of the law; that at such time the plaintiff was not of the opinion and belief that he had been actually and legally served with a copy of the summons and complaint in said action, or in said action at all; that

because of the aforesaid facts the plaintiff, through mistake, inadvertence, surprise or excusable neglect, failed to employ the services of an attorney, and refrained from making any legal defense to such action, and suffered a default to be taken therein and judgment rendered against him." This, of course, constitutes no excuse whatever. By his own pleading the appellant in this case shows that the service of summons in the personal injury action, that is, the action where judgment was taken by default against the appellant, was had in entire accordance with the provisions of sections 410 and 411 of the Code of Civil Procedure.

[3, 4] While the complaint in this action shows that the appellant on the 25th day of November, 1927, served and filed a notice of motion in the personal injury action referred to, setting aside the judgment therein on the grounds that it was allowed to be entered through mistake, inadvertence, surprise or excusable neglect, and upon the further ground that said judgment was procured by extrinsic fraud, the complaint likewise shows that it was not made within six months of the entry of the judgment, and therefore, as to the grounds of mistake, inadvertence, surprise, or excusable neglect, the time has gone by for raising such questions, and only the question of fraud can be considered herein. So far as the service of summons is concerned, and the entry of the default, while it does appear that the person making the return of the service of summons was mistaken as to the county in which the service was made, the fact exists that no default was entered against the defendant in said action, the appellant in this action, until more than thirty days had elapsed after the service of summons, and therefore the default was not prematurely entered, and the affidavit of service, though admitted to be erroneous as to the place of service, nevertheless showed the fact of service, and it was this fact that gave the trial court jurisdiction, and everything necessary to constitute a valid service of summons in the personal injury action referred to appears by the complaint in this action.

[5] In examining the complaint filed by the appellant herein, we find there is a complete absence of the following essential facts, as set forth by the respondent, necessary to constitute a cause of action based upon fraud: A representation as to a material fact, not merely an expression of opinion; that the representation is false or knowingly so, or else recklessly made, or without reasonable ground for believing it true; that it was made to induce the other party to act or refrain from acting; that it was relied upon, and in reliance thereon action was taken or refrained from being taken; that by reliance thereon the party has suffered damages.

A succinct statement of the law as to what is necessary to be set forth to show action of a fraud is set forth in 12 California Jurisprudence, p. 724, in section 12, which reads as follows: "Fraud may be the basis of an action for damages for deceit. When a cause arises out of an alleged false representation, the plaintiff, in order to prevail, must ordinarily show that the representation was as to a material fact; that such fact was false and known to be false by the party making it, or else recklessly made, or without reasonable grounds for believing its truth; that the representation was made with intent to induce the other party to do or refrain from doing some act; that it was relied upon by the other party—in other words, that such other party was actually misled and deceived and induced by it to act or refrain from acting; that in so acting or refraining from acting he was ignorant of the falsity of the representation and reasonably believed it to be true; and that he thereby suffered damage or injury. The absence of any one of these elements is generally fatal to a recovery." Nothing of this kind appears in the complaint.

Other authorities might be cited and a further elucidation made of the correctness of the trial court's ruling, but what we have set forth is sufficient to show that the judgment entered in this action is proper.

The judgment is affirmed.

All concur.

111 Cal. App. 79

McNEILL v. WHEAT.

Civ. 4250.

District Court of Appeal, Third District, California.

Jan. 12, 1931.

Judgment 🔑153(2).

Motion to set aside default judgment for mistake, under statute, made more than six months after entry of judgment, *held* too late (Code Civ. Proc. § 473).

Appeal from Superior Court, Los Angeles County; B. Rey Schauer, Judge.

Action by D. A. McNeill against Carl O. Wheat. From an order denying a motion to set aside a default judgment, defendant appeals.

Affirmed.

Burr A. Brown, of Long Beach, for appellant.

Willis I. Morrison, of Los Angeles, for respondent.

PLUMMER, J.

This is an appeal from an order denying a motion to set aside a default judgment.

The record in this case shows that on the 14th day of August, 1925, the plaintiff was injured by an automobile driven by the defendant. The action herein was begun on the 12th day of August, 1926; summons was served on the defendant on the 17th day of August, 1926, personal service being made upon the defendant in the county of Orange, by delivering to and leaving with the defendant a true copy of the summons attached to a true copy of the complaint in said action. The record shows that the service was made by a person duly qualified to make such service. Thereafter, no appearance having been made by the defendant, on the 20th day of September, 1926, default was entered in said action, and on April 5, 1927, after the hearing of witnesses in open court, judgment was entered against the defendant in the sum of $3,012. Thereafter, and on November 25, 1927, defendant moved to vacate the judgment on the ground of defendant's mistake, inadvertence, surprise, or excusable neglect, and upon the ground that the judgment was obtained by extrinsic fraud. The record shows that this motion was made more than six months after the entry of the judgment, and was therefore too late to give the court jurisdiction to set aside the default on either the ground of mistake, inadvertence, surprise, or excusable neglect, as provided for in section 473 of the Code of Civil Procedure. While the return of the summons erroneously stated the service of summons in the county of Los Angeles, the record shows that service was actually made in the county of Orange, but more than thirty days elapsed after service before the default of the defendant was entered. The affidavit filed by the appellant in support of his motion establishes the fact of service of summons in all particulars as required by sections 410 and 411 of the Code of Civil Procedure, and what we have said in the case of Carl O. Wheat, Plaintiff and Appellant, v. D. A. McNeill, Defendant and Respondent, 295 P. 102, in an opinion this day filed, applies to the service of summons, and also as to the failure of the appellant to set forth any facts justifying the setting aside of the default judgment.

On the ground of fraud, for the reasons stated in the opinion in the case to which we have referred, the order appealed from in this action is affirmed.

All concur.

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111 Cal. App. 177

PEOPLE v. SMITH.

Cr. 35.

District Court of Appeal, Fourth District, California.

Jan. 16, 1931.

1. **Licenses** 🔑18½.

Words "bona fide," in section of Corporate Securities Act excepting bona fide sales of securities by owners, cover manner of sale (St. 1929, p. 1254, § 2(c), par. 3).

> Corporate Securities Act, St. 1929, p. 1254, § 2(c), par. 3, provides that act shall not apply to sale in bona fide way of any security by owner, who is not issuer or underwriter thereof, for his own account and not for purpose of evading act.
>
> [Ed. Note.—For other definitions of "Bona Fide," see Words and Phrases.]

2. **Licenses** 🔑42(4).

Evidence of defendant's method of selling stock and circumstances surrounding corporation's organization and his acquisition of stock *held* admissible in trial for violating Corporate Securities Act (St. 1929, p. 1254, § 2(c), par. 3).

3. **Licenses** 🔑42(4).

Evidence *held* to show that stock was sold by owner partly for corporation's account to evade Corporate Securities Act (St. 1929, p. 1254, § 2(c), par. 3).

Appeal from Superior Court, Riverside County; O. K. Morton, Judge.

Joe A. Smith was convicted of violating the Corporate Securities Act, and he appeals.

Affirmed.

Josiah Coombs, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Lionel B. Browne, Deputy Atty. Gen., for the People.

BARNARD, P. J.

The defendant was charged with a violation of the Corporate Securities Act of the state of California in an information containing eleven counts, each count being similar in form to the first one, which reads as follows: "Joe A. Smith is accused by the District Attorney of Riverside County and State of California, by this information of the crime of a felony, to-wit: violation of the Corporate Securities Act committed as follows: That said defendant on or about the 16th day of December, 1929, at the said County of Riverside, State of California, and before the filing of this information, did willfully and unlawfully sell to J. A. Toombs and Hazel Toombs for value, 1000 shares of stock in Angeles Mines Incorporated, a corporation, purporting to convey an interest in a business to be carried on for profit, to-wit: the business of mining, under the name and style of Angeles Mines Incorporated, without first obtaining a permit from the Corporation Commissioner of the State of California so to do." He was found guilty by a jury, and from the judgment which followed he has taken this appeal.

It is earnestly urged that the case must be reversed because the appellant, as an individual, was selling stock personally owned by him, which he had acquired for value, and that he comes within the exception provided for in section 2 (c), paragraph 3 of this act, which exception reads as follows "(c) Except as hereinafter expressly provided, the provisions of this act shall not apply to the sale of any security in any of the following transactions: * * * 3. The sale in a bona fide way of any security by an owner who is not the issuer or an underwriter thereof, who sells the same for his own account; and not for the purpose of evading the provisions of this act." Stats. 1929, p. 1254. Appellant relies upon the case of People v. Pace, 73 Cal. App. 548, 238 P. 1089, 1094. In that case the question was presented as to whether or not an individual who was a bona fide owner of securities might lawfully sell them in repeated and successive transactions of a like or similar character, without first securing a license or permit in accordance with the provisions of the Corporate Securities Act. It was there held that this act as it then stood, was unconstitutional, in so far as it attempted to prevent such a bona fide owner from selling securities individually owned by him in repeated and successive transactions of like or similar character. That case involved a question very different from the one now before us, it being there pointed out by the court that the defendant therein had informed the parties purchasing stock from him that the stock being sold them was not treasury stock but was being transferred to them through some individual; that the corporation received no part of the money paid by the purchasers of the stock and all such money was retained by the defendant as his own funds; that no contention was made either at the trial or upon appeal that the defendant was not the bona fide owner of the stock sold; that no contention was made that the defendant either in acquiring the stock or selling the same was acting for the corporation; and further, that it was not even suggested that the defendant in acquiring and selling the stock was resorting to a subterfuge, in order to avoid the necessity of procuring a permit. In its opinion, the court said: "We would suggest that if the purpose of the section is to prevent fraudulent conduct in the sale of securities, it would not be a difficult matter to draft a provision of the law that would meet such a need." Subsequently, the Corporate Securities Act was amended and the portion providing an exception to the necessity of obtaining a permit, so far as here applicable, now reads as above set forth. It is appellant's contention that he comes within that exception; that the only question involved is as to whether he was the owner of the stock alleged to have been sold; that it affirmatively appears from the People's evidence that he was such owner, and the case should not have been allowed to go to the jury; and, further, that all evidence concerning the circumstances of each sale, and all evidence as to how he acquired the stock in question was inadmissible. On the other hand, it was and is the theory of the prosecution that it was proper to submit to the jury the questions as to whether the defendant was in fact the owner of the stock sold and was selling it in a bona fide way, whether he was selling the same for his own account and not for the benefit of the corporation, and also whether he made the sale in the manner he did for the purpose of evading the provisions of this act.

The stock sold by appellant was certain stock in a corporation organized under the laws of the state of Nevada, under the name of "Angeles Mines, Incorporated." It is conceded that this corporation had never applied to the corporation commissioner of the state of California for a permit to sell securities, that the appellant had never applied for a broker's or agent's license or permit to sell securities, and that no such permits had been issued. It is also conceded that the appellant sold shares of stock in this corporation to the several individuals, and in the amounts, as alleged in the various counts of the information. In connection with the incorporation of Angeles Mines, Incorporated, and how the stock in question came into the possession of appellant, the following facts appear: Articles of incorporation of the company named were filed in the office of the secretary of state of the state of Nevada on June 6, 1929, naming as original subscribers and first directors, three persons, to wit: Frank S. Cliff with 300 shares, F. E. Meder with 100 shares, and L. H. Peters with 100 shares. These articles were signed by these three persons and acknowledged on June 6, 1929. The minutes of the corporation show that the first meeting of incorporators was held on June 6, 1929, in Carson City, Nev.; the above-named three incorporators being present. It was reported that the articles of incorporation had been filed on that same day; the three persons above named were elected directors to hold office for the ensuing year; and a resolution was adopted authorizing the directors to issue the entire capital stock of the company "for money, labor done, personal property, real estate or leases thereof, or any of such considerations, as they shall from time to time deem advisable." Thereupon, the secretary presented transfers of subscription as follows: From Frank S. Cliff to Joe E. Smith, 300 shares; from F. E. Meder to Joe E. Smith, 100 shares; and from L. H. Peters to Joe E. Smith, 100 shares. A motion was passed approving these transfers, the written transfers being entered in the minutes. While there is an error as to the middle initial, appellant conceded in his testimony that these shares were on that date transferred to him. The next meeting shown by the record is the first meeting of directors, which was held in Carson City, Nev., on June 13, 1929, pursuant to a written waiver of notice signed by Frank S. Cliff, F. E. Meder, and L. H. Peters, although they had previously assigned to appellant all their stock in the corporation. The minutes of this meeting show that Cliff was elected president, Meder vice president, and Peters secretary and treasurer. Thereupon, the chairman read a letter from appellant offering to quitclaim to the corporation all his interest in certain mining claims in Los Angeles county, Cal., described in the letter, in exchange for 350,000 shares of the common stock of the corporation, at the par value of $1 per share, the same to be issued to him or to his nominees; whereupon, at the same meeting, a resolution was adopted accepting this offer and directing the transfer of said 350,000 shares of stock to the appellant. Thereupon, these same three directors adopted a resolution accepting their own resignations as officers and directors of the corporation, to take effect at the close of the meeting. Thereupon, the appellant, his attorney, and another, were elected officers and directors of the corporation by the three retiring directors, the appellant being elected president, treasurer, and director. The minutes of the same meeting, on June 13, 1929, in addition to the written resignation as officers and directors of the three original incorporators, also show that there was put in the signed but undated resignations of appellant's attorney and the other party, who on that day had been elected officers and directors with the appellant.

It thus appears that appellant owned all of the stock of the incorporators from and after June 6, 1929, that his proposition to exchange his mining claims for 350,000 shares of stock in the corporation was presented at the first meeting of the board of directors and accepted that same day by three directors who had a week before assigned all of their interest in the corporation to the appellant, and who at the same meeting at which they accepted this proposition, accepted their own resignations as officers and directors of the corporation and elected appellant, his attorney and another, as such officers and directors; and that all of these new officers and directors, with the exception of the appellant, at the same time handed in their undated resignations as such officers and directors. Thereafter, as shown by the minutes, these three new directors continued to hold meetings, presided over by the appellant as president, all subsequent meetings being held in Los Angeles, Cal. At the first meeting, on July 1, 1929, one Harcourt was employed as superintendent of construction on the company's mining properties. The appellant, as president of the corporation, was authorized to borrow the sum of $5,000 or any portion thereof, from any bank or individual. At a meeting of the board of directors on August 18, 1929, a report was submitted by appellant, as president, showing the progress of development work at the mine and showing that four additional men had been employed. At a meeting on September 2, 1929, although no borrowing of money or other financing was reported by the president, he reported it was necessary to install a water system and was authorized to proceed therewith. At a meeting on September 16, 1929, the president reported that the water system had been installed, and that the corporation had incurred a monthly rental of $50 for water. At a meeting of the board of directors held on October 14, 1929, the by-laws were so amended as to permit the annual meetings of the stockholders to be held in Los Angeles. At a meeting held on January 16, 1930, the president was authorized to borrow $25,000, or any portion thereof, from any bank or individual.

It further appears that the defendant acquired the mining claims which he exchanged for the 350,000 shares in this corporation partly from one Harcourt and partly from two persons acting as trustees for one Carpenter. Harcourt testified that he owned five of these claims, upon which he had spent about $3,700 in development work, and that he thought they were worth about $50,000; that he quitclaimed these to the appellant on February 1, 1929, receiving 75,000 shares of stock in Angeles Mines, Incorporated, in payment therefor, but that this stock was not delivered to him until some time in July, 1929; that at the time he delivered the quitclaim deed to appellant, it was agreed between them that he was to get 75,000 shares of stock for his property, but at that time no corporation had been formed. He further testified that between May and September, 1929, appellant furnished to him various supplies for the purpose of developing the mine, including the paying of labor bills amounting to $1,700. The appellant himself testified that while he bought the claims from Harcourt on February 1, 1929, and subsequently gave him 75,000 shares of stock in the corporation for the property, no agreement to do this was made before June, 1929, and that when Harcourt deeded the property to him it was agreed that Harcourt should have some interest but the amount thereof was not stipulated. He further testified that he bought the Carpenter claims for 25,000 shares of stock in the corporation, paying the same after the company was incorporated, but that when he bought the same on February 2, 1929, there was no price agreed upon between them, but that "they were trusting to my integrity to deal fairly and rightly with them." He further testified that his proposition to exchange the mining property for 350,000 shares of stock in the corporation was made to the corporation on the same day it was accepted; that the total issue of stock in the corporation was 350,000 shares, 250,000 of which were issued to him, 70,000 to Harcourt, and 30,000 to Carpenter; that at the time of the trial he still owned 200,000 shares; that he had never met the three directors of the corporation at the time they elected him president on June 13, 1929, and transferred 350,000 shares of stock to him; that he first heard of the corporation on the day it was organized, and that he heard of it through his attorney; that the stock certificates had not been printed on June 13, 1929; and that he put in some improvements on the mining properties after he became president of the corporation but could not say how much he had expended in this, nor could he approximate it. He further testified that the original shares in the company were transferred to him on June 6, 1929, as a part of the consideration for the proposition which he first made to the company on June 13, 1929, a week after the stock was transferred.

In reference to how the sales were made, the evidence shows that the appellant was a preacher; that he had formerly preached at the Four Square Church in Riverside, and most, if not all, of these sales were made to parties who attended this church. J. A. Toombs testified that he was a member of this church; that he became acquainted with appellant through the purchase of a Bible from him; that between the first and 16th day of December, 1929, appellant called at his home and told the witness and his wife that he had a project he was putting over; that he was selling stock in a mining company and he showed samples of gold and silver ore; that he told of a man named Carpenter, stating that Carpenter had been converted under his ministry and healed at one of his meetings; that he had investigated a mine belonging to Carpenter and decided it was a project fit "to put over to carry on the work of the Gospel"; that the project would pay dividends at the rate of 20 per cent. a month, and that 10 per cent. of the net earnings of the mines were to be set aside for the work of the Gospel, to be divided among the churches in different districts in proportion to the amount of money invested in each district; that appellant stated he was selling stock in the Angeles Mines, Incorporated, but said nothing about it being his own stock; that witness invested over $1,000 and had received nothing back; and that appellant promised the witness remuneration for any help he would give him in selling stock to others, saying that the state allowed him to give him 10 per cent. of any amount that the other party might invest. Appellant stated that he was representing the corporation of which he was president and was trying to raise some money to put the mine over; and that he needed the money to pay for some cyanide. Mrs. Hazel Toombs corroborated her husband's testimony and added that the appellant had stated that Carpenter wanted to give appellant a mine to help in the Lord's work and that "he just gave him this mine," and further that appellant stated he "wanted to sell the stock and put over the mine and get this money, to go ahead and develop this mine." W. A. Hart, who also bought a thousand shares of this stock, testified that appellant told him "he wanted to raise money to develop that mine, and that is what the money—what stock he sold, that is what the money would be used for, for developing this mine, and he also said ten per cent. of the net income after it was in operation, would go for Mission purposes, and also pay—commence paying the first of March, twenty per cent. of what I might invest. In five months I would have my investment all paid back"; that appellant represented he was selling the stock "of the corporation"; that when he purchased this stock appellant took a blank certificate out of his brief case and filled in his own name, Joe A. Smith as the owner, and 1,000 shares on the face of the certificate, and then turned it over and filled in the other side; that appellant told him that the state authorities at Sacramento would not grant him a permit to sell stock with a clause in it giving 10 per cent. of the profits to missions, and that this was the reason the company was incorporated in Nevada; that he also told him he carried the blank certificates around with him in order to expedite matters, and all the purchaser would have to do was to send the stock in to Los Angeles and have it transferred; that he further stated that the stock belonged to the Angeles Mines, Incorporated, and that every dollar which the witness paid for the stock would be used in the development of this mine. Mrs. Milholland testified that she purchased some of the stock; that appellant introduced himself as a representative and president of the Angeles Mines, Incorporated; stated that the purpose of the organization was chiefly religious, and secondly, financial, for the benefit of the investor; and that the money she paid was to be used in the development of the mine. Mrs. Glick testified that appellant told her he was representing the corporation and that this was not his own stock. The appellant admitted having sold the stock as alleged in the information, but testified that the stock was issued to him in exchange for mining properties, and that he later sold the stock as his individual property.

Most of the contentions of appellant may be treated under the one head, that the evidence does not support the verdict. Appellant not only contends that it was necessary for the prosecution to show that he was not the owner of the stock he sold, but takes the further position that his ownership is conclusively shown by the certificates bearing his name upon their face, and by his testimony that he paid something of value for them, and therefore that all other evidence as to such ownership or as to his methods in the sale of the stock, was inadmissible. He disposes of the question of fraud with the ingenious argument that one witness, a former owner of the mine, stated that it was worth $75,000 and that he had put $3,700 into its development, and since this conclusively shows that appellant had paid value for the 350,000 shares of stock, there was no fraud. Even if the mine was worth $75,000 appellant paid nothing until after the corporation was formed and then turned over 100,000 of the shares to the original owners of the land and kept 250,000 shares, although he had put nothing in. He himself testified that he paid nothing when he took the deed to the mining claims, and that there was no agreement as to what he was to pay until after the corporation was organized. Harcourt, from whom the claims on which the mine was situated were purchased, testified that when he gave the deed to appellant, on February 1, it was agreed he was to get 75,000 in stock but that no corporation was yet formed. Appellant not only represented to the various purchasers that he was selling stock for the company in order to get money with which to develop the mine, but the record shows that he actually put some money into such development work. While his counsel argues that it was legitimate for him to loan his own money to the corporation, we find no evidence in the record that he ever made any such loan.

[1, 2] Appellant argues that the words "bona fide," in the section of the California Securities Act we have been considering, does not refer to the manner of sale but has to do only with the question of the genuineness of the ownership of the stock, and the genuineness of the incorporation of the company in another state for a legal purpose. We think these words also have reference to the manner of sale, but even if appellant is correct in his contentions, the evidence as to the method of sale and circumstances surrounding the organization of the company, and the acquiring of the stock by the appellant, the admission of which is attacked, was admissible for the purpose of showing whether the appellant was, in fact, the owner of the stock; whether, in fact, he was acting for himself or acting for the corporation; and whether his method of procedure was for the purpose of evading the provisions of the act in question. The jury was not compelled to believe his statement that he was the owner of the stock, but was entitled to consider the surrounding circumstances in determining whether he was in fact the owner, whether he was acting for himself or for the corporation, and whether the sales were made in a bona fide way or for the purpose of evading the act.

[3] The evidence shows that at the organization meeting of the corporation all of the stock in the company was transferred to appellant and that no one else owned any of the stock until he caused certain shares to be transferred to others in payment for the mining claims involved. At the time his proposition to exchange the mining claims for all of the stock of the corporation was acted upon, he owned all of the stock in the corporation and through dummy directors was dealing with himself. Whether or not he was the owner of the 350,000 shares of stock, he was, in fact, the issuer thereof. The evidence is sufficient to show that the sales of stock described in the information were not sales of securities by an owner who was not the issuer thereof; that such sales were not made in a bona fide manner by an owner for his own account alone; and that such sales were not entirely for his own account but in part for the account of the corporation, and made with the purpose of securing funds to sufficiently develop the property which had been transferred to the corporation to make such a showing as would enable the appellant to make further sales for his own profit. We think the evidence is sufficient to show that the entire proceeding was carried out by the appellant for the purpose of evading the pro-

visions of the Corporate Securities Act. If the circumstances disclosed by this record do not show a deliberate intention to evade this act, it would be difficult to imagine a set of circumstances that would show such an intention. In our opinion, the evidence is entirely sufficient to support the verdict.

Appellant complains of the giving and refusal of certain instructions, but except in one instance where the matter complained of was fully covered by another instruction, the views, we have herein expressed dispose of these objections. After carefully examining the instructions, we find no error therein.

Appellant advances the proposition that under the authority of People v. Pace, supra, the portion of the act here under consideration, is unconstitutional. The matter is not otherwise argued, and the authority is so clearly not in point that we do not feel called upon to go into the question at any length. In our opinion, the point is without merit.

The judgment is affirmed.

We concur: MARKS, J.; WARMER, Justice pro tem.

211 Cal. 361

CROCKETT LAND & CATTLE CO. v. AMERICAN TOLL BRIDGE COMPANY OF CALIFORNIA et al.

S. F. 13381.

Supreme Court of California.
Jan. 22, 1931.

1. Eminent domain 🔑317(2).

Where statute in terms provides for condemnation of land for public use, it will be construed to authorize taking of fee.

2. Eminent domain 🔑317(2).

Toll bridge company, condemning land for approach to toll bridge, obtained fee and not mere easement (Code Civ. Proc. § 1239, subd. 1).

3. Eminent domain 🔑317(2).

If condemnor taking land for approach to toll bridge only obtained easement, it included right to enjoy easement; hence original owner could not occupy land condemned.

In Bank.

Appeal from Superior Court, Contra Costa County; A. B. McKenzie, Judge.

Action by the Crockett Land & Cattle Company against the American Toll Bridge Company of California and others. Judgment for defendant, and plaintiff appeals. Affirmed.

Courtney L. Moore, of San Francisco, for appellant.

J. E. Rodgers and A. F. Bray, both of Martinez, and John G. McKean, of Oakland, for respondents.

SEAWELL, J.

The sole question presented by this appeal is as to the relative rights of the parties herein as defined by the decree of condemnation rendered in favor of the assignor of respondent American Toll Bridge Company of California, wherein a strip of land containing seven-tenths of an acre, owned by appellant, was condemned as and for a viaduct and approach to the Carquinez Straits bridge. Said bridge is a structure of great magnitude, and spans the Carquinez Straits, a navigable body of water, at a point between San Pablo and Suisun bays. Its northerly viaduct and approach rests on Solano county soil and its southerly viaduct and approach are built on Contra Costa county soil. It is with the latter situation that this appeal has to do.

On February 5, 1923, the board of supervisors of Contra Costa county granted to Rodeo-Vallejo Ferry Company a franchise to construct, operate, and maintain said bridge, and subsequently its rights in the premises were sold and transferred to respondent American Toll Bridge Company of California. Said Toll Bridge Company having been let into the possession of said seven-tenths acre strip upon complying with the decree requiring the payment of $5,000 as the value of said strip, as found by the jury, and the additional sum of $1,000, fixed by the court as a fund to pay any further damages or costs that might be recovered in said proceeding, as well as all damages that might be sustained if for any cause the property should not be finally taken for said public use, built thereon one small residence, and moved thereon another, and constructed two garages, all of which are located beneath the floor level of the bridge at depths varying from 35 to 120 feet below said floor level. Said two small residence houses are occupied exclusively by its toll gatherers, watchmen, and other employees, who, in addition to the performance of other duties, are charged with the duty of inspection and reporting any structural or serious changes which might threaten the safety of the bridge, as well as protecting it against the acts of maliciously disposed persons or fortuitous events.

Appellant claims the right to occupy said houses on the theory that the condemnation proceedings did not vest the fee of said seven-tenths acre in the condemner. In fact, it is contended that, under the provisions of section 1239, Code of Civil Procedure, subdivision 1, the Toll Bridge Company had not the right to condemn the fee, but an easement only in said lands, and that the occupancy of the whole of said strip is not necessary for the use and enjoyment of said easement. Said statute provides: "The following is a classification of the estates and rights in lands subject to be taken for public use:

"1. A fee simple, when taken for public buildings or grounds, or for permanent buildings, for reservoirs and dams, and permanent flooding occasioned thereby," etc. That the land taken is to be devoted to a public use is not contested. That a massive steel and concrete bridge spanning for a great distance navigable waters of the San Pablo and Suisun bays built for public use in the manner described in the proceedings is both a public and permanent building within the meaning of said section 1239, would seem to require nothing further to be urged in its defense than a statement of the proposition. That the right of eminent domain may be exercised in acquiring private property for a use such as has been granted by franchise to respondent is made specific by the provisions of section 1238, Code of Civil Procedure. It matters but little so far as the right of respondent to occupy said houses is concerned, whether the respondent was given the power to condemn the fee or merely an easement in said seven-tenths acre strip in view of the need that exists for the exclusive occupancy of the whole of said strip. That the condemnation suit was tried upon the sole theory that the fee was sought rather than an easement is made manifest by the pleadings and the proceedings had upon trial. The complaint in said proceedings alleges the necessity of "*acquiring* the herein described lands. * * *" "The whole of said land is and will hereafter be necessary for the construction, maintenance and operation of said bridge approach." The prayer is for a judgment condemning and taking said lands as described for a public use and for the determining of the *value of said land.* (Italics supplied.) The verdict of the jury reads: "We the jury in this case hereby assess the value of the .7 acre tract involved in this action at the sum of Five Thousand Dollars, $5,000." Nothing was said about acquiring a lesser interest than the fee, and the sum of $5,000 awarded to appellant as the value of a precipitous seven-tenths of an acre of land situate on a wide stretch of the bay shore would indicate that the jury understood that they had appraised the full value of the fee. The court found that the use for which said strip of land was condemned and taken was a public use, to wit, the construction, operation, and maintenance of a toll bridge for the transportation of vehicular, freight, pedestrian, and other traffic, and for furnishing transportation to the public generally, and it was necessary as and for an approach to said bridge. The judgment makes mention that the issue of the value of the land sought to be condemned was submitted to the jury, and approves the value as fixed by the jury.

The final order of condemnation was filed October, 1923. Appellant accepted the $5,000 award and costs, and neither moved for a new trial or appealed from the judgment. After a lapse of three and a half years, it filed its complaint, praying that it be restored to possession of said strip of land without an offer on its part to return said sum of $5,000, or any part thereof.

The trial court found that said strip of land was, in the condemnation proceeding, condemned in fee, and that on April 22, 1924. the award and costs were accepted by the appellant herein, and the judgment has become final; that said bridge had been fully completed and was in full operation at the time the instant action was commenced; that said bridge is a permanent building within the meaning of section 1239, Code of Civil Procedure, and a public building within the meaning of the provisions of the Political Code; that the proper safeguarding, care, and operation of said bridge requires that the owners and operators of the bridge have the exclusive occupancy of said strip of land.

[1, 2] The judgment which followed did not make special mention of the fee, but adjudged the respondent bridge company to be entitled to the sole and exclusive occupancy of said strip of land until the expiration of the franchise granted to respondent by the board of supervisors of Contra Costa county, at which time it will become the property of the counties of Contra Costa and Solano, state agencies, subject to the right of the state to acquire it prior to the day on which the franchise expires. The law is that, where the statute in terms provides for the condemnation of lands for public use, it will be construed to authorize the taking of the fee. McCarty v. Southern Pacific Co., 148 Cal. 211, 82 P. 615. The same rule would apply to pleadings and judgments.

Apart from the question as to the ownership of the fee, there can be no doubt that the respondent is entitled to the exclusive occupancy of the entire strip upon which there are erected six or more massive towers and piers, which support the weight of the bridge. It may become necessary to construct other piers or to resort to other methods as a means of strengthening the pier support, which carries an enormous overhead tonnage, and thereby practically occupy the whole of said seven-tenths of an acre of land. Surely such a right could not be contested. The houses, which are occupied by toll-gatherers, caretakers, and others, are so located as to give to the occupants a full view of the tower and pier structure for the entire length of the bridge, and serve as convenient telephone stations for communicating with the farthest end of the bridge in emergency cases. A part of the electric lighting appliances are located also upon these premises. The occupancy at all hours of said foundation base by said several employees and their families affords a vantage point from which ready and frequent observation may be made of the understructure of the bridge, as well as an opportunity to observe trespassers, and said occupancy is not only consistent with the maintenance and operation of a public bridge of the type of the Carquinez bridge, but it is in the interest of public safety. This court held in McCarty v. Southern Pacific Co., supra, that the condemnation of an easement for levee purposes gave to the owner of the easement the right to erect and maintain on the levee all buildings or other constructions that may be reasonably necessary or convenient for the use to which it is devoted, or which are adapted to preserve it in good condition for that use.

In Tucker v. Tower, 9 Pick. (26 Mass.) 109, 19 Am. Dec. 350, an easement was granted for a toll road. It was held that a residence erected thereon in which the toll gatherer lived and collected fares was a reasonable use of the easement. The court further said:

"The ground taken by the plaintiff is founded upon a supposed limitation of the right of the corporation to use the surface of the land only for the purpose of travel; but we do not understand their right to be so limited, but that they may make such use of the land below the surface as may be necessary to secure and maintain the proper enjoyment of their franchise; thus, without doubt, posts may be sunk into the earth for the gate to swing upon; and such digging of the soil is justifiable as may be necessary for drains to the road. And we are of opinion also, that a toll-house may be placed there, and that if convenient this may be made so as to accommodate the toll-gatherer with a dwelling-house; and that all things necessary for this may be also lawfully done, such as the cutting down the trees, digging a cellar, well," etc. Reading v. Davis, 153 Pa. 360, 26 A. 62.

[3] That the fee of said strip was condemned and it was so understood by the parties to the condemnation action there can exist no doubt. If in fact only an easement was obtained, it was an easement which included what are termed secondary easements, that is, the right to do such things as are necessary for the proper enjoyment of the easement itself. North Fork Water Co. v. Edwards, 121 Cal. 662, 54 P. 69; Hamaker v. Pacific Gas & Electric Co., 59 Cal. App. 642, 211 P. 265.

From any angle the case may be examined, it is plain that the occupancy by appellant of said strip condemned as and for the construction, maintenance, and operation of a toll bridge would be to place an unreasonable and unwarranted limitation upon the rights of said bridge company, and would seriously interfere with the proper enjoyment of the franchise which has been granted to it.

There is but little, if any, merit in appellant's contentions that it is legally entitled to occupy any portion of said condemned strip.

Judgment affirmed.

We concur: WASTE, C. J.; RICHARDS, J.; SHENK, J.; CURTIS, J.; PRESTON, J.; LANGDON, J.

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211 Cal. 375

BALAAM v. PERAZZO.

Sac. 4356.

Supreme Court of California.

Jan. 23, 1931.

1. Judgment 🔑117.

That defendant in action to quiet title defaulted did not justify relief beyond that demanded (Code Civ. Proc. § 580).

2. Judgment 🔑17(1).

Defendant, in action to quiet title, had no right to affirmative relief against defaulting codefendant, not served with answer or cross-complaint seeking such relief (Code Civ. Proc. § 580).

3. Judgment 🔑17(1), 117.

Judgment quieting title in defendant as against plaintiff and codefendant, not served with defendant's answer or cross-complaint, which sought no such relief against codefendant, *held* void on face, and properly modified of court's own motion (Code Civ. Proc. § 473).

It appeared that defendant claimed to be owner as against alleged title of plaintiff, but made no averment of any right or title against codefendant, who was not served with answer or cross-complaint, that no evidence was offered with regard to any claim against codefendant, and that no finding thereon was made. Conclusions of law stated defendant was entitled to have title quieted as against plaintiff, but no mention was made of codefendant.

4. Appeal and error 🔑82(2).

Order modifying judgment void on face, being made after final judgment, was appealable.

In Bank.

Appeal from Superior Court, Tulare County; J. A. Allen, Judge.

Action by H. C. Balaam against J. J. Perazzo. Judgment for plaintiff, and defendant appeals.

Affirmed.

W. R. Bailey and Adolph Feierbach, both of Visalia, for appellant.

Karl A. Machetanz, of Exeter, for respondent.

RICHARDS, J.

This appeal is from a judgment in favor of the plaintiff in an action to quiet title to lot 26 and the south half of lot 25 in middle block of Baker's addition to the city of Exeter, county of Tulare, state of California. The complaint is in the usual form of an action to quiet title which, after setting up ownership of said lands in the plaintiff, alleges that the defendant claims some right, title, or interest in said lands, but that his claim is without right, and closes with the prayer that the plaintiff's title be quieted as against the defendant and as to said lands. The answer of the defendant, after denying plaintiff's claim of ownership, alleges that the plaintiff has in fact no interest in said premises, and then proceeds to allege affirmatively ownership thereof in the defendant, and, upon the predicate thereof, prays for affirmative relief that the defendant be adjudged to be the owner of, and entitled to the possession of, said premises, and that the plaintiff has no right, title, or interest therein. Upon the issues as thus joined, the Superior Court made and entered its findings and judgment in the plaintiff's favor, and it is from such judgment that this appeal has been taken.

The facts upon which the respective claims of the plaintiff and defendant are founded are practically undisputed, and may be briefly stated as follows: On and prior to October 23, 1923, one G. A. Perazzo was the owner of the premises involved in this action and of certain other lands and premises in said county of Tulare. Upon the above date Brambilio Juarez obtained a money judgment against G. A. Perazzo in the Superior Court of said county, which was duly docketed upon October 26, 1923, and thus became a valid and subsisting lien on any land standing in the name of G. A. Perazzo on the records of the county recorder of said county of Tulare as of said date. On October 28, 1924, G. A. Perazzo conveyed to his wife, Victoria Perazzo, the said and other pieces of property, which, however, were subject to the lien of the aforesaid subsisting judgment in favor of Brambilio Juarez. On February 1, 1926, a writ of execution was issued upon the aforesaid judgment in favor of Brambilio Juarez, and thereafter, and in pursuance thereof, the premises involved in this action were sold under said writ to Brambilio Juarez, who thereafter, and on the 23d day of August, 1927, prior to the issuance of the sheriff's deed thereon, duly assigned the certificate of sale to H. C. Balaam, plaintiff herein. On August 24, 1927, the sheriff executed and delivered to H. C. Balaam a deed to the aforesaid premises, which was duly recorded on September 1, 1927. Thereafter, and on November 20, 1928, the present action was commenced against the defendant J. J. Perazzo, who has succeeded to the interest of G. A. and Victoria Perazzo, which in due course ripened into the judgment from which this appeal has been taken. On December 3, 1924, one N. C. Medley commenced an action to quiet title in said court, affecting the aforesaid and other lands, against G. A. Perazzo, Victoria Perazzo, Brambilio Juarez, and certain other defendants not material to this controversy, the plaintiff Medley alleging that he was the owner of said premises and the whole thereof by virtue of a judgment which had been theretofore obtained against G. A. Perazzo, upon which judgment an execution sale had been had, at which sale the plaintiff Medley had become the purchaser of said premises, and as such was entitled to have his title thereto quieted as against the defendants in said action. The complaint and summons in said action were duly served upon G. A. Perazzo, Victoria Perazzo, and Brambilio Juarez. Jaurez did not appear or answer in said action. Victoria Perazzo, however, did answer, denying the alleged title of the plaintiff Medley to the lands involved therein or any portion thereof, and alleging herself to be the owner thereof by virtue of her aforesaid deed from G. A. Perazzo bearing the date of October 28, 1924. In her answer she asserted no claim of ownership of the pieces of land involved in this action as against Brambilio Juarez, and in her prayer she asked only for affirmative relief against the plaintiff Medley and all persons claiming under him. It affirmatively appears from the record in said action that the aforesaid answer of Victoria Perazzo therein, affirmatively claiming the ownership in herself of said lands, was not served upon her codefendant Brambilio Juarez, and that he made no appearance in said action in so far as the affirmative pleading of Victoria Perazzo was concerned. Upon the trial and submission of the cause, the court made its findings of fact and conclusions of law in favor of the defendant Victoria Perazzo, wherein the trial court found Victoria Perazzo to be the owner of lot 26 and the south half of lot 25 in middle block of Baker's addition to the city of Exeter, etc., and that she was "entitled to have her title quieted as to said real propery against claims of plaintiff herein, and to judgment for her costs." In its conclusions of law the court directed judgment in Victoria Perazzo's favor to be entered accordingly. It appears, however, that said judgment was on December 2, 1925, entered in the following form:

"It is therefore declared, ordered, adjudged and decreed that Victoria Perazzo, one of the defendants herein, is the true and lawful owner of the south half of lot 25 and all of lot 26 of the Middle Block of Baker's Addition to the city of Exeter, and every part and parcel thereof, and her title thereto is adjudged to be quieted as against all claims, demands, or pretensions of the plaintiff, or of other defendants herein, and said plaintiff and other defendants are hereby perpetually enjoined from setting up any claim thereto or any part thereof."

[1-4] From the foregoing judgment no appeal was taken by any of the parties to the action. However, on July 21, 1927, the trial court, having its attention called to the fact that in its said judgment it had undertaken to adjudicate the rights of Brambilio Juarez in and to the aforesaid lots 25 and 26 in the middle block of Baker's addition to the city of Exeter as between Brambilio Juarez and his codefendant Victoria Perazzo, undertook on its own motion to make and enter an order modifying its former judgment in the foregoing regard, which said order as to the effective portion thereof reads as follows:

"Now, therefore, on the court's own motion, it is ordered, adjudged and decreed that the said judgment, in so far as it relates to and affects the rights of B. Juarez, also known as Brambilio Juarez, in and to the property aforesaid is void and of no force and effect and should be and is hereby vacated and set aside." From the aforesaid order no appeal was taken by or on behalf of Victoria Perazzo or her successor in interest J. J. Perazzo, the defendant in this action. The present action was commenced, as we have seen, on November 20, 1928. The defendant Perazzo by his answer denied the ownership and right of possession of the plaintiff in and to the premises in question, and, having so done, undertook on his own behalf to state in the usual form a cause of action to quiet title thereto against said plaintiff, and prayed for such affirmative relief. Upon the trial of the cause, the said defendant insisted, and upon this appeal still insists, that the judgment rendered and entered in the action entitled N. C. Medley v. G. A. Perazzo et al., above referred to, was valid on its face in so far as the trial court undertook thereby to decree that Victoria Perazzo was the owner of the above-described premises, and that "her title thereto is adjudged to be quieted as against all claims, demands or pretensions of the plaintiff, or of other defendants herein, and said plaintiff and other defendants are hereby perpetually enjoined from setting up any claim thereto or any part thereof," and that, this being so, the order of the trial court made and entered on July 21, 1927, wherein it attempted to modify said judgment by striking therefrom the aforesaid portion thereof, was a void order, since it appeared upon the face thereof to have been an order made and entered on the court's own motion more than one year after the making and entry of the judgment which it purported to modify, and further made and entered ex parte and in violation of the express provisions of section 473 of the Code of Civil Procedure, and that said order, being thus void upon its face, for the foregoing reasons, was the proper subject of collateral attack in this action, and that the same could not be relied upon by the plaintiff herein to support the judgment of the trial court made and entered herein in his favor, and hence that said judgment should be reversed. We are unable to sustain the foregoing contentions of the appellant herein in the foregoing regards. It is true that in the action entitled N. C. Medley v. G. A. Perazzo et al., the defendant therein, Brambilio Juarez, suffered a default to be taken against him in so far as the asserted claim of title by the plaintiff therein to the premises here in question was involved. This fact, however, would not have entitled the plaintiff in that action to be granted any relief in excess of that demanded in his complaint (Code Civ. Proc. § 580; Staacke v. Bell, 125 Cal. 309, 57 P. 1012, and cases cited; Lang v. Lang, 182 Cal. 769, 190 P. 181; Metropolitan Life Ins. Co. v. Welch, 202 Cal. 314, 260 P. 545), and certainly could not have entitled the defendant Victoria Perazzo in said action any right to affirmative relief therein as against Brambilio Juarez without service upon the latter of her answer or cross-complaint seeking such affirmative relief (Staacke v. Bell, supra).

The record in the foregoing case discloses that the defendant therein, Victoria Perazzo, while affirmatively setting forth in her pleading therein that she was the owner of the premises in question as against the asserted title of the plaintiff Medley thereto, made no averment whatever as to her right or title to said premises against her codefendant Brambilio Juarez, and did not in her prayer to her said pleading seek for any relief whatever against him. It further affirmatively appears that no service of the aforesaid answer of Victoria Perazzo was made, or attempted to be made, upon Brambilio Juarez; that during the trial of said cause no evidence whatever was presented with relation to the right or claim of said Juarez in or to said property or any portion thereof, nor was any finding thereon made by the trial court. In its conclusions of law the court found that Victoria Perazzo was "entitled to have her title quieted to said real property against claims of plaintiff herein and to judgment for her costs." Such being the state of the record in the case of Medley v. Perazzo et al., as disclosed by the judgment roll therein, it conclusively follows that the trial court therein had no power or jurisdiction to include in its judgment therein any adjudication whatever as to the rights of Brambilio Juarez in and to the premises involved in the present action, and that in so far as the judgment therein undertook to adjudicate that the defendant Victoria Perazzo should have her title thereto quieted as against her codefendant Brambilio Juarez said judgment was void upon its face. Lang v. Lang, supra; Metropolitan Life Ins. Co. v. Welch, supra. This being so, it further conclusively follows that it was within the power of the trial court, upon having its attention in any manner called to the fact that a portion of one of its judgments was void upon its face, of its own motion to made and enter the order which the court did make and enter upon July 21, 1927, modifying its said judgment so as to strike therefrom the portion thereof which upon the face of the judgment roll in said action appeared to be void. People v. Davis, 143 Cal. 675, 77 P. 651; People v. Greene, 74 Cal. 400, 16 P. 197, 5 Am. St. Rep. 448. Furthermore, its said order, being one made after final judgment, was an appealable order, and from said order neither the defendant herein nor his predecessor, Victoria Perazzo, appears to have taken an appeal.

For the foregoing reasons it would seem clear that the defendant in this action was not entitled to urge upon the trial thereof or upon this appeal either the validity of the judgment in the former action of Medley v. Perazzo as against Brambilio Juarez, the predecessor of the plaintiff herein, nor to urge upon this appeal that the trial court was in error in upholding the order made and entered on July 21, 1927, in said former action, and, having done so, in adjudging upon the record herein that the plaintiff herein as the successor of Brambilio Juarez was entitled to have his title quieted as against said defendant, and to enter its judgment accordingly quieting the same.

The judgment is affirmed.

We concur: WASTE, C. J.; SHENK, J.; PRESTON, J.; LANGDON, J.; SEAWELL, J.; CURTIS, J.

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211 Cal. 322

PEOPLE v. HOWARD.

Cr. 3284.

Supreme Court of California.
Dec. 31, 1930.

1. Jury 🔑33(1).

Substitution of alternate for regular juror who disclosed prejudice against certain witnesses, instead of ordering mistrial, *held* not invasion of right of jury trial (Pen. Code, § 1089; Const. art. 1, § 7).

> No invasion of right of jury trial occurred, since the same proceedings were had in selection of alternate jurors as in the case of first twelve jurors who took their places in the box, and no complaint was made that the alternate juror selected was not in fact a fair and impartial person to act as juror.

2. Jury 🔑149.

In murder prosecution, procedure by which alternate juror was substituted in place of regular juror disclosing prejudice against certain witnesses *held* mere irregularity (Pen. Code, § 1089; Const. art. 1, § 7).

3. Jury 🔑79(3).

Defendant had right to impartial jury, but not to jury composed of particular individuals.

4. Criminal law 🔑736(2).

Where evidence on whether confession was result of promises by authorities to merely charge defendant with manslaughter was conflicting, question was for jury.

5. Criminal law 🔑683(1).

In murder prosecution, decedent's estranged wife's testimony respecting defendant's proposal of marriage and her answer *held* proper rebuttal evidence, where defendant had testified otherwise.

6. Homicide 🔑22(2).

To be "murder of first degree," killing must be premeditated, except when done in perpetration of certain felonies (Pen. Code, § 189).

> [Ed. Note.—For other definitions of "Murder in First Degree," see Words and Phrases.]

7. Homicide 🔑22(1).

If act is preceded by, and is result of, concurrence of will, deliberation, and intent, crime of "first-degree murder" is proved (Pen. Code, § 189).

8. Homicide 🔑23(1).

When killing is proved to have been committed by defendant, presumption is that it was malicious and an act of murder, but, in such case, verdict should be murder of second degree (Pen. Code, § 189).

9. Homicide 🔑254.

Evidence *held* to establish second-degree murder rather than first-degree murder as found by jury (Pen. Code, § 189, and § 1181, as amended by St. 1927, p. 1037).

RICHARDS, J., dissenting.

In Bank.

Appeal from Superior Court, Los Angeles County; Carlos S. Hardy, Judge.

John Lee Howard was convicted of murder in the first degree, and he appeals.

Judgment modified, and cause remanded, with directions.

Superseding opinion in 289 P. 830.

Josiah Coombs, John A. Deweese, and Delbert A. Hessick, all of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., W. R. Augustine and Wm. F. Cleary, Deputy Attys. Gen., and John L. Flynn, Buron Fitts, and Wayne Jordan, all of Los Angeles, for the State.

WASTE, C. J.

The defendant was charged with the murder of Victor A. Cooley. The jury returned a verdict of murder in the first degree, without recommendation. The court below denied motions for new trial and for reduction of sentence, and pronounced sentence and judgment imposing the death penalty. Defendant appeals from the judgment of conviction and from the orders denying the said motions.

At the commencement of the trial, it appearing that the case would be somewhat protracted, two alternate jurors were duly selected, as provided by law. These alternates took the necessary oaths, assumed their places in the box with the regular jurors, and heard all of the evidence introduced upon the trial. At the conclusion of the evidence, and during the oral argument, one of the regular jurors sought the trial judge in chambers prior to the convening of court, and there disclosed to him that she personally knew two of the witnesses who had testified on behalf of the defendant in the cause, and that on account of certain facts which she personally knew concerning these witnesses, and which she disclosed to the judge, she was prejudiced against each of said two witnesses and their testimony. The judge thereupon called the attorneys for the prosecution and for the defense and also the defendant into his chambers and fully disclosed the situation to them. There was considerable discussion, in which the defendant personally took some part, concerning the situation in which the cause was placed, it being generally agreed that the juror who had reported to the judge should be excused from passing on the case. Thereupon one of the defense counsel suggested a stipulation excusing the juror and selecting in her stead one of the alternates, stating "there is no real reason why she should sit in preference to either of the two alternates. * * * Why can't we stipulate * * * that the juror be excused because of her statement to the court, and that the clerk may draw one of the two alternates." A stipulation to this effect was entered into in open court by the respective counsel, and the regular juror was dismissed, and one of the alternates, chosen by lot, took her place in the jury box. The regularity of this proceeding by which the alternate was selected was also stipulated to. The closing arguments were then concluded, and the cause submitted to the jury, which, as already stated, returned a verdict finding defendant guilty of murder in the first degree, without recommendation.

[1-3] It is now contended by the defendant that, upon discovering the state of mind of the regular juror, a mistrial should have been ordered, and that to substitute the alternate for the regular juror under such circumstances amounted to a reversible error, in that he was thereby deprived of a trial by jury as guaranteed by section 7 of article 1 of the Constitution. While the value and importance of the privilege thus guaranteed cannot be overemphasized, on the record now before us we cannot see how or wherein there was any invasion of the common-law right of a jury trial. The first essential of a common-law jury in criminal causes is a jury of twelve citizens, no more nor less, drawn from the locality, duly examined and sworn to try the cause. No objection was offered to the panel in this case. The second requirement is that the jurors must be impartial. No claim is made that juror Shields, the alternate selected, was not in fact a fair and impartial person to act as a juror. While the record brought here does not contain the examination of the jurors on voir dire, it does indicate that the same proceedings were had in the selection of the alternate jurors as in the case of the first twelve who took their places in the box. We may assume that the defendant was satisfied that the alternate jurors thus selected would give him the fair and impartial trial to which he was entitled, should either be called in lieu of one of the other jurors. The third essential is that the verdict shall be unanimous, and that was so in this case, for the record shows that the twelve jurors agreed and returned a unanimous verdict.

While the circumstances of this case are not such as to bring it within the purview of section 1089 of the Penal Code providing for alternate jurors, we think the procedure by which the alternate juror was substituted in the place and stead of the regular juror was, at most, but an irregularity which in no way substantially affected the defendant's rights. In the execution of the means which the lawmakers provide to enforce the guaranties of the organic law, the end to be effected must be through the adoption of a reasonable and practical method to secure attainable ends. When this has been done, nothing more can be demanded, from the very nature of things. It is not claimed that the verdict would have been any different had the alternate juror not participated in the deliberations of the jury. He was subject to the same challenge and took the same oath as the other jurors. We should assume that in all respects he obeyed his oath and that he well and truly tried all the matters in issue and rendered a true and impartial verdict in the cause. Defendant's right was to a fair and impartial jury, not to a jury composed of any particular individuals. People v. Durrant, 116 Cal. 179, 199, 48 P. 75. The situation here presented is not one in which a waiver of the right to a jury trial in a felony case enters into the consideration.

No case has arisen in this state, or perhaps elsewhere, precisely like the case at bar in its facts. Earlier cases, in which disqualification of a juror has been raised after verdict in criminal causes, are reviewed in People v.

Duncan, 8 Cal. App. 186, 96 P. 414. In that case, one Bernard Sherry appeared at the trial and substituted himself as a juror in place of John H. Sherry, whose name was upon the jury list, and who had been regularly subpœnaed to attend court as a trial juror. Upon the impanelment of the jury, the name of the rightful juror was drawn, and in answer thereto the other Sherry took his place in the box, and after due examination as to his qualifications, was accepted and sworn as a juror and acted throughout the trial of the cause. The jury returned a verdict of guilty of murder in the second degree. On appeal, it was contended that Bernard Sherry never became a juror because he was not selected and returned as required, and that therefore the verdict was the verdict of but eleven jurors. The court swept aside the contention, saying that it begged the question. The judgment of conviction was affirmed, and the petition to have the cause heard in the Supreme Court was denied.

We find no merit in defendant's first contention.

Prior to his untimely death, the decedent was engaged in the automobile rental business in the city of Pasadena. In the early part of January, 1928, the defendant was employed by him, and by mutual agreement went to live with the decedent and his wife. The Cooleys became estranged, and separated in September, 1928, whereupon the defendant and decedent took an apartment together. They were apparently on good terms and quite friendly. At about 12:50 a. m. on the morning of April 17, 1929, the defendant telephoned to the Pasadena police station and stated to the officer responding to the call: "This is Jack Howard. There has been a murder committed in my apartment. I have called the ambulance. I wish you would send a couple of the boys over." Upon arriving at the apartment the officers found the decedent sitting on the edge of the bed in a semiconscious condition. The room was in a state of disorder, personal belongings having been upset and scattered about, giving evidence of the perpetration of a robbery. The injured man was removed to the emergency hospital, and from there to the Pasadena hospital, where he was operated on to relieve paralysis resulting from a blow on the skull with a solid instrument. It was the doctor's opinion, given at the trial, that the blow had been struck while the decedent was lying down. The decedent never regained consciousness, and passed away three days later. Shortly after reporting the matter to the police, the defendant stated that he had no definite idea as to the identity of the perpetrator of the crime, but mentioned the name of a person who was supposed to have previously threatened the decedent's life. At that time the defendant also stated that he had driven the decedent home from the garage on the night of the homicide at about 9 p. m., and, as was his usual custom, returned to the garage and there busied himself about the automobiles until the last of the rented cars had been brought in, whereupon, at about 1 a. m. he again returned to the apartment and found the decedent in an unconscious or semiconscious condition, which prompted him to notify the authorities. Substantially the same story was told by the defendant at the coroner's inquest held on April 23, 1929, and again repeated to the police on the same day. Three days later, however, defendant modified his story and told Detective H. M. Thomas that he had driven to the apartment alone on the night of the homicide at about 10:30 p. m. to secure a bottle of whisky; that the decedent was there and upbraided him for absenting himself from the garage; that the decedent grabbed him and a struggle ensued in which he struck the decedent on the head with his mechanic's hammer; that he thought he had killed the decedent, and thereupon disordered the room in order to give the appearance that the homicide had been committed in an attempt to burglarize the apartment; that he then went to the garage and performed his usual duties, returning to the apartment after 12 p. m., when he notified the police. Defendant also stated to the detective that the killing was not premeditated, and expressed his willingness to plead guilty to a charge of manslaughter. After the usual proof as to its voluntary character, the prosecution introduced in evidence, over defendant's objection, a written confession made and signed by the defendant on the same day as the oral statement just above outlined had been made, wherein the defendant admitted striking the decedent with a hammer while struggling with him.

[4, 5] The defendant took the stand in his own behalf and related many of the matters already narrated. He reiterated his original story to the effect that he had found the apartment disordered and the decedent injured when he returned after closing the garage. He did not deny making the confession, but testified that the story therein related was concocted by him, upon suggestion of the police, in order to clear the decedent's estranged wife, whom he claimed was innocent, and still leave himself open to no greater charge than that of manslaughter. Defendant admitted having called on the decedent's estranged wife on the night of the homicide. On cross-examination, defendant stated that prior to the homicide he had given her several Christmas and birthday gifts, but denied that he had ever loved the woman or proposed marriage to her. He also admitted saying to the district attorney subsequent to the confession: "You are trying to ring in an innocent person [meaning decedent's wife].

I done this without anybody's help," but insisted that he said this to divert suspicion from Mrs. Cooley, and to back up his confession. While on the stand, defendant conceded that the confession had not been procured by means of threats or violence, but stated it was the result of promises by the authorities to merely charge him with manslaughter. The evidence upon this issue was conflicting, and the question was one for the jury's determination. Defendant produced several witnesses who testified that his general reputation for peace and quiet was good. Much of defendant's evidence was controverted by the rebuttal evidence of the prosecution. Among other witnesses called by the people in rebuttal was the decedent's estranged wife, who testified that defendant had proposed marriage to her, but that she had told him, in substance, that she would never marry any one as long as Mr. Cooley lived. This was proper rebuttal evidence, for defendant on cross-examination had testified otherwise.

[6-8] The defendant contends that the evidence does not warrant a verdict of first-degree murder because of the asserted absence of a showing of express malice. Murder is defined as the unlawful killing of a human being with malice aforethought. Section 187, Pen. Code. Such malice may be express or implied. It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow-creature, and implied when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart. Section 188, Pen. Code. All murder which is perpetrated by means of poison, or lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or which is committed in the perpetration or attempt to perpetrate arson, rape, robbery, burglary, or mayhem, is murder in the first degree; and all other kinds of murders are of the second degree. Section 189, Pen. Code. To be murder of the first degree, under our statute, the killing must be premeditated, except when done in the perpetration of certain felonies; that is to say, the unlawful killing must be accompanied with a deliberate and clear intent to take life. If the act be preceded by, and be the result of, a concurrence of will, deliberation and intent, the crime of first-degree murder is proved. People v. Bellon, 180 Cal. 706, 182 P. 420. When the killing is proved to have been committed by the defendant, and nothing further is shown, the presumption of law is that it was malicious and an act of murder; but in such a case the verdict should be murder of the second degree, and not murder of the first degree. People v. Knapp, 71 Cal. 1, 6, 11 P. 793; People v. Ford, 85 Cal. App. 258, 263, 258 P. 1111.

[9] In the present case, the prosecution relied principally on the defendant's confession to prove his connection with the offense. If the confession be disregarded, the record is entirely destitute of evidence tending to establish the circumstances and conditions actually existing just prior to and at the time of the striking of the fatal blow. If, as urged by the people, the jury in weighing and considering the evidence might properly reject as untrue that portion of the confession wherein defendant charged the decedent with having been the aggressor in a quarrel which led up to the homicide, there remains no evidence from which it might reasonably be deduced that the killing was the result of a willful, deliberate, and premeditated intent to kill. We do not question the propriety of the jury's action in rejecting any portion of the defendant's evidence or confession which to it was unworthy of belief. However, if it be assumed that this was done in the present case, there is a dearth of evidence tending to show the conditions as they existed at the time of the homicide, and from which it might reasonably be held that the murder was, in fact, willful, premeditated, and intentional. In this regard, the state failed to satisfy the burden of proof. On the other hand, if it be assumed that the jury accepted defendant's confession in toto, the offense would still be that of second-degree murder, for defendant did not satisfactorily establish such provocation as would excuse the homicide or reduce it to manslaughter. The commission of the homicide by the defendant being proved, the burden of proving circumstances of mitigation, or that justify or excuse it, devolves upon him, unless the proof on the part of the prosecution relieves him of this burden. Section 1105, Pen. Code.

Section 1181 of the Penal Code, as amended in 1927 (Stats. 1927, p. 1037), provides, in part, that, if the evidence in a criminal cause shows the defendant to be not guilty of the degree of the crime of which he was convicted, but guilty of a lesser degree thereof, or of a lesser crime included therein, the trial court or any court to which the cause may be appealed may modify the judgment accordingly without granting or ordering a new trial. This court had occasion to consider the amended section in the case of People v. Kelley, 208 Cal. 387, 391, 281 P. 609. We are of the view that the record now before us establishes murder of the second degree. We entertain a doubt as to its showing murder of the first degree. Our attitude of mind seems to be shared by the prosecution. While contending that the evidence is amply sufficient to support the verdict, the people concede that it is "not as strong as that usually accompanying first degree murder cases." Under no theory, they state in their brief, can it be said that the evidence does not "support a judgment of second degree murder." What has been said under this assignment sufficiently disposes of the defendant's contentions touching asserted errors of the court below in charging the jury upon first-degree murder, and in denying his motions for new trial and reduction of sentence. We have examined the remaining assignments of error, including those having to do with the trial court's rulings on the evidence, and find nothing approximating prejudicial error.

The judgment of the lower court of murder of the first degree is modified. The cause is remanded to the trial court, with directions to enter a judgment against the defendant finding him guilty of murder of the second degree, and to thereupon pronounce judgment upon him as prescribed by law.

We concur: PRESTON, J.; LANGDON, J.; CURTIS, J.; SHENK, J.; SEAWELL, J.

RICHARDS, J. (dissenting).

I dissent. It is conceded in the foregoing opinion that the circumstances of this case are not such as to bring it within the purview of section 1089 of the Penal Code, which has reference to the substitution during a criminal trial of alternate jurors. The case stands therefore as though there existed no provision of law permitting substitution of another person in the place and stead of a regularly drawn and impaneled juror. In the absence of such legal warrant the person introduced into the jury in the midst of the trial in this case was nothing more than a mere bystander. It is also practically conceded in the foregoing opinion that the defendant did not expressly consent in open court to the substitution of such bystander in the place and stead of the regular juror during the trial of the cause. This to my mind under authorities hereinafter to be cited amounted to a violation of the constitutional right of the defendant to a trial by jury. The argument that the substituted person was otherwise qualified to act and serve as a juror, that he took the usual oath, and that it must be assumed that he obeyed the same to the extent of joining with the regular jurors in rendering a just and impartial verdict, is utterly sophistical, and, if permitted to pass without protest, would permit any number of bystanders to be introduced in the regular panel during the trial of criminal causes, and would entirely subvert the constitutional guarantee as to trial by jury.

Section 7 of article 1 of our state Constitution provides in part that "the right of trial by jury shall be secured to all, and remain inviolate." The value and importance of the right thus guaranteed cannot be overemphasized. It has always been considered as one of the principal bulwarks of liberty under both the English and American systems of government and constitutional law. While the origin of this institution may be uncertain, it has been so long and so deeply rooted in the institutions of the English people that neither conquest nor change of sovereignty ever operated to either abolish it or even to work its material modification. We find in Blackstone, not only the most correct estimate of this institution, but also its greatest encomium, when he states: "The trial by jury has ever been and I trust ever will be looked upon as the glory of the English law. * * * It is the most transcendent privilege which any subject can enjoy, or wish for, that he cannot be affected either in his property, his liberty or his person, but by the unanimous consent of twelve of his neighbors and equals." The learned author refers to a celebrated French writer (Montesquieu, Spirit of Laws, XI, 6), who concludes that those who assert, because Rome, Sparta, and Carthage have lost their liberties, therefore those of England in time must perish, should have recollected that Rome, Sparta, and Carthage, at the time when their liberties were lost, were strangers to the trial by jury. Blackstone (Jones), vol. 2, pp. 1989, 1991. In his great work on "Laws and Jurisprudence of England and America," at page 121, Judge Dillon states: "I consider the trial by jury an essential part of our judicial system. It has a cherished tradition. Its roots strike down deep into the experience, the life, and the nature of the people who have developed and perfected it. It gives an individuality to our legal system. It is a vital part of it.' The fundamental privilege thus developed under English institutions has been secured to every person in our own country charged with crime, by the Constitution of the United States and of each individual state. The language of the Constitution of this state has been in part above quoted, and the courts of this state have uniformly held that the cardinal principle therein enunciated is to be considered as meaning that the essential features of trial by jury as known to the common law must be preserved and its benefits secured to all those who were entitled under the common law to the right of trial by jury. People v. Powell, 87 Cal. 348, 25 P. 481, 11 L. R. A. 75; People v. Peete, 54 Cal. App. 333, 365, 202 P. 51; People v. Kelly, 203 Cal. 128, 133, 263 P. 226; 15 Cal. Jur., p. 325, § 5. Under the common law there was no provision for alternate jurors, and the rule was well settled that, if during a trial a juror became incapacitated or was for any reason discharged, a new juror either had to be sworn and the trial begun anew, or the jury had to be dismissed and a new jury impaneled. This is still the law in those jurisdictions where there are no alternates or where the alternate jurors have in the course of the trial become regular jurors. It is so stated in section 1123 of our Penal Code, which in part provides that: "If, after all alternate jurors have been made regular jurors, a juror becomes so sick as to be unable to perform his duties and has been discharged by the court, a new juror may be sworn and the trial begun anew, or the jury may be discharged and a new jury then or afterwards impaneled." It has, however, been held that the Legislature has power to provide for alternate jurors, and our state Legislature has so provided from a time as far back as 1895, when section 1089 was added to our Penal Code (Stats. 1895, p. 279), which section provides for the selection of alternate jurors in the discretion of the court, and their substitution in place of the regular jurors in certain situations. This section of the Penal Code was amended in 1927 (St. 1927, p. 1063, § 2) so as to provide that the court may in felony cases direct the calling of not more than two alternates, who may sit as regular jurors under the conditions expressly provided for in the section as thus amended, which, in so far as these are pertinent to the situation before us, reads as follows: "If, before the final submission of the case, a juror die, or becomes ill, so as to be unable to perform his duty, the court may order him to be discharged and draw the name of an alternate, who shall then take his place in the jury box, and be subject to the same rules and regulations as though he had been selected as one of the original jurors." The constitutionality of the foregoing provisions of the Penal Code were fully considered and upheld in the case of People v. Peete, supra, wherein a rehearing was denied by this court, and which desion meets with our full approval, and it may be taken to be settled law, that the Legislature has the power to provide for alternate jurors in a proper case. The Legislature, as we have seen, has so provided in sections 1089 and 1123 of the Penal Code, but in so doing has expressly limited the right of the trial court in any criminal case to substitute alternate jurors for any one or more of the regular jurors to try such cause to cases where, "before the final submission of the case, a juror die, or become ill, so as to be unable to perform his duty." This express limitation upon the power of the trial court to substitute alternate jurors for regular jurors renders the conclusion irresistible that in no other instance than that of the death or serious illness of a regular juror is the court given any power whatever to make such substitution. It would seem to follow as a necessary conclusion that the substituted alternate juror in the instant case, having been called to replace a regular juror who had neither died nor become ill so as to be unable to perform his duty, had no more right to sit or act in the case than any other person who might have been selected under like circumstances by any method not authorized by the express provisions of the foregoing sections of the Penal Code. This conclusion brings us to a consideration of the next question involved in this appeal, which is as to whether under the provisions of our Constitution and laws a defendant can waive his aforesaid constitutional right to trial by a common-law jury.

Prior to the amendment of the state Constitution in 1928 it was well settled by the decisions of this court and of the appellate court of this state that neither the defendant nor his counsel could waive the right to a jury trial in a felony case. People v. Deegan, 88 Cal. 602, 26 P. 500; People v. Metropolitan Surety Co., 164 Cal. 174, 128 P. 324, Ann. Cas. 1914B, 1181; People v. Nakis, 184 Cal. 105, 193 P. 92; Amos v. Superior Court, 196 Cal. 677, 239 P. 317; Ex parte Bracklis, 52 Cal. App. 274, 198 P. 659; People v. Garcia, 98 Cal. App. 702, 277 P. 747; People v. Spinato, 100 Cal. App. 600, 280 P. 691. In the year 1928, however, section 7 of article 1 of the state Constitution was amended so as to read in part as follows: "The right of trial by jury shall be secured to all, and remain inviolate; but in civil actions three-fourths of the jury may render a verdict. A trial by jury may be waived in all criminal cases, by the consent of both parties, expressed in open court by the defendant and his counsel." In the case of People v. Garcia, supra, it was held that under the foregoing provision of the Constitution as thus amended the defendant in felony cases must personally and expressly consent to the waiver of trial by jury, and that the consent of the defendant's counsel, even though expressed in his presence, was not sufficient to constitute such a waiver. In the case of People v. Spinato, supra, the case of People v. Garcia, supra, was cited with approval, in the face of the strenuous insistence on behalf of the people that under the decisions of federal and other state courts an express waiver of this constitutional right by counsel in the presence of the defendant should be held an implied waiver, sufficient to satisfy the constitutional and statutory provisions touching the right of trial by jury. The cases thus cited were analyzed by the appellate court and were held to have no application to the situation in California created by the aforesaid recent amendment to its Constitution, expressly providing that, in order to constitute a waiver of the right to jury trial in felony cases, the "consent of both parties expressed in open court by the defendant and his counsel" must concur in order to accomplish such waiver.

The Supreme Court of the United States has had occasion in a recent and very well reasoned decision (Patton v. United States, 281 U. S. 276, 50 S. Ct. 253, 74 L. Ed. 854) to pass upon the right of a defendant to a common-law jury of twelve persons, wherein it was held that this right on the part of a defendant was of such importance that he alone could personally stipulate it away by his express agreement in open court to be tried by less than twelve jurors. It would seem to be axiomatic that, if a defendant may only by his personal and express agreement in open court waive the right to trial by a common-law jury of twelve persons, he cannot, without such express waiver and consent, be put upon his trial before any less number than twelve jurors, since, as was held by the Supreme Court of the United States in Patton v. United States, supra, no distinction can be drawn between the effect of a complete waiver of a jury and consent to be tried by a less number than twelve, but that both forms of waiver amount in substance to the same thing. In the light of the foregoing decisions and of the admitted facts of the instant case, I am constrained to hold that in the absence of an express agreement on the part of the defendant himself, consenting to the substitution of an alternate juror in the place and stead of one of the regular jurors impaneled to try the cause, and who was shown to be neither dead nor ill so as to be unable to proceed with the trial, it was prejudicial error on the part of the trial court to undertake to make such substitution and thereafter to proceed with such trial before eleven regular jurors and one alternate juror, with the result of the defendant's conviction.

It is, however, contended by the prosecution that the foregoing error of the trial court was merely an error in procedure for which the case should not be reversed, under the provisions of section 4½ of article 6 of the state Constitution, in the absence of a showing that such error has resulted in a miscarriage of justice. I am, however, of the opinion that there is no merit in this contention, and that the denial of the right of trial by a common-law jury to a party so entitled amounts in itself to a miscarriage of justice, and that to such a situation section 4½ of article 6 of the Constitution can be given no application. People v. Hall, 199 Cal. 451, 458, 249 P. 859, and cases cited; People v. O'Connor, 81 Cal. App. 506, 254 P. 630; People v. Young, 100 Cal. App. 18, 279 P. 824.

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211 Cal. 354

FIGONI v. FIGONI.

S. F. 13238.

Supreme Court of California.
Jan. 12, 1931.

1. Marriage 🔑57.

Terms "annul" and "annulment," as commonly applied to marriage, mean to declare void or render invalid (Civ. Code, § 82).

[Ed. Note.—For other definitions of "Annul; Annulment," see Words and Phrases.]

2. Judgment 🔑252(5).

Complaint praying for annulment of incestuous marriage and for general relief *held* to support judgment declaring marriage void (Civ. Code, §§ 80, 82).

Complaint purported to be filed under Civ. Code, § 82, providing for annulment of marriages. Section 80 provides that either party to incestuous or void marriage may proceed by action in the Superior Court to have the same so declared. Complaint alleged facts showing incestuous marriage, and, in addition to praying for annulment of marriage, also prayed for general relief.

3. Marriage 🔑62, 64.

Court, in action to annul incestuous marriage, *held* authorized, after declaring marriage void, to adjudicate custody of minor children and division of property thereby avoiding multiplicity of suits (Civ. Code, § 80).

4. Marriage 🔑64, 66.

Custody of minor children on annulment of incestuous marriage is peculiarly for trial court, and its determination will not be disturbed, except for clear abuse of discretion (Civ. Code, § 80).

In Bank.

Appeal from Superior Court, Santa Clara County; J. R. Welch, Judge.

Action by Maria Figoni against John Figoni. From the judgment rendered, defendant appeals.

Affirmed.

Superseding opinion of the District Court of Appeal, 291 P. 266.

Waldo F. Postel, of San Francisco, for appellant.

R. V. Bressani and C. C. Coolidge, both of San Jose, for respondent.

SHENK, J.

This is an action to have it declared that the marriage between the parties is void, for the custody and support of minor children, and for a division of property acquired during the marriage relation.

The plaintiff is the niece of the defendant; the latter being a brother of the full blood of the plaintiff's father. The parties participated in a ceremony of intermarriage at Redwood City on July 22, 1919. To this union were born two children, a daughter aged seven years and a son aged five years at the time the present action was commenced in February, 1927.

The court found that neither party knew at the time of said purported marriage, nor at any time thereafter until their separation on July 3, 1926, that the marriage was incestuous or in conflict with the laws of the state, that the plaintiff mother is a fit and proper person to have the custody and control of the children, and that the parties, subsequent to said marriage, accumulated by their joint efforts, and while they were living together as husband and wife, certain real property situated in the city of Palo Alto. On conclusions of law from the facts found, the court entered judgment declaring said marriage null and void, awarded the custody of the children to the plaintiff, divided said real property equally between the parties, and reserved the question of the support and maintenance of the children for further consideration upon motion of either party.

[1, 2] On this appeal from the judgment, the defendant contends, first, that the complaint fails to state a cause of action, in this, that it purports to have been filed under section 82 of the Civil Code providing for the annulment of marriages when the action should have been brought, so it is claimed, under section 80 of the same Code providing that "either party to an incestuous or void marriage may proceed, by action in the superior court, to have the same so declared." There is no merit in the contention. The complaint alleged the facts, including that of the incestuous marriage, which, if true, called for some action on the part of the court. Although the complaint prayed for an annulment of the marriage, it also prayed for general relief. The court treated the action as one brought under section 80 and "declared the marriage wholly null and void from the beginning." No prejudice whatsoever was suffered by the defendant because of the alleged technical misuse of the terms "annul" and "annulment." In fact, the commonly accepted meaning of those terms is to declare void or render invalid.

[3] It is next contended that, in an action under section 80 of the Civil Code, the court is confined in its judgment to a declaration that the marriage is void and can grant no further relief, such as awarding the custody of children and dividing the property. This would indeed be a narrow view to take of the powers of the court in the premises. The power of the court to declare the marriage void is conceded. The power to provide for the custody of minor children born during the marriage relation must also be conceded. Likewise, the power of the court to divide equally between the parties the property acquired by their joint efforts while living together under a void marriage entered into in good faith is well established. Schneider v. Schneider, 183 Cal. 335, 191 P. 533, 11 A. L. R. 1386; Coats v. Coats, 160 Cal. 671, 118 P. 441, 36 L. R. A. (N. S.) 844; Macchi v. La Rocca, 54 Cal. App. 98, 201 P. 143. Vested with these powers, and having the parties before it, with the issues tendered and joined, we can see no possible reason why the court should not proceed, as it did in this case, to adjudicate the entire controversy between the parties in the same action, and thus avoid a multiplicity of suits.

[4] Finally, it is contended that the evidence does not support the findings. It is asserted that on the record the custody of the children should have been awarded to the father instead of to the mother. This matter is so peculiarly the province of the trial court that its determination will not be disturbed, except in the face of a clear abuse of discretion, which we do not find here. It is also claimed that the evidence shows without conflict that the real property divided equally between the parties was acquired by the defendant from funds owned by him before the marriage ceremony took place. This contention is not supported by the record. At the trial the defendant attempted so to establish, but the evidence on the subject is not of that conclusive character as to require a reversal. Furthermore, it appears that on July 22, 1926, the defendant sued the plaintiff for a divorce in Santa Clara county. In his verified complaint he alleged that the real property, which was divided between the parties in the present action, was "acquired by him from his earnings since the marriage of said parties." This declaration, when considered with the other evidence on the subject, was sufficient to create a conflict to be resolved by the trial court.

The judgment is affirmed.

We concur: WASTE, C. J.; RICHARDS, J.; SEAWELL, J.; CURTIS, J.; PRESTON, J.; LANGDON, J.

211 Cal. 336

KENNEY v. ANTONETTI et al.

S. F. 14065.

Supreme Court of California.
Jan. 8, 1931.

Rehearing Denied Feb. 5, 1931.

1. Automobiles ⚷244(20).

Fact that defendant's horses were unattended on highway at night, and other facts shown, sufficiently established prima facie case for guest injured when automobile collided with horse (St. 1923, p. 565, § 151; Civ. Code, § 1714).

Evidence showed that parties in automobile were driving at reasonable speed at about the hour of midnight along fenced highway where it adjoined branch owned by defendant, and that suddenly two horses unattended on road loomed up ahead of automobile, and that driver slowed down and succeeded in passing between them, but almost immediately thereafter another horse invisible in darkness jumped in front of automobile and collided with it.

2. Automobiles ⚷242(1).

In action by guest in automobile colliding with horse, it was not incumbent on plaintiff to show how horses came to be loose, or who permitted them to enter highway (St. 1923, p. 565, § 151).

3. Negligence ⚷121(2).

Theory of doctrine of "res ipsa loquitur" stated.

The theory of doctrine of "res ipsa loquitur" is that defendant in charge of an instrument which causes injury either knows cause of accident or has the best opportunity of ascertaining it, and plaintiff, having no such knowledge, is compelled to allege negligence in general terms and to rely on proof of happening of accident in order to establish it.

[Ed. Note.—For other definitions of "Res Ipsa Loquitur," see Words and Phrases.]

In Bank.

Appeal from Superior Court, Santa Cruz County; H. C. Lucas, Judge.

Action by Agnes Kenney against Joe Antonetti and others. From a judgment of nonsuit, plaintiff appeals.

Reversed.

Rehearing denied; SHENK and LANGDON, JJ., dissenting.

Superseding opinions in 282 P. 1008; 290 P. 617.

Harry I. Stafford, of San Francisco, John H. Leonard and Willard D. Paine, both of Santa Cruz (Daniel R. Shoemaker, of San Francisco, of counsel), for appellant.

Wyckoff & Gardner, of Watsonville, and Ross & Ross, of Redwood City, for respondents.

PRESTON, J.

The judgment of nonsuit entered herein in favor of defendants is hereby reversed.

Plaintiff, a young woman of twenty-one years, sustained severe and permanent injuries, to wit, facial scars and loss of right eye, as the result of an automobile accident which occurred in substantially the following manner: She was riding in the front seat of said automobile as guest of the owner and driver. With other guests in the rear, the parties were proceeding home from a dance at about the hour of midnight on February 21, 1927, driving at a reasonable speed along a fenced highway near Santa Cruz, where it adjoined a ranch owned and operated by the defendants. Suddenly two horses, unattended on the road, loomed up ahead of the car. The driver slowed down, and succeeded in passing between them, but almost immediately thereafter another horse, invisible in the darkness, jumped in front of the machine and collided with it. The force of the impact turned the car over into a ditch, and the aforesaid injuries to plaintiff resulted.

Plaintiff, by her amended complaint, alleged negligence in general terms, to wit: "That said horse or horses was or were among a number of horses that were, through the negligence and gross carelessness of defendants, permitted to remain on said highway or road unattended by any person;" that "said horses were under the control of and owned by defendants" and said highway was "fenced on both sides by a substantial fence." Defendants answered with a general denial and a charge of contributory negligence. At the conclusion of plaintiff's evidence the court granted defendants' motion to strike out the testimony of five witnesses to the effect that they had seen horses, evidently owned by defendants, straying unattended on the highway at the point in question at various times just prior to the accident, and further granted a motion by defendants for nonsuit made upon the ground that there was no proof of the material allegations of the complaint or that said horses were controlled or owned by defendants or by their negligence permitted to remain unattended on the highway, nor was there evidence sufficient to allow the case to go to the jury. Judgment for defendants followed, and plaintiff appealed.

[1-3] It is the contention of appellant that there was sufficient evidence on the question of defendants' negligence to allow the case to go to the jury, and that the court erred in

striking out said testimony and in granting a nonsuit. In other words, she pleads applicability of the doctrine of res ipsa loquitur, and urges that a prima facie case was made by her, proving directly and inferentially every allegation of the complaint. With these claims we must agree.

Defendant Joseph Antonetti testified that the horse that caused the accident was his; he then stated that he himself did not own the horse but it was one of five horses belonging to the ranch company, or partnership, consisting of himself—the boss—and certain of the other defendants, one of whom, defendant Digrazia, had the care and control of the animals. Section 151 of the Motor Vehicle Act (Act 5128, Deering's General Laws 1923, Stats. 1923, pp. 517, 565), in part provides in substance that no person owning or controlling live stock shall voluntarily or negligently permit any of them to stray or remain unaccompanied upon a fenced public highway, and section 1714 of the Civil Code in part provides in substance that everyone is responsible for an injury occasioned to another by his want of ordinary care or skill in the management of his property. The fact that defendants' horses were unattended upon the highway at night and the other facts adduced by the evidence, considered in the light of the above provisions and the further general rules of negligence applying at all times, clearly gave rise to an inference of negligence here, and sufficiently established plaintiff's prima facie case. It was not incumbent upon her to prove just how the horses came to be loose or who permitted them to enter the highway, for this was obviously a fact peculiarly within the knowledge of defendants. In the exercise of ordinary care, how would it be possible for horses to stray time and again unattended upon the highway, as plaintiff attempted, by the evidence stricken out, to show it was the custom of defendants' horses to do? The theory of the doctrine of res ipsa loquitur is that a defendant in charge of an instrumentality which causes injury either knows the cause of the accident or has the best opportunity of ascertaining it, and the plaintiff, having no such knowledge, is compelled to allege negligence in general terms and to rely upon proof of the happening of the accident in order to establish it. 19 Cal. Jur., § 127, p. 713.

As said in Michener v. Hutton, 203 Cal. 604, 265 P. 238, 240, 59 A. L. R. 480: "One who seeks to recover damages for injuries alleged to have been incurred by reason of another's negligence must establish by a preponderance of the evidence that the latter's negligence has occasioned him loss. However, where the facts are such as to give rise to an inference of negligence from the inherent nature and character of the act causing the injury, or, in other words, to give application to the principle of res ipsa loquitur, the burden of proceeding is shifted to the defendant and if he would escape an adverse finding he must adduce evidence to meet the plaintiff's prima facie case."

An able discussion of the questions here confronting us is found in Breidenbach v. McCormick Co., 20 Cal. App. 184, 128 P. 423, 425, where the court held, upon a showing of injury by a runaway horse, unattended in the streets of a city, that a prima facie case of negligence was made out against the owner. That case cites with approval the rule laid down in Judson v. Giant Powder Co., 107 Cal. 556, 40 P. 1020, 29 L. R. A. 718, 48 Am. St. Rep. 146, as follows: "When a thing which causes the injury is shown to be under the management of the defendant, and the accident is such as in the ordinary course of things does not happen if those who have the management use the proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from the want of care." To the same effect see, also, the numerous other cases reviewed in the opinion in Breidenbach v. McCormick Co., supra, and Michener v. Hutton, supra, and cases therein cited; also Roberts v. Griffith Co., 100 Cal. App. 456, 280 P. 199; and Olden v. Babicora Development Co. (Cal. App.) 290 P. 1062.

See, also, Hansen v. Kemmish, 201 Iowa, 1008, 208 N. W. 277, 45 A. L. R. 499, and note, where the court holds that one who is by statute required to restrain his boar is prima facie negligent in permitting it to be at large on a highway, where an automobile collides with it, to the injury of the driver, but he may show in defense that he in fact exercised reasonable and ordinary care in restraining the animal. The case of Doherty v. Sweetser, 82 Hun, 556, 31 N. Y. S. 649, is directly in point to the effect that the fact that a horse is in the street unattended shows negligence; and the burden is on the person in charge of the horse to show that he used all proper means to prevent it from escaping and that he was without fault.

Under any but exceptional circumstances, the exercise of ordinary care will serve to keep unattended animals in their proper inclosures. In these days of rapid automobile transportation, the extreme hazard to drivers and passengers of animals straying unattended on the roads at night cannot be overestimated. The driver is placed in a well-nigh helpless position because of the tendency of an animal to spring out of the darkness in front of a car when blinded or hypnotized by its headlights. Against this contingency, drivers should be protected, by having our roads clear of such obstructions, and every owner of live stock should make an earnest endeavor to so control their movements with due care that the lives of others may not be thereby endangered.

For these and other reasons we must conclude that the court erred in granting defendants' motion for nonsuit, and further discussion becomes unnecessary.

We concur: WASTE, C. J.; LANGDON, J.; CURTIS, J.; SHENK, J.; RICHARDS, J.; SEAWELL, J.

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211 Cal. 346

SECURITY-FIRST NAT. BANK OF LOS ANGELES v. RUDDLE PROPERTIES, Inc., et al.

Sac. 4479.

Supreme Court of California.

Jan. 9, 1931.

1. Judgment 🔑306.

Where judgment contained clerical error, trial court had authority to make record speak truth.

2. Appeal and error 🔑659(3).

Plaintiff, by motion for diminution of record, could have trial court's order amending judgment nunc pro tunc incorporated in transcript on file in Supreme Court on defendant's appeal from judgment (Code Civ. Proc. § 953).

In Bank.

Appeal from Superior Court, Merced County; L. W. Fulkerth, Judge.

Action by the Security-First National Bank of Los Angeles, substituted for the Pacific-Southwest Trust & Savings Bank, a corporation, against J. G. Ruddle Properties, Inc., and others. On plaintiff's motion for diminution of record on appeal by defendant from judgment for plaintiff.

Motion granted.

Robert L. McWilliams, C. M. Peck, James F. Peck, C. F. Rafferty, and C. H. White, all of San Francisco, for appellants.

O'Melveny, Tuller & Myers and Homer I. Mitchell, all of Los Angeles, Stephen W. Downey, of Sacramento, and Edward Bickmore, of Merced, for respondent.

WASTE, C. J.

This is a motion by the respondent, upon suggestion of diminution of record, to have inserted in and made a part of the clerk's transcript an order amending the judgment appealed from.

Plaintiff brought the action to foreclose a mortgage given by the appellant J. G. Ruddle Properties, Inc., to secure a bond issue. Several junior incumbrancers were also named as defendants, some of whom answered, but none of whom asked that his lien be foreclosed. In fact, separate actions for the foreclosure of their respective liens had been filed by a few of the junior lienholders. At the commencement of the trial, it appears to have been understood by court and counsel that plaintiff's lien alone was to be foreclosed. and the findings of fact and conclusions of law, constituting the "decision" or judgment of the court (Aspegren & Co. v. Sherwood, Swan & Co., 199 Cal. 532, 537, 250 P. 400), were and are in accord with this understanding. However, the formal judgment thereafter signed by the court and entered by the clerk provided for the foreclosure of three of the junior liens, in addition to the foreclosure of plaintiff's mortgage. This apparent inadvertence was not called to the trial court's attention on the motion for new trial. The first brief filed upon the appeal from the judgment brought the matter to the attention of the respondent, who, in turn, directed the attention of the trial court to the apparent error or inadvertence in the judgment as entered. Declaring that the judgment as entered "does not correctly state the decision and judgment of the court by reason of inadvertence and mistake of the court and by reason of a clerical error and misprision of the clerk," the court made an order amending the judgment nunc pro tunc, to make it conform to the decision as pronounced in the findings of fact and conclusions of law; that is to say, to provide for the foreclosure of respondent's mortgage alone. By the present motion, respondent seeks to have the "Order Amending Judgment Nunc Pro Tunc" incorporated in and made a part of the transcript now on file in this court on the appeal from the judgment.

[1, 2] The trial court acted within its jurisdiction when it made its records speak the truth (Biaggi v. Ramont, 189 Cal. 675, 677, 209 P. 892; Dutton Dredge Co. v. Goss, 77 Cal. App. 727, 732, 247 P. 594), and we can conceive of no good reason why the order should not be brought up and made a part of the record before us. Section 953 of the Code of Civil Procedure provides that, if "there is any paper or record in the custody of the clerk of the trial court which was before the trial court but which is not included in the record on appeal, and an examination of such paper or record will assist in a determination of the appeal on its merits, the court in which the appeal is pending may, on motion of either party, or on its own motion, require the production of a certified copy of such paper or record, and the same shall thereupon be deemed a part of the record on appeal." Respondent seeks to bring the additional record here in the proper manner.

🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Biaggi v. Ramont, supra. If the amendment of the judgment was a proper one, it should be printed and filed as an amendment to the transcript in order that it might be before us when we come to a consideration of the appeal on its merits; if not a proper amendment, that fact may very readily be determined at such time.

It is therefore ordered that the motion be granted without prejudice to the later consideration upon this appeal of the question of the validity and effect of the order purporting to amend the judgment.

We concur: SHENK, J.; RICHARDS, J.; SEAWELL, J.; CURTIS, J.; PRESTON, J.; LANGDON, J.

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111 Cal. App. 107

In re RAPKEN.

RAPKEN v. SUPERIOR COURT IN AND FOR CITY AND COUNTY OF SAN FRANCISCO et al.

Civ. 7845.

District Court of Appeal, First District, Division 1, California.

Jan. 15, 1931.

Prohibition 🔑20.

Prohibition to restrain anticipated contempt proceeding will be denied, where petition did not set forth court records, showing proceeding was contemplated.

Petition by Elizabeth B. Rapken for writ of prohibition prayed to be directed to the Superior Court, in and for the City and County of San Francisco, and Hon. Frank H. Dunne, Judge of the Superior Court and the Juvenile Department thereof, to restrain the hearing of an anticipated contempt proceeding.

Writ denied.

Lucius L. Solomons, of San Francisco, for petitioner.

PER CURIAM.

Application for a writ of prohibition to prohibit the trial court from hearing an anticipated contempt proceeding for failure to comply with a court order.

The petition does not set forth any of the court minutes, records, or citations from which it appears that any such proceeding is contemplated. The document set forth on page 5 of the petition is merely a subpœna, in the usual form, to appear as a witness in a proceeding pending before the court. While the petition alleges on page 5 that in pursuance of the subpœna the court proceeded "on the return date, and many times thereafter to hear and try this petition based on said subpœna for contempt," etc., and "has proceeded to try her for contempt as a result of and based solely on said subpœna over the objections of petitioner," etc., the petitioner has not set forth the court minutes, or a transcript of the testimony, or something else of record to show that this has been done. All we have is the conclusion of the petitioner.

The petition is denied.

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111 Cal. App. 254

BROOKS v. CITY AND COUNTY OF SAN FRANCISCO et al.

Civ. 7447.

District Court of Appeal, First District, Division 2, California.

Jan. 21, 1931.

Rehearing Denied Feb. 20, 1931. Hearing Denied by Supreme Court March 19, 1931.

1. Automobiles 🔑244(35).

In death action arising out of rear-end collision, evidence supported finding of bus driver's negligence in driving at excessive speed in business district.

> Though evidence was somewhat conflicting, there was ample evidence to support implied finding that bus driver who collided with rear of deceased's automobile was guilty of negligence, directly contributing to accident and attendant injuries, in that he drove in business district at speed considerably in excess of 15 miles per hour, and drove his vehicle on public highway at speed greater than was reasonable and proper, having due regard to traffic, surface and width of highway.

2. Appeal and error 🔑1001(1).

Negligence being jury question, implied finding of bus driver's negligence, supported by evidence, will not be disturbed upon appeal.

3. Automobiles 🔑244(44).

Evidence supported finding deceased motorist, involved in rear-end collision on wet, slippery city street, was not contributorily negligent.

4. Automobiles 🔑246(58).

Evidence not conclusively showing deceased motorist, whose car was struck in rear, was contributorily negligent, instruction on last clear chance doctrine *held* properly given.

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by Eleanor P. Brooks, as administratrix of the estate of Charles C. Brooks, also known as C. C. Brooks, deceased, against the City and County of San Francisco and another. From a judgment in favor of plaintiff, defendants appeal.

Affirmed.

John J. O'Toole, City Atty., and Henry Heidelberg, Deputy City Atty., both of San Francisco, for appellants.

Carey & Gorfinkel, of San Francisco, for respondent.

LUCAS, Justice pro tem.

Appellants seek reversal of the judgment rendered in the trial court on a verdict for $15,000 awarded respondent in her representative capacity as damages for the death of her husband, who was injured and died as the result of an automobile collision alleged by respondent to have been caused through appellants' negligence.

As grounds for reversal appellants urge that the negligence of appellants was not proven, that the decedent was guilty of contributory negligence, and that the court erred in giving an instruction upon the doctrine of last clear chance.

Briefly the facts are these: On Sunday, November 6, 1927, at about 9:30 a. m., Charles C. Brooks was operating a Dodge coupé in a northerly direction on the easterly portion of the Embarcadero between piers 35 and 37 in the city and county of San Francisco. At the same time appellant J. M. Dunne, an employee of appellant city and county of San Francisco, was operating a seven-ton bus, 30 feet in length, to the rear of the Dodge coupé in the same direction and on the same side of the Embarcadero. The surfaced portion of the Embarcadero at the points involved in this action was then approximately 110 feet wide, having an asphalt surface or pavement on the easterly 30 feet thereof; the remaining 80 feet of said surface being cobbled pavement. The Dodge coupé driven by the said Brooks was first observed by appellant Dunne at a time when the bus driven by him was several hundred feet southerly from said coupé. Traveling at a speed variously estimated at from 15 to 30 miles an hour, the bus overtook the Brooks car, and when about 25 feet from it appellant Dunne steered sharply to the left and applied his brakes, thereby causing the bus to skid and collided with the rear end of the coupé. As a result the coupé was seen to spin around several times and come to a stop against the extreme easterly curb of the Embarcadero at a point estimated by several witnesses to be from 50 to 180 feet from the point of collision. The estimate of 180 feet, however, is substantiated by disinterested witnesses who actually made measurements on the ground.

The collision occurred in what is admittedly a business district of San Francisco, and at a time when the street was very wet and slippery. As a result of the collision the said Brooks sustained injuries from which he subsequently died.

[1, 2] While there is some conflict in the record, there is ample evidence to support the implied finding of the jury that the appellant Dunne was guilty of negligent conduct directly contributing to the accident and attendant injuries, namely, driving a motor vehicle in a business district at a speed considerably in excess of 15 miles per hour, and driving said vehicle on a public highway at a speed greater than is reasonable and proper, having due regard to the traffic, surface and width of the highway. This implied finding will not be disturbed upon appeal, since the question of negligence is purely one for the jury. Haines v. Fewkes, 190 Cal. 477, 213 P. 490.

[3] The same rule is likewise applicable to the question of decedent's contributory negligence. As to such negligence the record also discloses a conflict. Appellants attempted to prove in their affirmative defense that decedent just prior to the collision turned his Dodge car directly in front of the on-coming bus without giving the signal required by law. It is true that there is some evidence in the record which might warrant the jury in finding that the decedent did as appellants claim, but there is also evidence, some of which was produced by appellants themselves, to the effect that at a point on the Embarcadero about 180 feet north of the place of impact the easterly line of the street deviates somewhat towards the west; that decedent, whose car was then traveling at a rate of speed of from 4 to 7 miles an hour, had only "commenced to make a little turn to the west," or "turned very slightly to the west"; and that for the last 30 feet that his car traveled prior to the collision and at the time thereof decedent was signaling with his hand his intention to change the direction of his car.

On the whole the record is amply sufficient to justify a jury in concluding that decedent was free from negligence, both at the time of the collision and prior thereto.

[4] As to the propriety of the court giving an instruction upon the doctrine of last clear chance the parties in their briefs have but little to say. No criticism is made of either the form or substance of the instruction. Appellants, content with the assumption that the testimony conclusively shows that decedent immediately before and at the very moment of the impact was guilty of negligence, invoke the rule that where a decedent's negligence is

continuous and contemporaneous no instruction upon the last clear chance doctrine should be given. The assumption, however, is a false assumption, and the rule may not be applied. The judgment appealed from is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

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111 Cal. App. 124

COAST ELECTRIC SERVICE, Inc., v. JENSEN.

Civ. 7546.

District Court of Appeal, First District, Division 1, California.

Jan. 16, 1931.

1. Costs 🔑203.

Statute requiring memorandum of costs to be filed and served not later than five days after entry of judgment is mandatory (Code Civ. Proc. § 1033).

2. Costs 🔑203.

Failure to comply with statute governing filing and serving of memorandum of costs extinguishes remedy to recover costs, and operates as forfeiture of right thereto (Code Civ. Proc. § 1033).

3. Costs 🔑203.

Memorandum of costs served or filed too late will be stricken from files on motion (Code Civ. Proc. § 1033).

4. Costs 🔑203.

Trial court may extend time described by statute for filing and serving memorandum of costs (Code Civ. Proc. §§ 1033, 1054).

5. Costs 🔑203.

Order extending time for filing and serving memorandum of costs cannot be made after expiration of statutory time allowed for such filing and service (Code Civ. Proc. §§ 1033, 1054).

6. Costs 🔑203.

Order extending time for serving memorandum of costs, made three days after expiration of statutory period allowed for such service, *held* void (Code Civ. Proc. §§ 1033, 1054).

7. Appeal and error 🔑712.

Matters entirely foreign to record on appeal, no mention thereof being made in bill of exceptions, cannot be considered in determining appeal.

8. Costs 🔑203.

Trial court was without power to extend time for serving memorandum of costs, where statutory period therefor had expired, regardless of contents of affidavit supporting motion (Code Civ. Proc. §§ 1033, 1054).

Appeal from Superior Court, Santa Clara County; F. B. Brown, Judge.

Action by the Coast Electric Service, Inc., against J. Jensen. From an order denying his motion to strike from the files plaintiff's memorandum of costs, defendant appeals.

Reversed.

Chester E. Ross, of Gilroy, for appellant.

Carl L. Hubbell, of Los Gatos, for respondent.

KNIGHT, J.

Defendant appeals from an order denying his motion to strike from the files plaintiff's memorandum of costs. The judgment in the action was entered and the memorandum of costs was filed on February 13, 1930, but the memorandum was not served within the succeeding five days, as required by section 1033 of the Code of Civil Procedure. On February 21, 1930, which was three days after the expiration of the statutory period allowed for such service, the court made an ex parte order, based on affidavit, purporting to grant plaintiff an additional 15 days within which to serve said memorandum; and the same was served within the extended time. Defendant then presented a motion to strike the memorandum from the files, and, upon the failure of plaintiff to appear at the hearing of the motion, it was granted. Later, on plaintiff's motion, the memorandum was restored to the files, and defendant renewed his motion to strike, which was denied.

[1-6] The terms of section 1033 of the Code of Civil Procedure requiring the memorandum of costs to be served and filed not later than five days after the entry of judgment are mandatory, and failure to comply therewith extinguishes the remedy to recover the costs and operates as a fortfeiture of the right thereto. Chapin v. Broder, 16 Cal. 403. In other words, as said in Griffith v. Welbanks & Co., 26 Cal. App. 477, 147 P. 986, 988, if a "party fails, within the time prescribed, to file and serve his memorandum of costs, then he is to be conclusively deemed to have waived the costs, if any, accruing in his favor" (see, also, Riddell v. Harrell, 71 Cal. 254, 12 P. 67; Holmes v. Anderson, 90 Cal. App. 276, 265 P. 1010); and if the memorandum be served or filed too late it will be stricken from the files on motion (Dow v. Ross, 90 Cal. 562, 27 P. 409). Pursuant to the power granted by section 1054 of said Code the trial court may extend the time prescribed

by said section 1033 (Beilby v. Superior Court, 138 Cal. 51, 70 P. 1024); but it is well settled that orders of extension granted pursuant to said section 1054 must be made during the period of time within which the act may be done, that is, while the right is still alive; and, if made after the expiration of such period, the orders are void and confer no legal authority for the doing of the act. Clark v. Crane, 57 Cal. 629; Emeric v. Alvarado, 64 Cal. 529, 2 P. 418; Freese v. Freese, 134 Cal. 48, 66 P. 43; Estate of Clary, 112 Cal. 292, 44 P. 569. It follows, therefore, that, since the order extending time in the present case was granted three days after the expiration of the statutory period in which said memorandum may have been served, it was void.

[7] Counsel for plaintiff claims in his brief that the omission to serve the memorandum within the period of time prescribed by the statute was due to the fact that he was relying upon certain oral stipulations made by counsel for defendant in court to pay the judgment and the costs within a few days, providing execution was not issued; also upon certain letters written and payments made in confirmation of said stipulations. The matters referred to are entirely foreign to the record, however, no mention thereof being made in the bill of exceptions upon which the appeal was taken; consequently they are not the subject of proper consideration in the determination of the appeal. It is also claimed that it was discretionary with the trial court, under section 473 of the Code of Civil Procedure, to relieve plaintiff from its default in failing to serve said memorandum within the statutory period. Conceding this to be true, the record before us fails to show that any such relief was ever applied for or granted.

[8] It appears from the terms of the order extending time that it was based upon the affidavit of plaintiff's attorney, which affidavit has not been made a part of the bill of exceptions; and plaintiff argues, therefore, that it must be assumed that sufficient facts were set forth therein to justify the court in granting the order. But, as will be observed, under the authorities hereinabove cited, the court loses jurisdiction to extend time upon the expiration of the statutory period within which the act may have been done. Therefore, it was beyond the power of the court to grant the extension, regardless of the contents of the affidavit.

Neither was the affidavit upon which plaintiff's motion for restoration of the memorandum was based set forth in the bill of exceptions, and plaintiff contends therefore that the order made in that behalf is presumed to have been properly granted. This may be conceded also: but that proceeding had no bearing whatever upon the matter of plaintiff's default in failing to serve said memorandum within five days after the entry of the judgment. As shown by the contents of the notice of motion, the purpose of that proceeding was simply to nullify the previous order striking the memorandum from the files, upon the ground that it was granted during the excusable absence of counsel for plaintiff.

For the reasons above stated, it is our opinion that defendant's motion to strike plaintiff's memorandum of costs from the files should have been granted. The order denying the same is therefore reversed.

We concur: TYLER, P. J.; CASHIN, J.

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111 Cal. App. 189

BRIGGS v. CAMERON.

Civ. 4246.

District Court of Appeal, Third District, California.

Jan. 17, 1931.

1. Evidence 🔑588.

Testimony of driver of automobile concerning knowledge of dangerous condition of street and consequent negligence *held* properly rejected as unworthy of belief, in view of conflict and other contradictory testimony.

Owner of automobile in which plaintiff was riding at time of accident and chauffeur were called as witnesses by plaintiff, but they were not examined as adverse witnesses under Code Civ. Proc. § 2055. Both witnesses indicated entire willingness to testify to every circumstance favorable to plaintiff.

2. Evidence 🔑588.

Trial court, in determining credibility of witnesses, may consider all facts and circumstances and reject evidence if it appears improbable.

3. Appeal and error 🔑996.

Finding of trial court on question of negligence will not be disturbed, if from surrounding circumstances and reasonable inferences, reasonable minds might differ.

4. Evidence 🔑594.

General rule that witness' uncontradicted testimony regarding particular fact should be accepted as proof of such fact is subject to exceptions.

5. Evidence ⚷588.

Most positive testimony may be contradicted by circumstances so as to satisfy court of its falsity.

Appeal from Superior Court, Los Angeles County; Edward T. Bishop, Judge.

Action by Elizabeth H. Briggs against Walter Cameron. Judgment for defendant, and plaintiff appeals.

Affirmed.

John A. Deweese and Josiah Coombs, both of Los Angeles, for appellant.

George L. Greer, of Los Angeles, for respondent.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

This is an appeal from a judgment which was rendered against the plaintiff in an action for damages for personal injuries sustained in an automobile casualty.

The defendant is a brother of the plaintiff. They lived in separate homes in Culver City. They were on friendly terms with each other. The defendant owned a Cadillac touring car. December 23, 1926, he handed his chauffeur, Jock Gironda, $40, directing him to take the plaintiff in the automobile to the home of Mrs. Dunn at Santa Monica and purchase a Christmas turkey for himself and another for Mrs. Briggs. Gironda did so. Dewey street, in the vicinity of the home of Mrs. Dunn, had been recently paved. A broken water main had washed out a great hole beneath the paved surface of the street. This damage was apparently not visible. The chauffeur proceeded to return along Dewey street. As the Cadillac car was driven over this excavated space, the concrete gave way and precipitated the machine into the hole. The plaintiff was slightly injured. She brought suit for damages against her brother. The chauffeur was not made a party to the action. The cause was tried before the court without a jury. At the close of the evidence, both parties submitted the cause on its merits. The court found that neither the defendant nor his agent, Gironda, was guilty of negligence. Judgment was thereupon rendered in favor of the defendant.

The appellant contends the judgment is not supported by the evidence. The plaintiff called both the defendant and his chauffeur as her witnesses. They were not examined under the provisions of section 2055 of the Code of Civil Procedure as adverse witnesses. Both of these witnesses indicated an entire willingness to testify to every circumstance favorable to the plaintiff. The court might have been warranted in assuming the parties to the litigation were in collusion to establish a liability on the part of the defendant, which they expected the surety company to pay. The defendant testified to the ownership of the machine, the agency of the chauffeur, the invitation to his sister to ride in the car, the fact that she was residing with him at his home since the accident occurred, and that his Cadillac car was insured against accidents. Gironda, the chauffeur, with the evident purpose of trying to show his knowledge of the danger, so as to impute negligence, testified that Mrs. Dunn told him just before he drove onto Dewey street that "that road is very dangerous; the water is rushing terrible, * * * I wouldn't go over it if I was you." In response to the inquiry, "Q. Was the danger apparent?" he replied, "Yes, there was water rushing along the gutter and across the street into the lot. * * * Did you say to Mrs. Briggs, 'I am sorry I tried this. I knew I couldn't make it and I should not have tried it?' A. Yes sir. * * * I says, 'I was a fool to try to make this.' * * * Q. You saw something * * * that gave some indication that there was something wrong with the road, did you? A. Yes." On cross-examination for the purpose of impeachment, this witness was shown a written statement which he admitted having signed the day following the accident, in which he said: "The street was not covered with water on top, although there was some water in the gutter. Any ordinary prudent person would never have any reason to believe that the concrete would give way as it did, for it all looked to be in perfect condition to all of us in the car until we struck it." Mrs. Dunn contradicted Gironda's statement that she had warned him not to go by way of Dewey street because it was dangerous. She testified, "I didn't tell him the road was dangerous." There was no other evidence that the occupants of the machine had any previous knowledge of the dangerous condition of Dewey street. Mrs. Briggs testified: "As far as I could tell, it (the street) looked all right."

[1-3] From the foregoing conflict in Gironda's evidence respecting his knowledge of the dangerous condition of the street and the consequent negligence on his part, together with the contradiction of Mrs. Dunn that she told him of the danger, the court was warranted in rejecting his evidence upon that subject as unworthy of belief. Except for his testimony, there was no evidence of his negligence in driving along Dewey street. In determining the credibility of a witness, the court has a right to consider all the facts and circumstances of the transaction and reject the evidence if it appears to be improbable. 10 Cal. Jur. 1145, § 363. Even though there is no conflict in the evidence, if, from the surrounding circumstances of the case, together with such reasonable inferences as may be drawn therefrom, reasonable minds may differ as to the presence of negligence, the finding of the court

in that regard will not be disturbed on appeal. 19 Cal. Jur. 725, § 135; 2 Cal. Jur. 934, § 549; Whitmeyer v. Southern Pac. Co., 102 Cal. App. 199, 282 P. 1005; Wise v. Maxwell Hardware Co., 94 Cal. App. 765, 271 P. 918. Even though the evidence of the chauffeur in the present case were uncontradicted by his own testimony or that of other witnesses, the court might still be justified from other circumstances of the case in rejecting it as unworthy of credit.

[4, 5] While it is a general rule that the uncontradicted testimony of a witness to a particular fact may not be discredited, but should be accepted by the court as proof of the fact, this rule has its exceptions. The most positive testimony may be contradicted by the circumstances in evidence so as to satisfy the court of its falsity. Hufstetler v. Ind. Acc. Com. (Cal. App.) 290 P. 922; Caldwell v. Weiner, 203 Cal. 543, 546, 264 P. 1100; Michener v. Hutton, 203 Cal. 604, 612, 265 P. 238, 59 A. L. R. 480.

The circumstances of this case will not warrant this court in disturbing the judgment of the trial court.

The judgment is therefore affirmed.

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111 Cal. App. 198

MacLAREN v. GILBERT.

Civ. 6181.

District Court of Appeal, Second District, Division 1, California.

Jan. 19, 1931.

1. Limitation of actions 🔑21(1).

Action on ordinary indebtedness incurred for materials furnished or for labor or for money advanced for benefit of another at such other's request is within two-year limitation (Code Civ. Proc. § 339, subd. 1).

2. Limitation of actions 🔑197(1).

In action to recover alleged indebtedness, evidence *held* insufficient to establish "book account" within four-year limitation (Code Civ. Proc. § 337).

> Pursuant to oral agreement, plaintiff undertook to cause some improvements to be made upon property of defendant, for which defendant was to reimburse plaintiff. Evidence showed that bills for lumber and other materials were made out against defendant but delivered to and paid by plaintiff, that items between parties were noted in plaintiff's check stubs, and that plaintiff kept record of various items upon pieces of shingle and loose pieces of paper.
>
> [Ed. Note.—For other definitions of "Book Account," see Words and Phrases.]

3. Account stated 🔑1.

Account stated cannot be based on mere admission that something is due without specifying how much.

4. Account stated 🔑1.

To constitute "account stated," amount due must be specified or method agreed upon by which amount due can be definitely and certainly ascertained.

> [Ed. Note.—For other definitions of "Account Stated," see Words and Phrases.]

5. Limitation of actions 🔑197(1).

In action to recover alleged indebtedness, evidence *held* insufficient to establish "account stated" between parties within four-year limitation (Code Civ. Proc. § 337).

Appeal from Superior Court, Los Angeles County; Louis P. Russill, Judge.

Action by B. W. MacLaren against Grace Gilbert. From a judgment for plaintiff for part of demand only, plaintiff appeals.

Affirmed.

Willebrandt & Horowitz, of Los Angeles, for appellant.

Horace H. Appel and Albert Weiner, both of Los Angeles, for respondent.

CONREY, P. J.

The judgment rendered in favor of plaintiff covers the amount due on two promissory notes, which were set out in the first two counts of the complaint. About these items there is no controversy. The plaintiff appeals from the judgment because the court refused to allow the demand contained in the third count of the complaint; the amount thereof being $1,543.09.

The action was commenced on September 8, 1927. Count 3 of the complaint alleged that within four years last past the defendant became indebted to the plaintiff in said sum upon an account for certain goods, wares, and merchandise sold and delivered to the defendant, and for money advanced to the defendant at her special instance and request. By amendment the plaintiff was allowed to file a fourth cause of action upon an account stated, dated July 21, 1926, covering all the demands of the original complaint. The court found that during the month of June, 1924, the defendant became indebted to the plaintiff in said sum $1,543.09, for certain work and labor and moneys furnished by plaintiff to defendant, no part of which has been paid; but also found that there never was any account between the parties and that more than two years had elapsed since the obligation became due; also that on July 31, 1926, the plaintiff presented to the defendant an account but that the defendant objected to the same as incorrect, and that the defendant never accepted said account or agreed to its correctness or agreed to pay the same as presented. The court also found upon the third cause of action that the debt was barred by the provisions of section 339, subdivision 1, Code of Civil Procedure.

[1] From the evidence it is apparent, and it seems to be conceded, that the original indebtedness of the defendant to the plaintiff with respect to the matters included in count 3 of the complaint, whatever the actual amount thereof may be, was incurred more than two years before the commencement of this action. As an ordinary indebtedness incurred for materials furnished or for labor or for money advanced for the benefit of the defendant and at her request an action to recover thereon would be barred at the end of two years. However, it is contended by appellant that the items of this demand were contained in a book account and not upon an ordinary obligation or liability not founded upon an instrument in writing, and that therefore the period of limitation is four years, as provided by section 337, Code of Civil Procedure.

[2] We have examined the evidence, and we are satisfied that it is not sufficient to establish any book account, within the meaning of the statute or at all. By oral agreement, somewhat indefinitely arranged in conversations between the parties, the plaintiff undertook to cause some improvements to be made upon real property of the defendant, and the defendant was to reimburse the plaintiff for the moneys so expended. The plaintiff ordered lumber and other materials, the bills for which were made out as against the defendant but were delivered to the plaintiff, who paid the same. These bills rendered by the materialmen constitute a large part of what the plaintiff seeks to use as his book of account. The only other evidence relied upon, of this nature, is found in the plaintiff's statement that the items were noted in the stubs of his check book, none of which were produced in evidence. He also claimed that he kept the record upon pieces of shingle and loose pieces of paper; but these upon further explanation appear to have been only memoranda used for the purpose of ordering materials when needed. These various supposed writings were never assembled and added together so as to constitute a statement of account or so as to show any definite sum due.

[3-5] It is also provided by section 337, Code of Civil Procedure, that an action may be commenced within four years upon an account stated. The plaintiff by his amendment to the complaint alleged that on July 31, 1926, an account was stated between himself and the defendant, the amount whereof the defendant agreed to pay. The court found against the plaintiff on this issue. It is admitted that in July, 1926, the plaintiff presented an account. The court found that this occurred, but further found that the defendant objected to the account on presentation, as being incorrect; that defendant never accepted the account and never agreed to the account as contained in said statement. We think that the court's finding is in accordance with the facts, or at least is fully justified by the evidence. This finding was in accordance with the testimony of the defendant, who admitted that certain bills and checks were presented to her by the plaintiff on July 31, 1926, and that she told him that the bill was not correct and that she did not know what she was going to do about it. It further appears that she kept the papers for further examination and did not at any time admit that the account was correct or agree to pay the same. There is no merit in the claim of appellant that by a telegram such promise was made. On this point it appears that the plaintiff sent to defendant a telegram in which he asked her to advise him, "if you have been able to make any definite arrangement on our affairs." To this inquiry defendant authorized the plaintiff's mother to send a reply as follows: "I am sorry there is no immediate way of an adjustment of our affairs and you may depend upon me at the first opportunity." In this language there is no modification or retraction of defendant's previous refusal to admit the correctness of the items claimed. Where there is an admission that something is due without specifying how much, there is no account stated. The amount due must be specified or there must be a reference to something by which the amount due can be definitely and certainly ascertained. American, etc., Co. v. Chicago-Los Angeles Building Corp., 88 Cal. App. 300, 263 P. 297; Ough v. Ansonia Oil Co., 99 Cal. App. 769, 773, 279 P. 481.

The judgment is affirmed.

We concur: HOUSER, J.; YORK, J.

111 Cal. App. 243

KELLER v. KING, Director of Finance, et al.

Civ. 7474.

District Court of Appeal, Second District, Division 2, California.

Jan. 20, 1931.

As Modified on Denial of Rehearing, Feb. 28, 1931. Hearing Denied by Supreme Court March 19, 1931.

Mines and minerals ⚷6.

Where mineral permit covering land described in application not embraced in riparian proprietor's preferential permit was canceled for violation of its conditions, that riparian proprietor failed to exercise permit did not entitle applicant to permit covering preferential lands on original application (St. 1921, pp. 405, 409, §§ 4, 11).

St. 1921, pp. 405, 409, §§ 4 and 11, authorizing Surveyor General to grant to any person permits to prospect in submerged tidelands, provide that in case of application for permit by any one other than riparian proprietor, the riparian proprietor has six months within which to file application for permit, and that if the riparian proprietor fails to comply with requirements of the act his preferential rights cease.

Application by John M. Keller for a writ of mandate prayed to be directed to Lyman M. King, Director of Finance, Department of Finance, and another, requiring issuance of permit or amendment of permit to prospect for mineral in submerged tidelands.

Writ denied.

Faries & Williamson, of Los Angeles, for petitioner.

U. S. Webb, Atty. Gen., and H. H. Linney, Deputy Atty. Gen., for respondents.

CRAIG, J.

The petitioner, a person other than the littoral or riparian proprietor, filed an applicatiion for a permit to prospect for oil and gas upon a submerged area along the Pacific Coast in Santa Barbara county. Thereafter, and within a period of six months, the Standard Oil Company of California filed an application as littoral or riparian proprietor for a permit to prospect upon a portion of the same lands. The latter application was granted and the petitioner herein also received a permit a drill upon that portion of the lands described in his application not embraced in the permit to the littoral or riparian proprietor. Neither of the parties complied with the terms of said permits by commencing operations within the time prescribed by law, and their permits were forfeited and canceled by the state. Petitioner subsequently sought permission to drill upon the remainder of the area described in his application, which was refused, and he prays a writ of mandamus requiring the issuance either of "an amended permit or a new permit to prospect for oil and gas upon the lands described in said application and not included in the original state oil and gas prospecting permit issued to him."

Chapter 303 of the Statutes of 1921, pp. 405, 409, provides that:

"Sec. 4. The surveyor general is hereby authorized * * * to grant to any person * * * a prospecting permit * * * to prospect for oil or gas * * * upon condition that the permittee shall begin drilling operations within six months from the date of the permit * * *; provided, however, that in case of prospecting permits and leases to river beds, lake beds, overflowed, tide and submerged lands, the width or length of the prospecting permit or lease along the shore line, measured on an east and west or north and south line, shall not exceed one-quarter mile * * *; provided, further, however, that in case of an application for a permit or a lease covering tide, overflowed or submerged land by anyone other than the littoral or riparian proprietor, said littoral or riparian proprietor shall have six months within which to file an application for a permit or lease, but if said littoral or riparian proprietor fails to comply with the requirements of this act and its rules and regulations made in pursuance hereof, his preferential rights shall thereupon cease and forever be terminated, and the original applicant shall be permitted to proceed with his application. * * *

"Sec. 11. The surveyor general shall reserve and may exercise the authority to cancel any prospecting permit or lease upon failure by the permittee to exercise due diligence and care in the prosecution of the prospecting work in accordance with the terms and conditions stated in the permit or lease and shall insert in every such permit or lease issued under the provisions of this act appropriate provisions for its cancellation by him."

It is contended by the petitioner that upon the issuance of a permit to the Standard Oil company embracing a portion of the area described in his application, his right to a permit covering the same was simply held in abeyance for a period of six months, pending action of the littoral proprietor, and that upon its failure to comply with the terms or conditions stated in its permit he was entitled to proceed with his application. But

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

petitioner having received under his application all that the then existing conditions allowed, and having failed to exercise due diligence as defined by his permit, it was lost by cancellation. It must be remembered that petitioner is asking for this writ under his original and only application. This having been granted to its full legal extent, its function has been performed. That permit having been canceled for a violation of its terms and conditions, it has ceased to be and is no longer subject to amendment. Reduced to its last analysis, the construction placed by petitioner upon these provisions is that a failure to drill within the prescribed period of time constitutes a violation of the act itself, as well as the rules and regulations, and the permit; that in this instance the paramount permittee lost its rights, not because of noncompliance with the requirements of the permit alone that it drill within a specified time, but "in view of the fact that the same act complained of was a violation of all three requirements, and in view of the pleadings on the subject."

We have found no authority to compel the surveyor general to again act upon an application which has not been held in abeyance awaiting the exercise of due diligence and care in accordance with the terms and conditions stated in the permit of a littoral or riparian proprietor.

The demurrer is sustained. The peremptory writ of mandamus is denied.

We concur: WORKS, P. J.; IRA F. THOMPSON, J.

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111 Cal. App. 128

ATKINSON v. BOYNTON.

Civ. 7359.

District Court of Appeal, First District, Division 1, California.

Jan. 16, 1931.

Rehearing Denied Feb. 14, 1931.

1. **Brokers** ⚷86(1).

Evidence *held* to support conclusion that real estate agent earned his commission pursuant to oral modification of written agreement.

2. **Frauds, statute of** ⚷139(1).

Fully executed parol contracts are not affected by the statute (Code Civ. Proc. § 1973).

3. **Appeal and error** ⚷201(2).

Objections based on misconduct of trial judge in commenting on evidence, and uttering prejudicial remarks, cannot be made for first time on appeal.

Appeal from Superior Court, Santa Clara County; F. B. Brown, Judge.

Action by W. L. Atkinson against F. H. Boynton. From a judgment for plaintiff, defendant appeals.

Affirmed.

Bohnett, Hill & Campbell and L. H. Schellbach, all of San Jose, for appellant.

J. M. Atkinson, of Los Angeles, for respondent.

TYLER, P. J.

This action was one originally brought by plaintiff, a licensed real estate broker, against defendant to have a trust declared in his favor in a certain promissory note and deed of trust to the extent of $5,000; said note and deed of trust being in the name of defendant.

Before the case came to trial the note and deed of trust ceased to exist by reason of its payment by the maker before maturity. The fact of payment was set forth in an amended and supplemental complaint and a money judgment was prayed for. Judgment went for plaintiff. An appeal was taken from such judgment, which was reversed by reason of a certain error in the rejection of evidence. Atkinson v. Boynton, 97 Cal. App. 759, 276 P. 356. The facts leading up to the controversy may be summarized as follows: Appellant and one Arkelian entered into a written agreement through the agency of plaintiff and respondent to exchange certain real property belonging to them respectively. The property was to be exchanged without lien or incumbrance upon either parcel. Respondent was employed as agent of both parties and specially undertook as a condition precedent to his right to a commission to negotiate a loan for Arkelian on one of the parcels to be conveyed, said loan being necessary to provide Arkelian with funds to clear the property he was to convey to appellant and without which loan the exchange could not be accomplished under the terms of the written agreement. The agreement provided that each of the parties to the exchange should pay to respondent a commission of 5 per cent. The different parcels were each valued in the sum of $100,000. It subsequently developed that the transaction could not be carried out in all respects upon the terms provided for in the written agreement for the reason that Arkelian could not procure a loan. After negotiations between the parties, the contract was changed by oral agreement; the essential modification so far as the issues involved being that plaintiff agreed to accept a commission of $3,000 from each of the parties and further agreed that instead of receiving payment at the time the transaction was closed, he would accept $1,000 cash as part of the sum due from Boynton, the balance of $2,000 and the $3,000 due from Arkelian to be included in a note to be executed by Arkelian to Boynton, which plaintiff agreed to attempt to negotiate. Boynton then agreed to assume a mortgage of $25,000 on the property which he was obtaining from Arkelian and he further agreed to advance to Arkelian the sum of $17,000. Included in this latter amount was the balance of commission due plaintiff from Boynton and the balance of $3,000 commission due from Arkelian.

[1-3] The present trial was had by jury, and the main question presented was whether or not the parol modification of the written agreement provided that plaintiff's commissions were dependent upon his selling the note received by Boynton from Arkelian within a limited period. It was defendant's contention at the trial that plaintiff had agreed that he was to receive no commission other than the sum of $1,000 paid to him by Boynton unless he sold the note and deed of trust executed by Arkelian within a year after the transaction took place. Plaintiff, on the other hand, while admitting that defendant had prepared a written agreement to that effect, positively denied that he had agreed to any such arrangement. He testified that he refused to sign the same; he also testified that after such refusal on his part defendant had definitely agreed that there should be no limitation as to time, and promised to execute an agreement to that effect which he failed to do. It further appeared in evidence that plaintiff did within a year of the closing of the transaction present a buyer who was ready, willing, and able to purchase the note, but defendant refused to have any dealings with him and informed plaintiff that he had no interest in the note. There is therefore ample evidence in the record to support the conclusion that plaintiff earned his commission pursuant to an orally executed modification of the written agreement. Something is said in the brief of appellant concerning the sufficiency of the oral agreement under the provisions of the Statute of Frauds (Code Civ. Proc. § 1973). A fully executed parol contract cannot be affected by the statute of frauds, and cannot be assailed by either party on the ground that it is not in writing. This same point was passed upon on the former appeal. Atkison v. Boynton, supra. See also Moore v. Borgfeldt, 96 Cal. App. 306, 273 P. 1114. Appellant next complains of the action of the court in permitting the amendment of the complaint. He further contends that the trial judge was guilty of misconduct in commenting upon the weight of the evidence and uttering prejudicial remarks during the course of the trial. We have considered these objections and they are without merit. Moreover, no assignment of misconduct was made with respect to anything that was done or said by the trial judge. Objections of this character cannot be made for the first time on appeal. And, finally, complaint is made concerning the instructions given by the court to the jury. We have examined the instructions and we find no merit in this objection.

The judgment is affirmed.

We concur: KNIGHT, J.; CASHIN, J.

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111 Cal. App. 204

PEOPLE v. TOLEDO.

Cr. 112.

District Court of Appeal, Fourth District, California.

Jan. 19, 1931.

1. Criminal law 🔑274.

Defendant's mere belief that he would receive punishment lighter than that actually imposed is not sufficient ground for granting motion to set aside plea of guilty.

2. Criminal law 🔑274, 1149.

Motion to set aside plea of guilty on ground of duress is within trial court's sound discretion, and its determination will not be disturbed unless discretion was abused.

3. Criminal law 🔑274.

Trial court's refusal to set aside plea of guilty, under amended information charging forgery and two prior convictions of burglary, on ground of duress, *held* not abuse of discretion under evidence.

4. Criminal law 🔑274.

Statement of defendant at penitentiary after sentence on plea of guilty, taken down in shorthand and transcribed but not sworn to, *held* admissible to contradict assertions in affidavit supporting motion to set aside plea of guilty.

5. Criminal law 🔑274.

On motion to set aside plea of guilty and judgment entered thereon, trial judge should be allowed wide latitude in determining real facts to ascertain whether injustice has been done.

Appeal from Superior Court, Tulare County; Frank Lamberson, Judge.

Criminal prosecution by the People against Tony Toledo under an amended information charging the crime of forgery with two prior convictions of burglary. From the judgment rendered on a plea of guilty and from an order denying defendant's motion to set aside the judgment and for permission to withdraw plea of guilty, defendant appeals.

Judgment and order affirmed.

J. M. Lopes, of Tulare, and J. A. Chase, of Visalia, for appellant.

U. S. Webb, Atty. Gen., and John D. Richer, Deputy Atty. Gen., for respondent.

BARNARD, P. J.

The defendant was charged, in an amended information filed by the district attorney of Tulare county, with the crime of forgery and with two prior convictions of burglary. He entered a plea of guilty, admitted the priors, waived the time for pronouncing judgment, and was sentenced on September 22, 1930, to imprisonment in the state penitentiary at Folsom. On October 1, 1930, he moved to set aside the judgment, and for permission to withdraw his plea of guilty and enter one of not guilty. After a hearing, the court denied the motion, and this appeal is taken from this order, and also from the judgment originally rendered.

Appellant first contends that the evidence presented at the hearing does not support the order denying his motion for permission to change his plea. It is his position that, in any view of the case, certain statements made to him by the deputy district attorney prior to his plea of guilty constitute such a threat as to conclusively show that the plea of guilty was made, not freely and voluntarily, but under duress and as a result of fear. In his own affidavit, which appellant introduced in support of this motion, the principal statement complained of is thus set forth: "It is lucky for you that you got here now, for I was just about to file three other charges against you and one charge against your brother, Domingos Toledo, charging him with compounding a felony for offering to pay off those checks." The affidavit further sets forth that the deputy district attorney also stated that in case the other charges were filed against appellant, the term of his sentence would be 48 years, and that, if he entered a plea of guilty upon the single charge alone, sentence would only be 12 years; that affiant was informed by his own attorney that, if he entered a plea of guilty, his sentence would be 12 years, which could be reduced by credits for good behavior; that he entered his plea of guilty for the purpose of protecting his brother, for the additional reason that he believed his sentence would be but 12 years, and that he did not learn until after his plea was entered that the sentence would be for life. Appellant also introduced the affidavit of the attorney who represented him at the time he pleaded guilty, being a different attorney from those conducting this appeal, in which the attorney states that immediately after he arrived in the courtroom, prior to the plea of guilty, the deputy district attorney announced that it was a good thing he had gotten there, as he was about to get a warrant for appellant's brother and three more warrants for the appellant himself; that, during a conversation which followed, the deputy district attorney stated, in a rather impatient and threatening manner, that he had a witness to the effect that appellant's brother offered to and tried to buy one of the checks involved in one of the three additional charges; that he intended prosecuting all parties that had anything to do with these checks; that the sentence would be for 12 years; and that affiant believed 12 years to be the maximum sentence.

[1] The mere belief on the part of a defendant that he will receive a punishment lighter than the one actually imposed is not a sufficient ground for granting such a motion as we are considering. People v. Manriquez, 188 Cal. 602, 206 P. 63, 20 A. L. R. 1441; People v. Junod, 85 Cal. App. 194, 259 P. 101. Furthermore, in the instant case, not only would appellant's attorney be presumed to know the penalty provided by law for such a case, but the record shows that the trial court had before it the testimony of the deputy district attorney that, on the occasion in question, he told the appellant and his attorney, that the offenses charged in the information brought appellant under a life sentence, but that he would be eligible to parole in 12 years, and that he supposed he would probably be paroled at the end of that time. We might well say here, as was said by the court in People v. Perez, 9 Cal. App. at page 266, 98 P. 870, 871: "The court was not bound to accept as true the statements of appellant in his petition, but it was its duty to ascertain the facts and act accordingly."

In reference to the claim of duress, it appears that, when the case was called in court, appellant's attorney was not present. The district attorney testified that at that time the appellant called him over to him, and the following conversation occurred: "He says 'Tell me what this new paper is,' and then I explained to him it was the amended Freitas check charge, with the addition of the two priors for burglary, and he said, 'Well, I admit them.' He says 'he is right,' and then I told him, I says 'Tony, we have got two more checks' and he says, 'What are those,' then I explained to him how we had located two checks, one in Tipton and one here in Visalia, and I told him at that time that we were filing complaints against him on those two charges, and he said 'What is the best thing for me to do now?' He says 'Can I plead guilty to the charge without the priors,' and I explained to him there that the law compelled me to file the priors, and after I once filed them, it would be impossible for me to dismiss them, and he says, 'Well, I will plead guilty to all of them,' and I says, When do you want to do it, and we had some discussion. * * *" He further testified that the appellant wanted to plead then, but was told to wait until his attorney came. Thereupon the district attorney left the courtroom. After his attorney arrived, a conversation occurred between appellant, his attorney, and the deputy district attorney, the appellant's version of which is set forth in the affidavits above mentioned. The deputy district attorney's version is that he told them the following: "Furthermore, the district attorney's office is pretty hot about the attempted interference with witnesses in this case, and we don't like that, and it makes us pretty hot to have it happen, and we are contemplating filing a complaint against Domingues Toledo for attempting to interfere with witnesses."

He also admitted telling them that he intended to prosecute on the other charges on which he had evidence. At the hearing upon this motion, over the objection of appellant, the court admitted evidence as to the contents of a statement made by appellant after he had been taken to the penitentiary, which was taken down in shorthand and transcribed, but not sworn to. Nowhere in this statement does appellant claim that any promise was made to him that he would receive a lighter punishment if he pleaded guilty. The statement is far from convincing as to appellant's present contentions. He states therein that, after he talked with the district attorney in the courtroom, as above referred to, he understood it was all right with the district attorney if he pleaded guilty to the charges contained in the information, and that he later talked with the deputy district, attorney, but could not remember what he said except that "he said best thing to plead guilty." He then added, "I know he made a statement there he would be satisfied if I got 12 years." He further stated that he changed his mind when he saw the law book, and that the only quarrel he had with anybody was as to the penalty. It seems quite apparent from the record that this last statement is correct.

[2-5] Such a motion as this is addressed to the sound discretion of the trial court, and, unless this discretion is abused, its action will not be disturbed. People v. Lee, 17 Cal. 76; People v. Bostic, 167 Cal. 754, 141 P. 380; People v. Murphy, 62 Cal. App. 709, 217 P. 810; People v. Smink (Cal. App.) 288 P. 873. The order denying appellant's motion is amply sustained by the record. Not only have we serious doubt as to whether a statement by a district attorney that he contemplates doing his duty may ever be considered as duress, within the meaning of such a motion as this, but the record here shows no abuse of the discretion vested in the trial court. The only other point raised is, that it was error for the court to receive at this hearing evidence of the statement of appellant above referred to, which was taken down in shorthand, but not sworn to. What appellant said on that occasion was admissible for the purpose of contradicting assertions made by him in his affidavit. In any event, the same rules do not apply to a proceeding of this character, as govern the admission of evidence in the trial of a case. Where the foundations of a judgment already entered by a court are thus questioned, the trial judge should have a wide latitude in getting at the real facts and in ascertaining whether or not an injustice has been done to a defendant. An informal statement, made by the person seeking to set aside the judgment, may be even more illuminating than a more formal affidavit. This particular statement, as may be imagined from the objection, is not favorable to appellant's contentions, and further confirms the correctness of the order from which this appeal is taken.

The order and judgment are affirmed.

We concur: MARKS, J.; JENNINGS, J.

BATES v. CAMPBELL.*

Civ. 4227.

District Court of Appeal, Third District, California.

Jan. 13, 1931.

Rehearing Denied Feb. 11, 1931. Hearing Granted by Supreme Court March 12, 1931.

1. Libel and slander ⚷6(1).

Where there is statutory definition of libel, language fairly included in such definition is libel per se (Civ. Code, § 45).

2. Libel and slander ⚷89(1).

Complaint referring to severance of relations between plaintiff and bar association *held* to state cause of action for libel without necessity of an averment of special damage.

The alleged libelous publication made by defendant charged plaintiff, a publicity agent, with sequestrating stationery of a bar association, from which she was asked to resign her position of publicity agent under "circumstances * * * it would probably serve no useful purpose to recite * * *"; and that by concealing fact she was no longer in employ of the association, she had led lawyers and judges to sign letters and petitions, and newspapers to publish articles, under the belief that she was still in the employment of the association.

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Hearing granted 2 P.2d 383.

Appeal from Superior Court, Los Angeles County; Leon R. Yankwich, Judge.

Action by Rosalind Bates against Kemper Campbell. From a judgment for defendant, plaintiff appeals.

Reversed, with direction.

Rosalind Bates, in pro. per.

W. Joseph Ford, Meserve, Mumper, Hughes & Robertson and Anderson & Anderson, all of Los Angeles, for respondent.

Mr. Justice pro tem. **JAMISON** delivered the opinion of the court.

This is an action for damages for alleged libel. A demurrer to the amended complaint was sustained without leave to amend, and thereupon judgment was rendered in favor of defendant, from which plaintiff has appealed.

The question to be determined upon this appeal is whether or not the complaint states a cause of action against the defendant.

In substance, the amended complaint sets forth that defendant is president of the California Bar Association; that plaintiff is a widow engaged in business as a publicity agent, and, prior to the facts therein alleged, had built up a lucrative business as such publicity agent; that on or about October 31, 1927, defendant wrote and published a letter to others as follows:

"Referring to certain letter appearing in a morning paper of this date. Without taking the time to comment upon the entire letter of Mr. McNitt, I desire to correct one or two of the misstatements therein contained. These misstatements were perhaps due to the stress under which Mr. McNitt is apparently laboring in his campaign for election to the Board of Governors of the State Bar. I did not as stated by Mr. McNitt, nor did my office send 'to the metropolitan dailies publicity containing statements which were erroneous'. No publicity whatever was sent out from my office or by me concerning the election, which fact Mr. McNitt could have ascertained by the slightest inquiry.

"I did not ask Mr. McNitt to withdraw although I did consider it my duty as a long time acquaintance and as a member of the State Bar Commission to ask him whether he had considered the fact that as a member of the Board, if elected, it would be his duty to establish standards for admission which might conflict with the policy of the law school with which he is connected, this being a duty which cannot be delegated to a committee. In the course of the conversation, he stated he did not like to be in the position of running against leaders of the Bar, such as Mr. Hunsaker and Mr. James and he thought he would withdraw. Later on he informed me that he had been importuned by his friends to stay in the race.

"As to the principal subject of controversy to which the letters of Judge Hollzer, Miss Bates, Mr. McNitt, and Mr. Hunter, are directed, I think this could have been avoided, had there not been confusion with respect to the fact and date of termination of employment of Miss Bates by the Los Angeles Bar Association. This confusion is apparently cleared up by the publication of these letters. It would probably serve no useful purpose to recite the circumstances leading to the request for Miss Bates' resignation which in pursuance to such request, was received and accepted by the Board of Trustees on or about July 7, 1927. The confusion, however, is easily understood in view of the fact that Miss Bates without permission or consent continued to use Bar Association stationery and failed to notify the metropolitan papers of her change of status and in using her articles it was assumed that she still represented the bar association. In fact, not only Judge Hollzer, but a number of other judges and lawyers who signed certain petitions and letters at the request of Miss Bates have stated that they would not have done so had they known she was not employed by the Bar Association and had they known that certain other candidates were in the field. October 13, 1927. Kemper Campbell."

That by said article defendant intended it to be understood, and the article was understood by the readers of said publication to mean that plaintiff was discharged by the board of trustees of the Los Angeles Bar Association for the reason that she was not a fit person to occupy such position; that she appropriated to her own use, and used property of the Los Angeles Bar Association, and that she induced divers persons to sign petitions by the use of false pretenses; that it is not true that plaintiff was discharged by the board of trustees or at all; that it is not true that the resignation of plaintiff was requested by the board of trustees of the Los Angeles Bar Association; and it is not true that plaintiff appropriated to her own use and used property of the Los Angeles Bar Association, and it is not true that she induced divers persons to sign petitions by the use of false pretenses; that at all times, and at the time of writing said article, defendant well knew that said statements were false, defamatory, and untrue; that said article was false, libelous, defamatory, untrue, and unprivileged, and was written and published maliciously and with the evil intent to injure and defame plaintiff and destroy the business of plaintiff, and to prevent plaintiff from earning a livelihood for herself and her minor children; that said false and defamatory article greatly injured the reputation of plaintiff in the city of Los Angeles and the county of Los Angeles, and has exposed her to public hatred, contempt, ridicule, and obloquy and injured her in her said profession; that by reason of the premises plaintiff has been damaged, etc.

[1] Libel is defined by the Civil Code, § 45, as being "a false and unprivileged publication by writing, printing, picture, effigy, or other fixed representation to the eye, which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation." "This definition is very broad," as was said by the Supreme Court in the case of Schomberg v. Walker, 132 Cal. 224, 64 P. 290, 291, "and includes almost any language which upon its face has a natural tendency to injure a man's reputation either generally or with respect to his occupation." To the same effect are the later decisions of the Supreme Court. Stevens v. Snow, 191 Cal. 58, 214 P. 968; Layne v. Kirby, 208 Cal. 694, 284 P. 441; Maher v. Devlin, 203 Cal. 270, 263 P. 812, 815. Where there is a statutory definition, language which is fairly included in such definition is libel per se. Schomberg v. Walker, supra; Stevens v. Snow, supra.

[2] Is the language used in the publication fairly included in this definition of libel? The publication, after stating that it would serve no useful purpose to recite the circumstances leading to the request for plaintiff's resignation, then proceeded to charge that plaintiff, without the permission or consent of the association, continued to use its stationery, that she failed to notify the metropolitan papers of her change of status, and in using her articles it was assumed that she still represented the association, that she secured the signature of Judge Hollzer and other judges and lawyers to petitions and letters which they would not have signed had they known that she was no longer in the employment of the association.

In effect, this publication charges plaintiff with sequestrating stationery of the association, and by means thereof, and by concealing the fact that she was no longer in the employment of the association, she induced the metropolitan papers to publish articles and Judge Hollzer and other judges and lawyers to sign letters and petitions under the belief that she was still in the employment of the association, and which they would not have done had they known the truth.

We are of the opinion that, taking the publication as a whole, the average person of intelligence reading it could not avoid the conclusion that it imputed to plaintiff crooked work, dishonest practices, and fraudulent and reprehensible conduct, calculated to bring her into general contempt and which would have a tendency to injure her reputation and to injure her with respect to her occupation, and, therefore, the complaint states a cause of action without the necessity of an averment of special damage.

"It has never been the law that a publication, to be libelous, must accuse a person of having committed a crime or otherwise violated some law." Maher v. Devlin, supra.

The judgment appealed from is reversed, with direction to the trial court to overrule the demurrer, granting defendant a reasonable time to answer.

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111 Cal. App. 104

STRASBURGER v. PRESCOTT et al.

Civ. 6126.

District Court of Appeal, Second District,
Division 2, California.

Jan. 14, 1931.

As Corrected Jan. 28, 1931.

1. Appeal and error 🔑910.

In absence of proof of ordinance respecting signals established at intersection, appellate court must consider case where automobile turning to right struck pedestrian as one where automobile overtook and ran down pedestrian.

2. Automobiles 🔑245(72).

Pedestrian is not guilty of contributory negligence as matter of law for failure to look behind and discover approaching automobile.

3. Automobiles 🔑160(3), 168(4).

Motorist must anticipate that he may meet persons on street and must keep proper lookout for them and keep machine under control enabling him to avoid collision with another using proper care and caution (Deering's Gen. Laws 1923, Act 5128, § 130).

4. Automobiles 🔑245(6).

Negligence of motorist overtaking and running down pedestrian from rear *held* for jury.

5. Automobiles 🔑242(6), 244(26).

Inference of agency arises between owner of automobile and driver from fact of ownership and is sufficient to make out prima facie case.

6. Husband and wife 🔑102.

Husband is not liable for torts of wife.

7. Automobiles 🔑245(28).

Evidence of agency between driver of automobile striking pedestrian and husband of owner *held* insufficient to require submission to jury.

Appeal from Superior Court, Los Angeles County; Leonard Wilson, Judge.

Action by Bertha Strasburger against Robert L. Prescott and others. From a judgment of nonsuit, plaintiff appeals.

Affirmed in part, and reversed in part.

Charles S. Conner, of Los Angeles, for appellant.

IRA F. THOMPSON, J.

This is an appeal from a judgment of nonsuit in an action to recover for personal injuries. The respondents have filed no brief. According to the evidence presented by the appellant in her brief she was standing on the sidewalk at the northeasterly corner of Sixth and Alvarado streets in Los Angeles at about 12 o'clock noon on June 12, 1927. The intersection is provided with signals. She waited for the traffic going north and south on Alvarado street until she heard the first bell, when she started to cross Alvarado street. She had taken two or three steps, when the automobile driven by the respondent Elaine L. Schuck attempted to turn to the right from Sixth street into Alvarado street, ran into her from the rear, and struck her down. There is evidence to indicate that the respondent Schuck was confused in the signals. According to the testimony of appellant, the former said that she thought she could make it before the second bell rang. There was testimony to the effect that respondent Schuck for some time prior to June 12 had been living with her sister and brother-in-law, the other respondents; that the automobile belonged to her sister, Marie Prescott, who on the day of the accident was in San Francisco, but who had let respondent Schuck have the key to the car; that she asked her brother-in-law about using the car, but he said "no." She took it anyway. Miss Schuck also testified that all three of them operated the same car.

[1-4] The judgment must be reversed. In the absence of proof of the ordinance relating to the signals established at the intersection, we must consider the case simply as one where the automobile overtook and ran down the appellant from the rear. The rules of law applicable in such a case are: First, the pedestrian "is not guilty of contributory negligence, as a matter of law, because of a failure to look behind him and discover an approaching car which may heedlessly run him down" (Burk v. Extrafine Bread Bakery, 208 Cal. 105, 280 P. 522, 524, and cases cited); second, the operator of an automobile is bound to anticipate that he may meet persons on the street and he must, in order to avoid a charge of negligence, "keep a proper lookout for them and keep his machine under such control as will enable him to avoid a collision with another person using proper care and caution, and if the situation requires he must slow up and stop" (Reaugh v. Cudahy Packing Co., 189 Cal. 335, 208 P. 125, 127; Rush v. Lagomarsino, 196 Cal. 308, 237 P. 1066); third, the driver of a motor vehicle must before turning see that such movement can be made in safety, and, if it cannot be made in safety, must wait until it can be so made (California Vehicle Act, § 130, Deering's Gen. Laws, 1923, p. 1891, Act 5128). Applying these rules to the instant cause, it is patent that there was sufficient evidence of negligence on the part of the respondent Schuck that the court should under proper instructions have left the cause to the jury, at least so far as the respondent Schuck is concerned.

[5] Concerning the respondent Marie Prescott, who it was testified was the owner of the automobile, the law is established that an inference of agency arises between the owner of a motor vehicle and the driver from the fact of ownership, and is sufficient to make out a prima facie case. Perry v. Paladini, 89 Cal. App. 275, 264 P. 580; Hathaway v. Mathews, 85 Cal. App. 31, 258 P. 712. The nonsuit was therefore improperly granted as to the respondent Marie Prescott.

[6, 7] However, the husband is not liable for the torts of his wife, and there was no evidence to establish an agency between him and his sister-in-law. In fact, the only evidence upon this phase of the question was to the effect that he told her she could not take the car. The motion was properly granted as to him.

Judgment affirmed as to respondent Robert L. Prescott and reversed as to respondents Elaine L. Schuck and Marie Prescott.

We concur: WORKS, P. J.; CRAIG, J.

111 Cal. App. 306

KENNEDY et al. v. NATIONAL SURETY CO.

Civ. 6490.

District Court of Appeal, Second District,
Division 2, California.
Jan. 23, 1931.

1. **Mechanics' liens** ⚷315.

Subcontractors' waiver of rights against contractor's surety, being condition on which subcontract was obtained and surety bond executed, *held* supported by consideration, precluding recovery on bond for labor and materials furnished (Code Civ. Proc. § 1183).

2. **Mechanics' liens** ⚷208, 315.

Subcontractors may waive lien against property, and also their rights against contractor's surety (Code Civ. Proc. § 1183).

3. **Trial** ⚷397(1).

Contractor's surety's defense of estoppel against subcontractors raised material issue, on which judge should have made finding.

4. **Appeal and error** ⚷1122(2).

Where jury is expressly waived, and evidence is clear and fully presented, appellate court may make findings contrary and in addition to those of trial judge (Code Civ. Proc. § 956a).

Appeal from Superior Court, Los Angeles County; H. V. Alvarado, Judge.

Action by R. J. Kennedy and another, copartners, doing business under the fictitious name and style of the Wilshire Plumbing Company, against the National Surety Company and others. Judgment for plaintiffs, and defendant named appeals.

Reversed, with directions.

Bailie, Turner & Lake and Allen T. Lynch, all of Los Angeles, for appellant.

John J. Craig, of Los Angeles, for respondents.

ARCHBALD, Justice pro tem.

This is an appeal by the defendant National Surety Company from a judgment for $4,117.09 in favor of plaintiffs and against all defendants.

The action was brought by R. J. Kennedy and J. F. Alexander, partners under the fictitious firm name of Wilshire Plumbing Company, to recover a balance due them for labor and material furnished by them under a subcontract to Whiting, Boynton & Potts, appellant's codefendants in the case, who had the contract for the erection of an apartment building on a lot owned by one Gussie Starling. Subsequent to the making of the general contract the contractors applied to the National Surety Company for a labor and material bond under section 1183 of the Code of Civil Procedure, and were advised by the representative of such company that because of the insufficient financing of the project the company could not write a bond unless they had a release or waiver to cover the difference between the cost of the building and the amount of the first mortgage thereon. The general contractors secured a waiver from plaintiffs in the following language:

"January 7, 1926.

"To: National Surety Company, Guaranty Mortgage Company.

"Gentlemen: I (we) hereby agree to furnish building materials and supplies to the value of $10,000.00 to Whiting, Boynton & Potts, as contractor, and Miss Gussie Starling as owner, for use in the construction of a building on lot 24, of Foreman's Subdivision of the west 20 acres of lot 8, block 36, Hancock's Survey, as described in book 21, page 20, miscl. records of Los Angeles county, and do hereby waive my (our) right of lien in respect thereof against the property above described and also my (our) rights against the National Surety Co. as sureties for the above described building.

"Wilshire Plumbing Company
"By R. J. Kennedy."

Such waiver was delivered to the surety company, and thereafter, on the 8th day of January, 1926, the latter executed the bond upon which suit was brought, and judgment entered against them. The trial court found that respondents executed the waiver above set forth, that it was not signed as part consideration for the subcontract of respondents but was signed after such subcontract had been executed, and that there was no consideration for it. No finding was made by the court on the second separate defense of defendants' first amended answer, which pleads the waiver as an estoppel; and as to the third defense, which alleges in substance that the claim of plaintiffs was waived, the court found adversely.

[1] There does not seem to be any conflict in the evidence except as hereinafter noted. Mr. Kennedy of the respondent firm admitted signing the waiver, and testified that when his company was awarded the subcontract the general contractor stated to him that in order to bond the job it would be necessary for them to furnish certain releases to the bonding company, and that that is why the waiver was given. Mr. Marcy of the surety company testified that he told Mr. Kennedy that he would have to have a certain amount of releases or he could not execute the bond, and that after receiving the waiver he "verified this over the telephone with Mr. Kennedy that he had

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

signed it" and then issued the bond; that he had two conversations with Mr. Kennedy, the first on the day before the bond was executed and the second on the day of its execution. Mr. Boynton of the firm of general contractors testified that before the subcontract was let to respondents he told Mr. Kennedy that for the job to go ahead it was "necessary to obtain certain releases against the building company," and that, if he was to receive the subcontract, "it would be necessary that we have a release from him, in the amount we then agreed upon as $10,000." We find nothing in the evidence conflicting with the foregoing, except the following question and answer relative to the waiver: "Q. By Mr. Craig: Did you get any consideration at all for this, Mr. Kennedy? A. No, sir." Such a statement, in the face of the detailed statement, not only of Mr. Kennedy, but of the other witness, could be nothing except a bare conclusion and could not create a conflict in the evidence. Under the evidence, then, it clearly appears that, not only was the awarding of the subcontract conditioned on the giving of the waiver, but that the entire job depended on the execution of the bond, which was refused unless and until such waiver was obtained.

[2] It also clearly appears without conflict that the bond was executed in reliance upon the waiver, and it was the thing that induced appellant to execute the bond. There would seem to be no question but that respondents could waive the rights that would otherwise pertain to them under the bond. Fraters Glass & Paint Co. v. Southwestern Construction Co., 200 Cal. 688, 254 P. 1097. It is true that in the case cited the right to a lien against the property on which the building was constructed was waived, but on principle we see no difference between such a waiver and the one given here.

[3] The defense of estoppel set up in appellant's second and separate defense raised a material issue upon which the trial court should have made a finding. Taylor v. Taylor, 192 Cal. 71, 81, 218 P. 756, 51 A. L. R. 1074.

[4] Inasmuch as a jury was expressly waived in this case and as it is inconceivable that there could be any change in the evidence presented on a new trial, the evidence being so clearly and indisputably in favor of appellant, we feel compelled in the interest of justice to make findings on the evidence before us contrary and in addition to those of the trial court. Section 956a, Code Civ. Proc.; Kirk v. Culley, 202 Cal. 501, 507, 261 P. 994.

Contrary to finding II of the trial court, we find that all of the allegations of the defendant National Surety Company's third separate and further defense, as set forth in its first amended answer, are true. Contrary to finding IV of the trial court we find that the release, or waiver, mentioned and described therein was executed prior to and as part consideration for the execution of the plumbing contract set out and described in paragraph V of plaintiffs' complaint, as part consideration for the awarding of said contract to plaintiff by defendants Whiting, Boynton & Potts and as part consideration for the giving by the defendant National Surety Company of the bond described in plaintiffs' complaint, and that there was a sufficient consideration for the execution thereof. And in addition to the foregoing contrary findings we further find that all of the allegations contained in defendant National Surety Company's second separate and further defense are true.

The judgment is reversed and the trial court directed to enter a judgment in accordance herewith.

We concur: WORKS, P. J.; IRA F. THOMPSON, J.

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111 Cal. App. 99

BROWNING v. BROWNING.

Civ. 7290.

District Court of Appeal, Second District, Division 1, California.

Jan. 14, 1931.

Rehearing Denied Feb. 6, 1931. Hearing Denied by Supreme Court March 12, 1931.

1. Divorce ⚷184(12).

Where court, after granting divorce, allowed retrial on other issues, and different judge rendered substantially identical judgment, no harm resulted, although divorce issue was also retried.

> Since findings and judgment on second trial were substantially identical with findings and judgment on first trial, no injury resulted, even assuming that on second trial the only issues triable were those to which second trial was ostensibly limited.

2. Divorce ⚷296.

In divorce actions, trial court has large discretion regarding children's welfare (Civ. Code, § 138).

3. Divorce ⚷296.

In awarding child's custody to mother in divorce action, and allowing father temporary

custody, judgment appointing physician to prescribe when change of custody was warranted *held* within judge's discretion (Civ. Code, § 138).

It appeared that child was not in good health, and that trial court, by judgment in question, desired to prevent either party, so far as practicable, from doing anything injurious to child's well-being, and to that end authorized physician to supervise child's welfare and "to prescribe when and when not the child is in physical condition to change custody," and when father should be permitted to visit child during sickness.

Appeal from Superior Court, Los Angeles County; Clair S. Tappaan, Judge.

Divorce action by Theresa Browning against George L. Browning. From the judgment, plaintiff appeals.

Affirmed.

See, also, 208 Cal. 518, 282 P. 503; 291 P. 650.

A. W. Sorenson, Margaret E. Faires and Hubert T. Morrow, all of Los Angeles, for appellant.

W. I. Gilbert, of Los Angeles, for respondent.

HOUSER, J.

Originally, the action upon which this appeal is predicated was brought by the appellant herein for a divorce from the respondent. Incidental thereto were the major questions which are involved in this appeal and which relate to the validity of each of two provisions contained in the judgment, which respectively affect the custody of the minor child of the parties to the litigation and the approval by the trial court of a property settlement entered into between such parties prior to the institution of the action.

[1] In effect, the issues presented by the pleadings were twice tried. By the terms of the judgment rendered on the first trial plaintiff was granted a divorce from defendant; the custody of the minor child was provided for; and the property settlement theretofore entered into between the parties was approved. On motion of plaintiff, limited to the issues which related to the mentioned last two provisions of the judgment, a new trial was ordered generally. On retrial before a different judge, findings of fact were made and judgment rendered substantially identical with the findings made and judgment renered on the first trial, from which it would follow that, even assuming that on the second trial the only issues triable were those which related to the custody of the minor child of the parties and the fairness of the property settlement theretofore entered into between them, the plaintiff suffered no injury from the fact that on the second trial the case was tried as to all issues originally involved in the action.

That part of the order of the trial court with reference to the custody and care of the minor child of the parties to the action which is the subject of objection by appellant was as follows:

"It is further ordered, adjudged and decreed, that until further order of this court, the plaintiff shall have the custody of Thurlough Browning, the minor child of the parties hereto, with the following exceptions, to-wit: (Then follow particular directions as to when and under what circumstances the father of the child should be accorded the privilege of visiting the child, or of having its temporary custody.)

"Donald Fricke, M. D., physician and child specialist, is hereby appointed to supervise and take care of the physical wellbeing and welfare of said child, and to recommend and prescribe the treatment to be given said child, and to prescribe the treatment and care to be given said child as to diet, hours of sleep, periods of rest, exercise, recreation, work, and all other activities bearing upon said child's physical condition, and to prescribe when and when not the child shall remain in the house or in bed, and to prescribe when and when not the child is in physical condition to change custody, and to prescribe when and when not the defendant should be permitted to visit said child when said child is sick.

"Dr. George H. Kress, oculist, is hereby appointed to prescribe and give treatments for said child's eyes.

"The child specialist and the oculist so appointed shall serve until further order of this court. * * *"

The particular criticism of appellant of such order is that, although it provides that the custody of the minor child shall be in the mother, the care of such child is placed in a third person—a physician. With reference thereto, the evidence adduced on the trial showed that the child was not in the enjoyment of good health. From a reading of the order of which complaint is made it becomes apparent that, as far as was practicable, the intention of the trial court was to insure the welfare of the child, and to that end, to prevent either of the parties to the divorce action from doing anything which would or might materially injure the health and well-being of the child. Except on stated occasions and at fixed periods, when the father was permitted its temporary custody, the permanent custody of the child was awarded to the mother. The only limitation on such arrangement related solely to medical care and treatment of the child, which was to be under the recommendation of a physician—with the additional proviso that he should "prescribe when and when not the child is in physical condition to change custody, and to prescribe when and when not the defendant should be permitted to visit said child when said child is sick."

[2, 3] It will be noted that no right of custody of the child is given to the physician. His authority in the premises is limited to prescribing, recommending, and advising with reference to the physical care and treatment which the child should receive. The decisions emanating from the appellate tribunals of this state are unanimous in the declaration of the law that in divorce actions, in dealing with the welfare of the children of the parties thereto, a very expansive discretion is conferred upon the trial court. Simmons v. Simmons, 22 Cal. App. 448, 134 P. 791; Black v. Black, 149 Cal. 224, 86 P. 505; Jones v. Jones, 49 Cal. App. 165, 192 P. 867; Bancroft v. Bancroft, 178 Cal. 352, 173 P. 582. Nor in the order to which reference has been had is this court able to perceive any violation by the trial court of the power conferred upon it by the provisions of section 138 of the Civil Code.

In effect, the findings and judgment of the trial court are that, from a legal standpoint, the settlement agreement between the parties to the action was fair, just, and equitable. In connection therewith, appellant complains that each of several specified findings of fact made by the trial court does not find support in the evidence. A statement herein of each of such findings, together with a résumé of the evidence applicable thereto, would require no inconsiderable industry on the part of this court, which in the end would be of no material benefit either to the parties directly interested or to any other person. Therefore it is deemed sufficient to state that, after an examination of the record herein, this court is of the opinion that, with one exception, as to each of such criticized findings the direct evidence relating thereto fairly justified the conclusions on matters of fact as announced by the trial court. As to the one finding not properly within such inclusion, and which related to the ownership by plaintiff of 500 shares of Seaboard National Bank stock, it appears that, although the direct evidence adduced on the trial did not support such finding, nevertheless the inferences deducible from the entire evidence in the case were such that the trial judge was warranted in finding the issue in accordance with such inferences, rather than with the direct evidence received in relation thereto. But, in any event, whether the disputed facts were found either the one way or the other, it is clear that, considering the other findings made by the trial court, the questioned finding was not controlling in the premises.

No prejudicial error appearing in the record, it is ordered that the judgment be, and it is, affirmed.

We concur: CONREY, P. J.; YORK, J.

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111 Cal. App. 303

BEVERLEY v. NOEL.

Civ. 6750.

District Court of Appeal, Second District, Division 1, California.

Jan. 23, 1931.

Hearing Denied by Supreme Court March 24, 1931.

1. Joint adventures ⚿5(2).

Evidence supported findings that defendant was liable to plaintiff for one-half profits obtained in negotiating options on oil lands, under joint enterprise agreement.

The evidence disclosed that the plaintiff and defendant were working under a joint enterprise agreement whereby plaintiff was to obtain options on oil-bearing land, and defendant was to negotiate the options, the profits to be split between them, that plaintiff obtained options which defendant negotiated, and that defendant refused to account for the profits.

2. Joint adventures ⚿4(4).

Defendant's expenditures in negotiating oil options *held* not allowable under joint enterprise agreement, in absence of showing of reasonableness or necessity.

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

Action by F. L. Beverley against F. C. Noel. Judgment for plaintiff, and defendant appeals.

Affirmed.

Ben S. Hunter and James Farraher, both of Los Angeles, for appellant.

Kennicott & Williams, of Los Angeles, for respondent.

YORK, J.

Action for an accounting. The complaint alleged that the parties engaged in a partnership in September, 1920, whereby the plaintiff was to obtain options on oil-bearing lands, and the defendant was to negotiate the same, the profits realized therefrom to be divided equally between the parties. The answer denied these allegations, but admitted payment to respondent of certain sums of money for services rendered. The court found that the relation established was that of a joint enterprise, rather than a partnership, and this conclusion is not now a subject of dispute.

At the trial there was a sharp conflict in the testimony as to what was the agreement between the parties. The trial court found in favor of the plaintiff to the effect that the parties had engaged in a joint enterprise; that a profit was made; that there had been an accounting as to all business transacted between them, with the exception of four options—those known as the Carter, Harvey, Ralph, and Wagner options and leases. As to these transactions, a reference was ordered, the court reserving to itself, for settlement and determination, the propriety of all expenditures made in connection therewith. After the report of the referee had been made and approved, the court made its findings in favor of the plaintiff as to these four matters, setting forth the amount of gross profits derived therefrom, and the expenses properly deducible. Neither the referee's report nor the evidence taken by him can be found in the transcript.

From the judgment entered pursuant thereto, the defendant appeals, and makes the following specifications of error:

(1) That portion of finding of fact No. V, to the effect that the Mrs. Wagner option, which was executed on November 14, 1921, was negotiated by appellant, that the respondent was entitled to a division of the net profits, and that the net profits amounted to $1,180, is contrary to the evidence.

(2) Finding of fact No. VII, to the effect that on June 23, 1923, appellant was indebted to respondent in the amount of $2,531.60 as one-half of the net profits on the said Carter, Ralph, Harvey, and Wagner options, is contrary to the evidence.

(3) Finding of fact No. VIII, to the effect that the appellant, for the joint benefit of appellant and respondent, made a profit which has been unaccounted for, of $8,793.74, of which $4,396.87, less $1,865.27 paid respondent on account, was due respondent, is contrary to the evidence.

Appellant admits that there is no controversy at all as to the fact that the Carter, Harvey, and Ralph leases came directly through the plaintiff, Beverley, but contends that the Wagner option was an "entirely new matter."

Appellant also admits that certain of the findings of fact (Nos. III, IV, and V) correctly state the gross commissions received by him for negotiating the various leases in controversy, but maintains that the court overlooked certain items of commission paid out by him to third parties in negotiating the said leases, and which, if taken into consideration, would disclose an overpayment to respondent rather than an underpayment. Appellant in this connection contends that there is no evidence in the record that, even by implication, contradicts or questions his testimony as to the payment of these commissions.

[1] An examination of the record convinces us that there was sufficient evidence before the court to sustain each finding made. With reference to the Wagner lease, Mrs. Wagner testified that her option was obtained from her by plaintiff, and that she never had any dealings with any of the third parties mentioned, or with any one other than said plaintiff until defendant presented to her the lease which she executed.

[2] It is true that the defendant, while on the witness stand, testified as to various amounts paid out by him to third parties, but there is nothing in the bill of exceptions or record to show that these expenditures were either reasonable or necessary to the consummation of the four leases in controversy. The testimony of defendant discloses that these third parties took little or no part in the matter of negotiating the options or in securing the leases. For instance, defendant testified that he paid one Mr. Shell the sum of $1,226.45 for introducing him to Mr. Harvey and to a Mr. Bromley of the Barnsdale-Foster Company, an oil concern which leased one of the properties here involved. We do not know whether the evidence before the referee showed that these expenditures were necessary or unnecessary. The "report ad interim" of the referee, which we obtained from the Superior Court upon order, is incomplete, and we can find in it no statement of any such evidence, or any final report of the referee. In fact, the statement in the bill of exceptions is not the usual one as to the bill containing all of the evidence, or all of the evidence relating to the matters included in the appeal, but is in the following phraseology: "The foregoing bill of exceptions contains all the evidence offered or taken and all exceptions and proceedings taken at the trial of said action, upon which defendant relies."

The case of Fischer v. Martin, a New Jersey case decided in 1929, reported in (Err. & App.) 147 A. at page 492, involves an arrangement similar to the one involved in the case at bar. There the defendant claimed allowance as a proper expenditure against the joint enterprise the sum of $2,000 paid out by him to a third party for services rendered in connection with the transaction. It was there held that, while payments reasonably necessary made by either of the parties should be properly deducted from the total balance of the commissions and the balance divided equally, nevertheless, in the absence of proof that the payment made was requisite and necessary in order to bring about a successful closing of the transaction, such expenditure could not be allowed.

The judgment appealed from is affirmed.

We concur: CONREY, P. J.; HOUSER, J.

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111 Cal. App. 298

ROCHON v. PACIFIC COAST MORTG. CO.

Civ. 6322.

District Court of Appeal, Second District, Division 1, California.

Jan. 23, 1931.

1. Sales 🔑477(1).

Conditional seller, by failing to rescind contract for buyer's alleged fraud, ratified contract and was required to seek remedy under terms thereof.

2. Sales 🔑479(2).

Conditional seller must have reasonable ground for retaking property under contract provision authorizing repossession if seller deems buyer's financial condition such as to endanger security.

3. Sales 🔑479(2).

Where there has been no change in financial condition of conditional buyer between date of contract and date of repossession by seller, such repossession is unlawful.

4. Sales 🔑479(2).

Facts *held* not to show that conditional buyer had abused automobile so as to justify seller's repossession.

> The facts disclosed that the automobile was in good running order up to and including the day preceding the one on which the seller seized the automobile, and that an automobile spring had been broken only the preceding night.

5. Sales 🔑479(2).

Conditional seller's repossession of automobile *held* not justified under facts and terms of contract.

> Under the terms of the conditional sales contract, the seller had the right to repossess the automobile if he deemed the financial condition of the buyer such as to endanger his security, or if the buyer misused the automobile or defaulted in payments. The facts disclosed that there was no change in the buyer's financial status between the day the sale was made and the day on which the automobile was seized; that the buyer had not misused the automobile; and that buyer's alleged misrepresentation regarding the amount of his indebtedness had not tended to lessen or endanger the seller's security.

6. Sales 🔑481.

$545.50 damages for conversion of automobile *held* justified by evidence.

> The evidence disclosed that the conditional seller had repossessed automobile without proper cause; that at the time the automobile was wrongfully repossessed, it was worth between $850 and $900; and that at such time there was due the seller from the buyer the sum of $304.50.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by Rene H. Rochon against the Pacific Coast Mortgage Company. Judgment for plaintiff, and defendant appeals.

Affirmed.

Hardy, Elliott & Aberle, of Los Angeles, for appellant.

J. Russell Morton, of Pasadena, for respondent.

HOLLZER, Justice pro tem.

Plaintiff recovered judgment against defendant in the sum of $545.50, as damages for the conversion of an automobile.

The trial court found that on November 25, 1927, the defendant loaned plaintiff the sum of $304.50, taking title to the latter's automobile as security, giving back to him a sales contract, whereby the defendant sold said automobile to him for the sum of $417.36, payable in twelve equal monthly installments beginning December 29, 1927, and that on December 17, 1927, the defendant repossessed said automobile and refused to return the same to the plaintiff unless he paid to it the full amount owing upon said contract.

The defendant does not dispute the correctness of any of the foregoing findings.

In addition, the lower court found that no condition existed which gave the defendant the right to repossess said automobile and also that plaintiff had performed all of the covenants on his part to be performed, and had not breached any of the terms or conditions of said agreement nor committed any act justifying such repossession, and that he had been damaged by defendant's act in the sum of $545.50. As a conclusion of law, the court held that the defendant's act was wrongful and that plaintiff was entitled to judgment in said amount.

The defendant challenges the findings and conclusion of law mentioned in the preceding paragraph, and contends that said findings are not supported by the evidence, also that said conclusion of law is erroneous, and that the damages allowed to the plaintiff are excessive.

That the defendant took the plaintiff's automobile prior to the maturity of any installment payable under the contract and also disposed of said car is not disputed.

The defendant, however, seeks to justify its action in repossessing said automobile and disposing of the same, under two certain paragraphs of said contract.

One of these—omitting all portions not relevant to the present case—provides that should the seller (defendant) deem the financial condition of the purchaser (plaintiff) such as to endanger the rights or security of seller under said contract, or should said purchaser misuse or abuse the car, then the seller shall have the right to declare immediately due and payable the entire amount of principal and interest.

The other clause under consideration provides that if the purchaser shall be in default or fail to perform any of the conditions or covenants of the agreement, or misuse or abuse the car, then in any such case, the seller shall immediately have the right, without notice to the purchaser, to take possession of such car and proceed to sell the same.

Relying upon the foregoing provisions, defendant contends that after making said loan, it discovered that plaintiff had misrepresented his financial status in his application for the loan, in that by said application he had informed the defendant that he did not owe any past due debts, whereas, at the time of making said representation, he owed various debts totaling approximately $268, all of which were then past due.

Accordingly, it is urged that, upon discovering the existence of such indebtedness, the defendant concluded that the same endangered its rights and security under the contract, and thereupon declared the entire amount payable thereunder to be immediately due, took possession of said car and sold the same.

At the trial plaintiff admitted that he signed a written application for said loan, wherein he stated that he did not then owe any past due debts, and also admitted that he was in fact indebted at that time in the amount of $268, all of which was past due. On the other hand, plaintiff further testified that, at the time of making said application, he was interrogated on the question of his indebtedness by a representative of the defendant, on which occasion, he informed said representative that he owed a couple of hundred dollars, to which the defendant's agent responded, in substance, that everybody owed that amount.

[1] Assuming, however, for the purposes of this appeal, that the plaintiff had been guilty of the misrepresentation charged against him, such alleged fraud would only have entitled the defendant either to rescind the transaction or to affirm the contract. Having failed to rescind, the defendant must be deemed to have ratified the contract, and must seek for its remedy under the terms thereof.

It is conceded that the plaintiff had not failed to pay an installment owing under the contract. It is likewise undisputed that there had been no change in the plaintiff's financial status between the time he applied for the loan and the date on which the defendant seized his car.

Likewise, there is nothing in the record to show that plaintiff's alleged misrepresentation tended to lessen or endanger, or could have lessened or endangered, the defendant's rights or security under the contract.

We conclude, therefore, that nothing had occurred which, under the terms of the contract, justified the seizure of the car.

Hence, unless the plaintiff had violated some other covenant of the agreement, the act of defendant in repossessing the automobile and in refusing to return the same, except upon the condition that plaintiff pay the full amount owing under the contract, was arbitrary and unjustifiable, and constituted a conversion of the car.

[2, 3] The seller of property under a conditional sales contract, which authorizes the latter to repossess the property if he deems the financial condition of the purchaser such as to endanger the rights or security of the seller under the contract, may not act arbitrarily, but must have reasonable ground for retaking the property. In such case, where there has been no change in the financial condition of the purchaser between the date of making the contract and the time when the property is retaken, such repossession is arbitrary and unlawful.

[4, 5] Defendant makes the further contention that plaintiff had abused the car, in that at the time it undertook to repossess the same, the defendant found that a spring was broken, the battery was run down, and that the car was without gas and oil. Because of such condition of the car, it is argued that the seizure thereof was justified under the terms of the contract.

There is no merit in this point. Perhaps a sufficient answer to this contention would be to call attention to the fact that, at the time defendant repossessed the car, no such reason was assigned for taking the same. In addition, it should be noted that the plaintiff testified that the car was in good running order up to and including the day preceding the one on which the defendant seized it, and that the spring referred to had been broken only the preceding night.

It follows, therefore, that the trial court was warranted in finding that no condition existed which gave the defendant the right to repossess said automobile, and that plaintiff had not breached any of the terms of the contract, nor committed any act justifying the defendant repossessing the car.

[6] Upon the question of damages, it is sufficient to point out that the plaintiff testified that said automobile, at the time it was seized by the defendant, was worth between $850 and $900. Taking the minimum figure as the value of the car, and deducting therefrom the amount of the loan, to wit, $304.50, would leave $545.50 as the net worth of the car, and hence the damage to the plaintiff. This coincides with the sum which the lower court fixed as the amount of plaintiff's damage.

For the foregoing reasons the judgment is affirmed.

We concur: CONREY, P. J.; YORK, J.

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111 Cal. App. 136

SMITH et al. v. G. CAVAGLIERI MORTGAGE CO.

Civ. 4234.

District Court of Appeal, Third District, California.

Jan. 16, 1931.

Rehearing Denied Feb. 14, 1931.

1. Usury 🔑137.

In determining whether transaction constitutes usurious loan, justifying statutory penalty, court will consider substance rather than form (Deering's Gen. Laws 1923, Act 3757, § 3).

> Under Deering's Gen. Laws 1923, Act 3757, § 3, borrower, who, in return for loan, has paid or delivered usurious amount or value, may recover three times amount paid as usurious interest or profit.

2. Usury 🔑142(1).

Submitting to jury question of usurious intent, which clearly appears from undisputed evidence, is error (Deering's Gen. Laws 1923, Act 3757, § 3).

3. Usury 🔑137.

Delivery of note, secured by trust deed and subject to discount or bonus, *held* to constitute usurious loan, rather than purchase of note, within statute imposing penalty (Deering's Gen. Laws 1923, Act 3757, § 3).

> Evidence showed that lender drew all instruments involved in transaction, and knew that maker of note, desiring to procure loan to finance purchase of land and construction of apartment building, made note payable to contractor, who thereupon assigned note to lender; that contractor agreed to accept less than face value of note, the difference representing a bonus for lender; that money was to be advanced to maker as well as contractor; and that lender's ledgers showed entire transaction was carried in name of maker.

4. Usury 🔑137.

Lender's exaction of bonus, represented by note for amount greater than amount of loan, although usurious, is not "payment" of usurious interest, which under statute, is prerequisite to penalty (Deering's Gen. Laws 1923, Act. 3757, § 3).

> [Ed. Note.—For other definitions of "Payment," see Words and Phrases.]

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Action by Malcolm Smith and others against the G. Cavaglieri Mortgage Company. Judgment for defendant, and plaintiffs appeal.

Affirmed.

Andrew J. Copp, Jr., of Los Angeles, for appellants.

Julius V. Patrosso and C. C. Mishler, both of Los Angeles, for respondent.

Mr. Justice PLUMMER delivered the opinion of the court.

This action was begun and prosecuted by the plaintiffs to recover as a penalty under the Usury Act three times the amount of interest alleged to have been paid by them to the defendant by reason of the transactions hereinafter referred to. The defendant had judgment, and the plaintiffs appeal.

Two questions are presented to us in this action for our consideration: First, was the transaction involved a loan of money or the sale of a promissory note? Second, has there been any payment of usurious interest?

The trial court found that the transaction constituted a sale of a negotiable instrument, and not a loan, and also that no payment had been made.

The following facts are disclosed by the record: On and prior to the 17th day of June, 1925, the Edwin R. Rockwell Company, a corporation, was the owner of a contract for the purchase of certain lots in the city of Los Angeles, upon which there remained an unpaid balance of the purchase price of $20,000. The corporation desired to erect an apartment house upon the premises, and also to raise sufficient money to complete the purchase price of the lots. Tentative plans and specifications for such an apartment house had already been prepared and preliminary arrangements made with Malcolm Smith and the Malcolm Smith Company to construct an apartment house in accordance with the plans and specifications, upon a cost-plus basis. With these facts in view the Edwin R. Rockwell Company, by its president, set about to secure a loan sufficient to enable the company to proceed with the erection of the proposed apartment house. According to the testimony of Edwin R. Rockwell he called upon the defendant in the early part of June, 1925, in relation to procuring a loan. This testimony is disputed by the president of the Cavaglieri Mortgage Company. However, it does appear undisputed that Malcolm Smith called upon the defendant company and had an interview with the president thereof relative to securing a loan of $110,000 to be secured by a first lien upon the property, out of which it would be necessary to pay $20,000 to complete the purchase. It appears that the total expenditure of completing the purchase of the lots upon which the apartment house was to be built, and to complete the erection of the building, would entail an expenditure of about $160,000. After one or two interviews Mr. Cavaglieri agreed to advance the money, but stated, to use his own language, that "he would purchase the note for $110,000 at a discount of $5,000," but that he would not be able to handle the other portion of the loan. Thereupon it was arranged that the Cavaglieri Company should prepare the notes and the trust deeds, the note being executed by the Rockwell Company to Malcolm Smith, and by Malcolm Smith assigned to the defendant. In pursuance of this arrangement a note in the principal sum of $110,000 from the Rockwell Company to Malcolm Smith was prepared and a trust deed securing the payment thereof drawn to be executed by the Rockwell Company. Also, notes and a second trust deed covering the remainder of the money were drawn in the office of the Cavaglieri Mortgage Company. Only the $110,000 note is involved in this action. Following the drafting of these instruments the Rockwell Company executed the $110,000 note in favor of Malcolm Smith, and a trust deed to secure the same. The note and trust deed were dated June 17, 1925, and thereafter assigned by Malcolm Smith and his wife to the Cavaglieri Mortgage Company. No money was advanced, however, by the Cavaglieri Mortgage Company until the plans and specifications for the erection of the proposed apartment house were submitted to the Cavaglieri Company and approved by the company.

As a part of the same transaction, and bearing the same date, the following agreement was entered into relative to the payments to be made by the Cavaglieri Mortgage Company to the appellants in this action. This instrument, so far as necessary to be set forth, reads as follows:

"This agreement made this 17th day of June, 1925, by and between G. Cavaglieri Mortgage Company, Inc., hereinafter referred to as the party of the first part, and Malcolm Smith, hereinafter referred to as the party of the second part:

"Witnesseth: That the party of the first part undertakes to loan to the party of the second part the sum of One Hundred Five Thousand no/100 ($105,000.00) Dollars, evidenced by a promissory note in the sum of One Hundred Ten Thousand and no/100 ($110,000.00) Dollars executed by Edwin R. Rockwell Co., a corporation, in favor of Malcolm Smith, dated June 17, 1925, due on or before six (6) months after date, with interest at eight (8) per cent per annum, payable at maturity, and at the rate of one (1) per cent per month thereafter until paid, secured by a trust deed which shall be a first lien upon the property hereinafter described." (Then follows a description of lots 4 and 5 in tract No. 5542, city of Los Angeles, etc.)

The agreement then provides for disbursing the sum of $105,000 in installment payments, first, of $20,000; second, of $10,000; third, of $15,000; fourth, of $10,000; fifth, of $25,000; sixth, of $25,000; less accrued interest on note and miscellaneous expenses thirty-five days after notice of completion of the building has been filed, etc. Various provisions are then set forth in the contract relative to the rights of the respective parties, and, among others, the following paragraph appears: "The sum of $105,000.00 is payment in full for the assignment of said trust deed to G. Cavaglieri Mortgage Company, a corporation." The agreement further provided that all checks evidencing the installment payments should be made payable jointly to Edwin R. Rockwell Company and Malcolm Smith.

The testimony shows beyond contradiction that the difference between the face of the note for $110,000 and the $105,000 to be advanced was a bonus in the sum of $5,000, as commission or profit for loaning the money, or, as termed by the defendant, "a discount on the purchase price of the note." It is left somewhat uncertain as to whether the agreement which we have just set forth relative to making the instalment payments was executed on the same day that the $110,000 note and trust deed were executed, but the circumstances show that it was all a part of one transaction, and the instruments were all dated as of the same day. There is no dispute that the papers were all drawn in the office of the Cavaglieri Mortgage Company, nor is there any dispute of the fact that no consideration was ever paid or rendered by

Malcolm Smith to the Edwin R. Rockwell Company for the execution of the note and mortgage, other than his promise to erect the apartment house. Nor is there any dispute of the fact that the $105,000 to be advanced by the Cavaglieri Mortgage Company was to be applied in the payment of the expenses of completing the apartment house, and that the checks were to be drawn in favor of the Edwin R. Rockwell Company as well as in favor of Malcolm Smith.

The testimony of G. Cavaglieri shows that he knew that no consideration for the execution of the note and mortgage had passed from the Edwin R. Rockwell Company to Malcolm Smith, other than his agreement to erect the apartment house according to the plans and specifications approved by the Cavaglieri Company. The only testimony in the record as to the compensation of Malcolm Smith is to the effect that the apartment house was to be erected upon a "cost-plus" basis. The agreement itself evidences the fact that the first payment of $20,000 was to be applied in clearing the title to the lots. The ledger sheets of the G. Cavaglieri Mortgage Company, introduced in evidence, shows that the entire transaction, relative to advancing the money and the amounts paid, was carried in the name of Edwin R. Rockwell. The name of Malcolm Smith does not appear thereon.

[1] We do not need to cite authorities in support of the statement that the court will look at the transaction and consider its substance rather than its form. In this particular many authorities have been cited by counsel relative to accommodation notes, and the right to sell negotiable paper. In 39 Cyc. page 931, we find the rule relative to sale of negotiable paper, which is supported by practically all of the authorities, to wit: "After a negotiable instrument has once been validly negotiated by a transfer upon valuable consideration, it becomes an article of commerce and can be bought and sold as freely as any other property, the rate of discount being governed by the market value of each instrument. Such transactions are not within the letter or spirit of the usury laws." And on page 935 of the same volume, the following statement, which is likewise supported by the vast weight of authority: "But when the chose discounted is obtained directly from the maker or before it has acquired validity by a transfer for value, it can be nothing more than the maker's promise to pay, and the purchase of such a promise at a discount exceeding the lawful rate of interest is merely making a loan at a usurious rate. The rule applies when the lender takes the note under such circumstances from one known to be the agent of the maker." See, also, 27 R. C. L. 216. See, also, Rice v. Dunlap, 205 Cal. 133, 270 P. 196, as to charging bonus where one is known to be an agent.

The evidence in this case shows conclusively that the Cavaglieri Company knew that Malcolm Smith was acting in behalf of the Rockwell Company to secure a loan; that he was advancing nothing to secure the money; that he had simply agreed, and, so far as the record shows, it appears that it was an oral agreement at that time, to erect an apartment house. The Cavaglieri Company knew that Malcolm Smith, at the time the note and trust deed were transferred, could maintain no action upon either note or trust deed. This is not a case of failure of consideration after a bona fide sale and assignment of a promissory note. In this particular the respondent calls our attention to the case of Flood v. Petry, 165 Cal. 309, 132 P. 256, 258, 46 L. R. A. (N. S.) 861, and quotes therefrom, italicized, as follows: "It has long been the law in California that a failure of consideration in whole or in part after a bona fide assignment of a promissory note is no defense to a suit by the assignee against the maker, notwithstanding the former's full knowledge of the original consideration for which the note was given." Following this is an extended quotation from the opinion in that case. The circumstances are so radically different in the case at bar from the Petry Case that nothing said therein can be considered as controlling here. We have no dispute with the statement that, where a person has acquired a note in good faith for value before maturity, knowing that the consideration was an executory agreement on the part of the payee which might be broken, it constitutes no defense to the note, but here, the Cavaglieri Company is shown by the record to have arranged the entire transaction and drawn all the papers involved, and was not even paying the whole consideration to the payee of the note from whom it claims to be the purchaser.

[2, 3] Again, our attention is called to the language found in 39 Cyc. page 1057, as follows: "When a transaction honest in form is alleged to be a mere cloak to cover usury, the existence of the corrupt usurious intent behind the device is a question for the jury. If, however, a usurious intent clearly appears from undisputed evidence it is error to submit the question of intent to the jury. But if the transaction is apparently honest, and no evidence has been given tending to show an intent to evade the usury law, it is equally erroneous to submit the question of intent to the jury. It is for the jury to determine whether a usurious purpose lurks behind what purports to be a sale of property, or a note legal on its face but given for a larger sum than was actually advanced upon it, or commissions purporting to be paid to the lender or his agent for services rendered or expenses incurred in connection with the loan, or to factors and commission merchants for advances, or a loan of depreciated cur-

rency received at par, or an exorbitant charge for exchange upon the sale of a draft." Here, again, the facts disclosed by the record show that the foregoing statement of the law is not controlling here, save and except in so far as it is therein stated: "If a usurious intent clearly appears from undisputed evidence, it is error to submit the question of intent to the jury." There is no dispute in the evidence that the Cavaglieri Company drew all the instruments; knew where the money was going; knew that Malcolm Smith was acting in behalf of Edwin R. Rockwell Company to finance the undertaking; that a portion of the money was going to pay off the balance of the purchasing price of the lots; that the checks were to be drawn in favor of the Rockwell Company as well as in the name of Malcolm Smith; and that the ledger sheets of the Cavaglieri Company show that the whole transaction was carried in the name of Edwin R. Rockwell. Not to call such a transaction a loan is to erase from the statutes all the provisions relative to the exacting of usury and to endorse a transparent scheme to exact a bonus of $5,000 for making the loan in addition to collecting 8 per cent. for the first six months and 1 per cent. interest per month thereafter, and can only be classed as one of the devices to conceal usury, fittingly referred to and characterized in 27 Ruling Case Law, page 211, section 12. The mere fact that G. Cavaglieri called it a "purchase" or "discount" of the note can be given no weight as testimony, in view of the record disclosing that his company drew all the papers, passed upon the plans and specifications, carried the transaction in the name of Rockwell, advanced the money to Rockwell, paid off the purchase price, and knew that the entire transaction was an arrangement or scheme to finance the raising of money to erect an apartment house; that Malcolm Smith had done nothing or given nothing, other than his promise to build the apartment house, which was dependent upon the securing of a loan of money to pay the expenses thereof. It is a case where the name signified nothing. The transaction speaks for itself, and speaks only in one way—the name of Malcolm Smith appears upon the papers only to enable the Cavaglieri Company to obtain a bonus in addition to interest, and thus circumvent the usury law.

[4] The fact, however, that the finding of the court that the transaction was a purchase, and not a loan, has no substantial support in the testimony, does not lead to a reversal. In order that a penalty may be enforced and damages obtained on account of the exaction of usurious interest either as interest or by way of a bonus, it must be made to appear that the usurious interest has actually been paid, or that the bonus, which, taken together with the interest, stamps the transaction as usurious, must be shown to have been paid.

The complaint in this action was filed on the 6th day of July, 1926, at which date nothing had been paid to the Cavaglieri Mortgage Company on account of the principal due on the $110,000 note, nor any part of the $5,000 bonus hereinbefore mentioned. The record does show that on January 13, 1926, there was a debit charge entered against the account carried in the name of Edwin R. Rockwell of $4,400 interest on the trust deed referred to up to and including December 17, 1925. Notwithstanding this entry, however, the record shows advances made by the Cavaglieri Mortgage Company which necessarily cancels this charge. However this may be, and whatever effect may be given to the debit charge of $4,400 as provided for in the contract or agreement for installment payments heretofore set forth, it does not follow therefrom that any usurious money has been collected or was thereby collected by the mortgage company from the plaintiffs in this action. It may also be stated that exhibits, appearing in the record and introduced in evidence, of statements and claims made by the Cavaglieri Company a number of months after the institution of this action, indicate that the defendant intended to collect the full face value of the $110,000 note; and it does also appear in the record by exhibits and testimony admitted, over the objection of the defendant, that some company or concern paid the demands of the mortgage company, but it does not appear that any payments were made by or on behalf of the appellants in this action. The occurrences to which we are referring all took place some months after the beginning of this suit, and are not within the issues made by the pleading, and not tendered by way of a supplemental complaint, or otherwise. We may further state that, while these matters were introduced in evidence over the objection of the defendant, it does not appear that the appellants base any claim thereon. The charge of usury and the demand for treble damages, so far as this action is concerned, is based upon the debit charges found in the account books of the mortgage company. No claim is made that any part of the bonus exacted for the loan had been paid to the mortgage company by any of the appellants.

Under the provisions of section 3 of the act defining "usury" (Act 3757, Deering's General Laws 1923), the interest or bonus or the interest and bonus, if it is necessary to take both together to constitute usury, must have been actually paid. In Haines v. Commercial Mortgage Co., 200 Cal. 609, 254 P. 956, 255 P. 805, 53 A. L. R. 725, it is specifically held as follows (quoting from the syllabus): "A sum deducted from the amount of a loan as commission for granting it is not subject to the provisions of a statute authorizing the borrower to recover double the amount of usurious interest paid, and cannot be regarded as part of the principal of the loan for the purpose of computing the amount due and the overpayments of interest. The penalty prescribed for violation of the usury statute cannot be inflicted as to amounts not paid." In the case at bar the bonus is only a matter of a promise, to wit, as evidenced by the $110,000 note and the agreement to accept as the full amount of the loan $105,000. There is nothing in the record to show that the appellants ever tendered or paid either the $105,000 or the $110,000. In the Haines Case the amount of commissions or bonus was the sum of $1,020 which was deducted from the principal sum of the note when the loan was made. No part of this had been repaid by the borrower. The court included this sum in rendering judgment for treble damages, adding first this bonus to the interest that had been paid. This portion of the judgment of the trial court was reversed.

In Coulter v. Collins, 71 Cal. App. 381, 235 P. 465, the court held as follows (quoting from the syllabus): "Assuming that the exaction of a bonus for a loan (which bonus was added to the amount of the loan in making up the principal amount of a promissory note given by the borrower) was in the nature of an interest demand, in excess of the interest rate allowed by the usury law, nevertheless, in the absence of any payment made by the borrower, the right to treble damages given by the usury law when money is paid or value is delivered in violation of such law did not accrue; and a deed of trust, given as security for said note, did not constitute a 'thing of value' paid or delivered, within the terms and intention of the statute providing for such damages."

In 39 Cyc., page 1034, in dealing with conditions precedent to the right of recovery where usurious interest is involved, the rule is thus stated: "No cause of action to recover back usurious interest accrues until such interest has been paid. However, in order to be entitled to recover back usury paid it is not necessary that the usurious payment shall be made in money; it is sufficient if it is made in property or by the delivery of notes of third persons, accepted as payment. The debt is regarded as paid by the debtor if it is paid by a third person in accordance with an agreement between such third person and the debtor, but the mere charging of interest in a running account or the giving of a new note including usurious interest due, is not such a payment as will allow the debtor to maintain an action and recover usury paid." And as further amplifying the rule relative to maintaining such actions we find the following on page 1091 of the same volume, to wit: "A mere contract to pay usurious interest is not sufficient to ground such an action." In 27 Ruling Case Law, page 275, section 78, the requirement as to payment is thus stated: "Statutory provisions, akin to that in the national banking act, permitting the recovery of the interest paid under a usurious contract or a multiple thereof, require the actual payment of the interest before the liability for the penalty attaches. Moreover, the law will not construe that to be a payment of illegal interest which is not such in fact, in order to subject the lender to the penalty denounced for the illegal receiving of interest, when he is guilty of an illegal bargain only, and has subjected himself only to the forfeiture imposed by law for that violation. Thus it has been held that the requirement of actual payment is not satisfied by the circumstance that when the evidence of the debt was executed and the loan made a usurious discount was reserved. A reservation of that character constitutes a charging but cannot be called a payment."

In the case of McCarthy v. First National Bank of Rapid City, 23 S. D. 269, 121 N. W. 853, 855, 23 L. R. A. (N. S.) 335, 21 Ann. Cas. 437, a large number of cases are cited supporting the following statement: "The courts also uniformly hold that the including of interest in a renewal note is not a payment of such interest so as to entitle maker to sue for the penalty provided for payment. Neither is the deduction of a discount from the amount of the note, taken at the time of giving the note, a payment of such discount so as to authorize a suit for the penalty providing the amount of the discount is usurious." (Here follows a long list of citations.) The court then says: "These cases are based upon the theory that the mere reserving of a discount or the including of accrued usurious interest in a renewal note, while it may be the 'reserving or charging' of usury, it is not the 'paying' of same." To the same effect is the case of Citizens' National Bank of Danville v. Froman's Assignee, 111 Ky. 206, 63 S. W. 454, 757, 56 L. R. A. 673, which case is fully annotated, where it is held as follows (quoting from the syllabus): "The deducting of interest at an unlawful rate, by a national bank, from the amount placed to the credit of one for whom a note is discounted, is not a payment of unlawful interest which will sustain an action to recover double its amount."

While the charging of a bonus or the giving of a note for an amount greater than the principal sum loaned may subject the lender to a loss of interest in an action brought to enforce the collection of the note, it does not amount to a payment of usury interest sufficient to uphold a judgment for a penalty. Thus, in this case, if the difference between the face of the note and the amount of the money agreed to be loaned, as shown by the agreement set forth herein, cannot be included in ascertaining and fixing usurious interest paid, it does not matter what the legal effect of the bookkeeping entry relative to the

$4,400 interest charge may be held to be. There is no showing of the payment of usurious interest sufficient to support a judgment for the collection of the penalties specified in the usury law; $4,400 as interest for six months was not usurious.

The judgment is affirmed.

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111 Cal. App. 202

LOS ANGELES HOUSING CORPORATION v. CROWLEY.

Civ. 4247.

District Court of Appeal, Third District, California.

Jan. 19, 1931.

1. Pleading ⟹126.

Denial in action for money had and received *held* to constitute "negative pregnant."

> The denial in the answer that between December 30, 1924, and February 16, 1926, on defendant's promise to repay the same, plaintiff loaned and advanced to the defendant the sum named in the complaint, or any other sum as alleged in the complaint, constituted a "negative pregnant" and was an admission that plaintiff did loan to the defendant the sum named, since a denial that the act was done on the day named admits that the act was done.
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> [Ed. Note.—For other definitions of "Negative Pregnant," see Words and Phrases.]

2. Pleading ⟹126.

Denial that sum named in complaint is long past due does not negative allegation that it is due.

3. Appeal and error ⟹681.

Refusal to permit defendant to amend answer could not be considered on appeal from judgment, where request therefor and court's ruling thereon were not incorporated in bill of exceptions.

4. Appeal and error ⟹907(3).

When appeal is determined on judgment roll alone, all intendments will be made in support of judgment.

5. Appeal and error ⟹907(3).

When appeal is to be determined on judgment roll alone, all proceedings necessary to judgment's validity will be presumed to have been regularly taken.

6. Appeal and error ⟹544(1).

Where error relied on to destroy presumption of judgment's validity consists in matters dehors record, such matters must be brought to appellate court by bill of exceptions.

Appeal from Superior Court, Los Angeles County; Hugh J. Crawford, Judge.

Action by the Los Angeles Housing Corporation against J. A. Crowley. Judgment for plaintiff, and defendant appeals.

Affirmed.

W. O. Wanzer, of Long Beach, for appellant.

Mark F. Jones, of Los Angeles, for respondent.

JAMISON, Justice pro tem.

This appeal is from a judgment in favor of the plaintiff. The complaint contains two counts, the first of which alleges, in substance, that between December 30, 1924, and February 16, 1926, the plaintiff loaned and advanced to defendant on open book account the sum of $6,886.81 upon his promise to pay the same to plaintiff, then, after setting out an itemized statement of the dates and amounts so advanced and loaned, it is alleged that no part of said sum so loaned and advanced had been repaid plaintiff, although the same is long past due.

The second count sets forth an account stated between plaintiff and defendant for the money claimed to have been loaned and advanced as alleged in the first count.

The defendant answered the first count by denying that between December 30, 1924, and February 16, 1926, upon his promise to repay the same, plaintiff loaned and advanced on open book account to defendant the sum of $6,886.81, or any other sum, as alleged in the complaint and denied that said sum, or any other sum, was long past due, and denied each of the allegations contained in the second count of the complaint.

The case was set for trial November 3, 1927, but was continued from time to time until February 16, 1928, at which time the court proceeded with the trial and thereupon the defendant moved the court to permit him to file an amended answer. The motion was denied, and, the plaintiff having produced evidence in support of the matters set forth in the complaint, the court refused to hear any evidence offered by defendant and rendered judgment for plaintiff. This appeal was brought up on the judgment roll alone.

[1, 2] The denial in the answer that between December 30, 1924, and February 16, 1926, upon his promise to repay same, plaintiff loaned and advanced to defendant the sum

named in the complaint, or any other sum, as alleged in the complaint, constitutes a negative pregnant and is an admission that plaintiff did loan to defendant said sum.

Denial that the act was done on the day named admits that the act was done. Bates, Pleading, Practice & Forms, 340; Motor Investment Co. v. Breslauer, 64 Cal. App. 230, 221 P. 700. And the denial that the sum named in the complaint is long past due does not negative the allegation of the complaint that it is due.

[3-6] The refusal of the court to allow the defendant to amend his answer cannot be considered upon his appeal from the judgment where the request therefor and the ruling of the court thereon are not incorporated in a bill of exceptions or other appropriate method. 2 Cal. Jur. 521; Campbell v. Freeman, 99 Cal. 546, 34 P. 113. When an appeal is to be determined upon the judgment roll alone, all intendments will be made in support of the judgment and all proceedings necessary to its validity will be presumed to be regularly taken. If the error relied on to destroy such presumption consists in matters dehors the record, such matters must be brought to this court by bill of exceptions or other appropriate method. Caruthers v. Hensley, 90 Cal. 559, 27 P. 411.

We find no error of the trial court in the record before us, and the judgment is affirmed.

EDWARDS et ux. v. GULLICK et al.[*]

Civ. 7177.

District Court of Appeal, First District, Division 1, California.

Jan. 17, 1931.

Rehearing Denied Feb. 16, 1931. Hearing Granted by Supreme Court March 16, 1931.

Automobiles ⚷242(2).

Where injury to automobile guest arose through collision between approaching automobiles, doctrine of res ipsa loquitur *held* inapplicable.

Appeal from Superior Court, Santa Clara County; P. F. Gosbey, Judge.

Action by Benjamin Edwards and wife against C. M. Gullick and others. Judgment for plaintiffs, and defendants appeal.

Reversed.

Leo J. McEnerney, of San Francisco, and Maurice J. Rankin, of San Jose, for appellant Gullick.

Bohnett, Hill & Campbell and L. H. Schellbach, all of San Jose, for respondents.

PER CURIAM.

Action for personal injuries.

Plaintiff Huldah T. Edwards was riding as a guest of defendant C. M. Gullick in Gullick's automobile when a collision occurred and she received the injuries of which she complains. The car was being driven at or near the intersection of Berryessa road and the Oakland highway just outside the city of San Jose. Gullick, who was operating the car, was alone in the driver's seat. Plaintiff, her daughter, and Mrs. Gullick were riding in the rear seat. The Gullick car was proceeding in a southerly direction along the Oakland-San Jose highway, and before it reached the point of collision an automobile was observed turning into the highway from the Berryessa road, proceeding in a northerly direction directly in the path of the Gullick car. This automobile was driven by defendant Murotsune. Believing that a head-on collision was imminent, Gullick applied his brakes and swung to the left. Murotsune proceeding northerly collided with the Gullick car, striking it at or about the center. The accident occurred on the night of April 1, 1927, at about 8:30 o'clock. It was dark and the highway was wet and slippery from rain. Plaintiff alleged, and throughout the trial contended, that both Gullick and Murotsune were negligent in the operation of their machines. Evidence was offered to prove that Gullick was negligent in not having his car under control by reason of the speed he was traveling over a wet and slippery road and in turning to the left; that Murotsune was negligent in making too wide a turn into the road.

At the conclusion of the trial the jury rendered a verdict in favor of plaintiff and against defendant Gullick in the sum of $6,000. It further found in favor of defendant Murotsune.

Defendant Gullick appeals. The main ground relied upon for a reversal of the judgment is that the trial court committed prejudicial error in instructing the jury that the doctrine of res ipsa loquitur had application to the facts of the case. Upon this subject and at the request of plaintiff, the court instructed the jury as follows:

"You are instructed that while it is true as a general rule that mere proof of the occurrence of an accident raises no presumption of negligence, yet there it a class of cases where this principle does not govern—cases where the accident is such as in the ordinary course of things would not have happened if proper care had been used. In such cases the maxim res ipsa loquitur is held to apply, and it is presumed in the absence of explanation by the defendant that the accident arose from want of reasonable care.

"You are instructed that if you find from a preponderance of all of the evidence that

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[*] Hearing granted 1 P.2d 11.

the plaintiff, Huldah T. Edwards, without any contributory negligence on her part, was injured while she was a guest of, and riding in, the automobile operated and controlled exclusively by the defendant Gullick, and that the plaintiff, Huldah T. Edwards, was injured in an accident on account of the manner in which such automobile was operated, and the accident was such as in the ordinary course of things does not happen, if those having the operation and management of such automobile use proper care, then the law presumes that in so far as the defendant Gullick is concerned, he has been guilty of negligence. The plaintiffs have then made out a prima facie case against the defendant Gullick.

"The burden of proceeding is then shifted to the defendant Gullick, and if he would escape an adverse finding, he must adduce evidence to meet plaintiffs' prima facie case. The legal presumption resulting from such accident and injury as I have just stated, if you find such facts to be the case, constitutes evidence of negligence against the defendant Gullick, which cannot be ignored by the jury unless satisfactorily rebutted."

It is claimed by appellant that the giving of this instruction under the facts of the case violates every principle of law. It is his contention that the doctrine of res ipsa loquitur never applies to a case where the injury arose through a collision between approaching vehicles in an action brought by a gratuitous passenger in one of the automobiles, against the operators of both vehicles, and in which plaintiff pleads and proves the reason of the accident, that is to say, the manner of the collision; that under such circumstances nothing is left for inference, and therefore there is no occasion for indulging in presumption.

It is further claimed that the rule precludes its application where, as here, plaintiff introduces evidence showing that any one of two instrumentalities in the hands of different persons could have caused the injury. It is pointed out that under the evidence the jury could have found that the injury was proximately caused through the negligence of defendant Murotsune by reason of his making too wide a curve at the time he turned into the road, or it could, as it did, find that the collision was caused solely through the negligence of Gullick, or as claimed by plaintiff, that it was caused by the concurrent negligence on the part of both defendants.

Numerous authorities have been cited to us illustrating the application of the doctrine of res ipsa loquitur as applied to different situations, but we need not be at pains to review these cases as the precise question here involved has been considered and passed upon in the very recent case of Keller v. Cushman (Cal. App.) 285 P. 399, where the authorities are extensively reviewed. It is there held that in a collision between two moving automobiles where either one of two defendants, wholly independent of each other, may be responsible for the injury complained of, the rule of res ipsa loquitur cannot be applied, for the reason that it is just as reasonable to infer that one was wholly responsible for the collision as to infer that the other was. See, also, Diamond v. Weyerhaeuser, 178 Cal. 540, 174 P. 38. To apply the presumption under such circumstances would be mere surmise or guesswork. The error in giving the instruction compels a reversal of the judgment. This conclusion renders unnecessary a discussion of other alleged errors.

The judgment in favor of plaintiffs and against defendant Gullick is therefore reversed.

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111 Cal. App. 87

WRIGHT et al. v. SCHAAF et al.

Civ. 6282.

District Court of Appeal, Second District, Division 1, California.

Jan. 13, 1931.

1. Parties ⚷7(2).

Trustees of express trust, transacting business as finance company, *held* proper parties plaintiff, with legal capacity to sue on automobile dealer's guaranty.

> By terms of trust involved, trustees, in addition to legal title, had unconditional power and discretion, as if absolute owners, in acquiring, managing, and disposing of trust estate, including power to sell beneficial shares, and also to determine what, if any, dividends were to be paid; such power being subject only to obligation to render annual account to beneficiaries.

2. Partnership ⚷64.

Trustees of express trust, transacting business as finance company under fictitious name, *held* not copartnership or unincorporated association within statute requiring publication of certificate (Civ. Code, § 2466).

> It appeared that trustees filed declaration of trust with county recorder, and filed certificate with county clerk stating they were transacting business under fictitious name, and giving name and residence of each trustee, as contemplated by Civ. Code, § 2466. They also complied with

further requirement that such certificate be published.

3. Guaranty ⚷66.

Automobile dealer, who guaranteed payment under conditional sales contract, *held* not discharged by finance company's alleged negligence.

Dealer agreed, when guaranteeing payment, that his obligation should not be that of surety or guarantor, but should be absolute and unconditional and enforceable against him, even though finance company's right to enforce contract against buyer be impaired. Evidence showed that buyer disappeared with automobile; that company filed claim under embezzlement insurance policy; that insurer found automobile, but company declined to accept it; and that company did not notify dealer that automobile had been located.

4. Guaranty ⚷91.

That finance company failed to minimize damages by refusing to inform dealer guarantying payment of whereabouts of embezzled automobile *held* not sustained by evidence.

Appeal from Superior Court, Santa Barbara County; J. T. B. Warne, Judge.

Action by F. A. Wright and others against Oliver H. Schaaf, doing business under the name of the Hitchcock Motor Company. Judgment for plaintiffs, and defendants appeal.

Affirmed.

W. P. Butcher, Jr., of Santa Barbara, for appellants.

Charles W. Engelbertson, of Santa Barbara, for respondents.

HOLLZER, Justice pro tem.

In 1923 the plaintiffs, trustees of an express trust, filed in the office of the county recorder of Santa Barbara county, being the county in which they were transacting business, the declaration of trust under which they were operating. At the same time they filed in the office of the county clerk of said county a certificate, duly acknowledged, to the effect that as trustees of said trust they were transacting business under the fictitious name of County Finance Company. Said certificate set forth the name of each of the plaintiffs, also their respective residences, and was published once a week for four successive weeks during 1923 in a newspaper of general circulation published in said county. An affidavit of said publication was likewise filed in the office of said county clerk. By the terms of said declaration of trust plaintiffs as trustees were given, not only the legal title to, but also unconditional power, control, and discretion as if absolute owners, in acquiring, operating, and disposing of the trust estate, including the power to sell beneficial shares, and also to determine what, if any, dividends were to be paid; the power of the trustees being subject only to the obligation to render an annual account to the beneficiaries.

At all times mentioned herein defendant Schaaf was engaged in business under the name Hitchcock Motor Company. On April 4, 1925, defendant entered into a conditional sales contract with one Weber, pursuant to which the latter agreed to purchase an automobile for $1,107.75, payable in certain installments. On the same day defendant assigned this contract to plaintiffs by an instrument in writing, under which the defendant guaranteed payment of all moneys owing upon said contract, including reasonable attorney's fees, also waived presentment for payment, demand, protest, and nonpayment, also agreed that, in case of nonpayment, suit might be brought against defendant without joining the purchaser of the automobile, and further agreed that the defendant's rights and privileges should not be those of a surety or guarantor or an indemnifier, but that his obligation to the plaintiffs should be deemed absolute and unconditional, and should be enforceable even though the plaintiff's right to enforce said contract against the purchaser be suspended or impaired.

On October 4, 1925, Weber defaulted, leaving a balance of $453.75 due and unpaid. Shortly thereafter plaintiffs notified the defendant of such default and demanded payment of said balance, but nothing has been paid thereon.

Weber having disappeared with the automobile, the plaintiffs, who had insured the same against loss through embezzlement, made a claim against the insurance company for the balance owing to them. The insurance company refused to pay the same, claiming that no embezzlement had been committed.

However, in May, 1926, the insurance company secured possession of the automobile and offered to deliver the same to the plaintiffs, but the latter refused to accept it. The plaintiffs at no time informed the defendant that the insurance company had located the automobile, nor did the defendant inquire of the plaintiffs as to the whereabouts of the car. About a year after the insurance company had located the car, defendant ascertained its whereabouts, at which time the automobile had depreciated in value to the extent of about $400.

The trial court rendered judgment in favor of the plaintiffs for the balance owing on Weber's contract, plus interest and attorney fees in the additional sum of $100. On this appeal the defendant contends:

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

[1] "1. That plaintiffs had no legal capacity to sue and were not the proper parties plaintiff.

[2] "2. That the trust agreement was in effect a copartnership between the trustees and the shareholders, and there was not a compliance with section 2466 of the Civil Code as to the filing and publication of the certificate of fictitious name.

"3. That if said association did not constitute a copartnership it was an unincorporated association of individuals doing business under a fictitious name without having filed and published a certificate as required by section 2466 of the Civil Code.

[3] "4. That the defendant, as guarantor under the contract with plaintiff, was discharged by the negligence of the plaintiffs.

[4] "5. That plaintiffs by their laches and negligence failed to minimize the damages by refusing to notify defendant of the whereabouts of the automobile."

We have considered the various contentions advanced by appellants, and find there is no merit in any of them. The judgment, accordingly, is affirmed.

We concur: CONREY, P. J.; YORK, J.

111 Cal. App. 209

CANTWELL v. GAGE (GAGE, Intervener).

Civ. 7649.

District Court of Appeal, First District, Division 1, California.

Jan. 20, 1931.

Rehearing Denied Feb. 19, 1931. Hearing Denied by Supreme Court March 19, 1931.

1. Insurance ⚷188(2).

Evidence showed that, under note or contract sued on, life insurance premium was payable only on condition that well then being drilled would produce oil, which failed to occur, precluding recovery.

Note or contract in question provided for payment of premium at designated times "after the first well comes in," with provision that, if well should come in for less than stated quantity of barrels, amount of policy should be reduced, and evidence disclosed that, although maker of note or contract was ultimately successful in finding oil after he drilled a third well, he did not intend, when promising to take out life insurance, to drill more than one well.

2. Contracts ⚷346(2).

To recover on conditional promise, promisee must allege and prove compliance with condition.

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Action by Thomas F. Cantwell against Arthur G. Gage, wherein Marie B. Gage intervened. Judgment for plaintiff, and defendant appeals.

Reversed.

See, also, 295 P. 376.

Mitchell, Silberberg & Davis and Peery Price, all of Los Angeles, for appellant and intervener.

Rohe & Freston and Ralph E. Lewis, all of Los Angeles, for respondent.

TYLER, P. J.

Action to recover a premium on a life insurance policy.

The basis of the action is an instrument in writing denominated by the parties as a promissory note. The instrument called the note reads as follows:

"$3277.50 December 20, 1922

"As endorsed hereon after date, for value received, I promise to pay to the order of myself Three Thousand Two Hundred Seventy-seven 50/100 Dollars with interest at the rate of six per cent per annum from date until paid."

On the back thereof appears the following indorsement:

"Payable 25% on the first day of the month on the succeeding thirty days after the first well comes in on the Howland and Hopkins Strip at Santa Fe Springs Oil Field. Payable in cash 75% on the succeeding 60 days thereafter. If however the well should come in for less than 1000 barrels settled after thirty days, policy to be reduced to $50,000.00 and first $50,000.00 to be cancelled out on monthly term rate of company.

"[Signed] Arthur G. Gage."

As indicated from the foregoing, Gage was engaged in the business of drilling for oil. Plaintiff was an insurance agent. The agreement was given in payment of a full year's premium upon a life insurance policy. This policy insured appellant's life for the sum of $100,000 in favor of his wife, and was issued on November 29, 1922. The agreement sued upon was made in favor of respondent, agent, for the reason he had paid the insurance company the net amount of the premium, less his commission. Nothing having been paid by Gage upon the contract, action was brought by plaintiff to recover the full amount due thereon. Judgment went in favor of plaintiff, and defendant appeals.

[1] It was appellant's contention at the trial that the instrument sued on was payable upon the condition that the first well which was being drilled upon the property at the time the contract was made should produce oil. The trial court found in substance that it was not true that payment depended upon the happening of this condition. There is no evidence whatever in the record to sustain this conclusion. The evidence shows that defendant, Gage, had an interest in the lands mentioned in the instrument sued upon. He contemplated drilling a well on the property, and had confidence that it would be a good producer. The property is situated in the Santa Fé Springs district. Plaintiff on many occasions had attempted to sell defendant life insurance, but had met with no success. Finally, unbeknown to defendant, and upon his own initiative, plaintiff caused the insurance company he represented to issue defendant a policy subject to his approval. Upon the policy being issued, plaintiff called upon defendant, and again solicited him to procure insurance, and at the same time informed him of the arrangement he had made with the company. Defendant then told plaintiff that he knew it would be a good thing for his family, and, if the well he was drilling came in, as he believed it would, he would be very glad to take the policy. He informed plaintiff that the well he was drilling ought to be completed in about three months. Plaintiff, according to his own testimony, replied: "All right; three months is not so far ahead, and I will take a chance with you on that basis." Thereupon the instrument sued on was prepared by plaintiff and signed by defendant. Defendant proceeded with his drilling operations upon the well, but it produced no oil, and was subsequently abandoned, and plaintiff was so notified. Some time thereafter, defendant made arrangements to and did drill a second well, with the same result. A third well was then sunk, and this well has been producing about one hundred barrels a day since the latter part of 1923.

The finding of the trial court that it was not true that the instrument sued upon was payable upon the happening of the condition that the first well then drilling on the property should come in is indefinite. The record, however, discloses that the trial court was of the opinion that there was no ambiguity in the instrument, and that the language referred to any well that might be first brought in. It also appears that the court was of the further opinion that, if no well was ever brought in, nevertheless defendant would be responsible for payment within a reasonable time. Either conclusion finds no support in the record. The instrument itself and all the evidence and surrounding circumstances negative any such determination. There is no evidence in the record to show that, at the time the agreement was entered into, defendant ever contemplated the digging of any other well. He had great confidence that the first well would come in and be a large producer. He was also of the opinion that it would be brought in in about three months, and the parties contracted for payment accordingly.

[2] The evidence also shows that, if the well which was being drilled when the contract was made failed to come in, defendant would be unable to take the policy; that plaintiff understood this condition, and agreed, in such event, that it was to be canceled. All of the evidence and the surrounding circumstances show conclusively that the contract was payable only upon the condition that the well which was being drilled at the time the agreement was made should come in, and that such contingency never happened. The bringing in of this particular well was a condition precedent to the right of plaintiff to recover. As he expressed it, he took his chance. Having done so, he should be made to abide the result. It is elementary that, where a promise is conditional, it is incumbent on a plaintiff to allege and prove that the condition has been complied with before he can recover. Van Buskirk v. Kuhns, 164 Cal. 472, 129 P. 587, 44 L. R. A. (N. S.) 710, Ann. Cas. 1914B, 932. Here plaintiff has utterly failed to make such proof.

The judgment is reversed.

We concur: KNIGHT, J.; CASHIN, J.

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111 Cal. App. 213

CANTWELL v. GAGE (GAGE, Intervener).

Civ. 7650.

District Court of Appeal, First District, Division 1, California.

Jan. 20, 1931.

Rehearing Denied Feb. 19, 1931. Hearing Denied by Supreme Court March 19, 1931.

Appeal and error 🔑843(2).

Question whether attachment was valid, having become moot when court decided that plaintiff was not entitled to recover, need not be considered.

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Action by Thomas F. Cantwell against Arthur G. Gage, wherein Marie B. Gage intervened. Judgment for plaintiff, and intervener appeals.

Reversed.

See, also, 295 P. 375.

Mitchell, Silberberg & Davis, and **Peery Price,** all of Los Angeles, for appellant and intervener.

Rohe & Freston and **Ralph E. Lewis,** all of Los Angeles, for respondent.

TYLER, P. J.

This appeal is prosecuted by the intervener, Marie B. Gage, from a judgment denying her any relief against an attachment on real property standing in her name, which was levied during the course of a suit against her husband, Arthur Gage, the defendant herein.

In the latter suit the intervener filed a complaint in intervention, claiming ownership of the attached property. Her complaint in intervention, which followed an unsuccessful motion to dissolve the attachment, prayed for a dissolution of the attachment, being in effect an attempt to quiet title against the attachment. The complaint in intervention set up the attachment in the original action levied upon property alleged to be that of the intervener. In reply to the complaint in intervention, plaintiff denied generally and specifically all the allegations of the complaint, and set up three affirmative defenses. All of these defenses are based upon the theory of a fraudulent conveyance of the attached property to intervener by her husband.

The court gave its judgment in favor of plaintiff and respondent; the judgment being that the intervener take nothing by her complaint in intervention. Several grounds are urged for a reversal of the judgment. It appears from the record that the conveyance of the property in question was made by defendant to his wife some seven years prior to the creation of plaintiff's indebtedness. It is claimed by appellant that the evidence shows at that time defendant was solvent, and there is no evidence of a fraudulent intent on the part of defendant in making the transfer. It is further claimed that there is no finding by the court upon this question, which, it is urged, is necessary to support the theory of fraudulent conveyance. The additional claim is made that plaintiff was not an existing creditor at the time of the conveyance, for which reason he cannot be heard to complain. Relief was denied the intervener upon the ground that she did not come into court with clean hands. This theory was based upon the conclusion of the trial court, so it is claimed, that the intervener had so conducted the property as to justify the imposition upon her of a constructive trust. We do not think we are called upon to discuss or decide the various questions presented upon this appeal, for the reason that they have become moot. The only purpose of respondent in this proceeding is to keep in force the attachment until the final determination of the status of the basic action in which the attachment issued. We have this day decided (295 P. 375) that defendant was not liable upon the instrument sued upon. This being so, any question concerning the validity of the attachment becomes unimportant.

The judgment, therefore, has no longer any force or effect, and should therefore be reversed. It is so ordered.

We concur: KNIGHT, J.; CASHIN, J.

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111 Cal. App. 279

BARBER v. GORDON.

BARBER et ux. v. SAME.

Civ. 4240.

District Court of Appeal, Third District, California.

Jan. 21, 1931.

1. Appeal and error 🔑192(1).

Questions as to uncertainty or ambiguity in pleading cannot be raised for first time on appeal.

2. Negligence 🔑121(5).

To sustain defense of inevitable accident, defendant must show reasonable diligence has been exercised and that occurrence could not have been reasonably anticipated.

3. Negligence 🔑1.

No cause of action arises for injury to person or property unless other's act or omission involved failure to exercise care.

4. Automobiles 🔑244(40).

In action for injuries sustained in automobile collision resulting when steering mechanism of driving gear on defendant's automobile became locked, evidence sustained finding for defendant.

> The evidence disclosed that defendant had the automobile oiled and greased as often as a reasonable person would deem necessary, and had no knowledge that steering mechanism of cars might become so locked as to render car unmanageable.

Appeals from Superior Court, Ventura County; Edward Henderson, Judge.

Actions by George R. Barber and by George R. Barber and wife against Ethel Gordon, consolidated for trial. Judgments for defendant, and plaintiffs appeal.

Affirmed.

🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Louis Greenbaum, of Los Angeles, and A. L. Stein, for appellants.

C. A. Reynolds, of Seattle, Wash., and Ivan Kelso and Clifford P. Grua, both of Los Angeles, for respondent.

PLUMMER, J.

The actions above named were consolidated and tried as one. Both actions were prosecuted to recover damages for injuries alleged to have been suffered in an automobile collision. The complaint in both cases alleged the negligence of the defendant. The defendant in both cases set out, among other matters, inevitable accident as one of the grounds for her defense.

The record shows that the appellants were driving northerly on a public highway in the county of Ventura. At the same time, respondent was driving southerly. As the respective parties approached a turn in the road, the automobiles collided. The jury found in favor of the defendant in both actions. The defense of inevitable accident was based upon the alleged locking of the steering mechanism of the car driven by the respondent. According to the testimony of the respondent, at the time of the collision the steering mechanism became locked so that it was impossible to turn the automobile to the right in rounding a curve, in order to avoid the collision.

[1] The first point made by the appellants for reversal is directed against the pleadings, it being alleged that the defense of inevitable accident or casualty does not specifically set forth the basis of such inevitable accident or casualty, in order to constitute a defense. The record shows, however, that no demurrer was interposed on the ground of uncertainty or ambiguity, and no attempt made to require the respondent to set forth more specifically the alleged grounds of defense. Having gone to trial without raising any question as to the sufficiency of the pleadings or of the answer interposed in each cause, we think it is now too late to raise questions which only could have been raised by demurring specially. While practically admitting a conflict in the evidence, it is urged on the part of the appellants that the testimony is such that a new trial should be ordered.

[2, 3] In order to sustain the defense of inevitable accident or casualty, the defendant must show that reasonable diligence has been exercised, and that the occurrence was such as could not have been reasonably anticipated. In volume 1, page 260, Cyc. of Automobile Law of Blashfield, we find the following which we think applicable to this case: "As a corollary of the above rule (referring to rules relating to liability), for determining legal responsibility for negligence, if a motorist or other traveler has exercised ordinary care as required by common law, or the highest degree of care, as required by some statutes, and has nevertheless been the occasion of inflicting injury on another, the accident is said to be inevitable, for which no liability attaches." Citing a number of authorities and giving instances of such accidents.

In 45 C. J. 635, § 10, the rule is thus stated: "The first element of actionable negligence is lack of care. No person is an absolute insurer of his acts, or of the safety of others or their property, and if one is injured in person or property, as a result of some act or omission of another, but such act or omission does not involve any lack of duty or proper care, no cause of action arises, but the injury suffered is damnum absque injuria." And, as stated in Long v. Louisville & N. R. Co., 128 Ky. 26, 107 S. W. 203, 205, 13 L. R. A. (N. S.) 1063, 16 Ann. Cas. 673: "The rule that a man must use his own property so as not to injure his neighbor has never been understood to make one an insurer in the lawful use of his property. If, in the lawful use of his property, a man accidentally does an injury to his neighbor which ordinary prudence would not have anticipated to result from his act, it is damnum absque injuria."

In Guile v. Snyder, 165 Ark. 221, 263 S. W. 403, 404, the Supreme Court of Arkansas used the following language in relation to the question which we have under consideration: "The foundation of liability, then, is knowledge—or, what is deemed in law to be the same thing, opportunity by the exercise of reasonable diligence to acquire knowledge—of the peril which subsequently results in injury. In a word, negligence or contributory negligence is lack of foresight or forethought." Citing a number of authorities.

[4] In the case at bar the testimony shows that the respondent was driving her automobile from Seattle to southern California; that the automobile was overhauled and placed in condition before leaving Seattle; was again overhauled, greased, etc., at Redding, Cal.; was again reexamined, reoiled, and regreased at Alameda, Cal. The testimony further shows that the respondent was driving a Buick car; that the steering mechanism in other cars of the same model had been known to become locked so as to render the car unmanageable, but of this fact the respondent had no knowledge. After the collision it was found that the steering mechanism of the driving gear was locked. Two questions of fact were presented to the jury: One, as to whether there was a defect in the mechanism which caused it to become locked, a defect of such a character as not to be reasonably anticipated as causing trouble, by the driving of the car; second, as to whether the respondent had used due care in having the car oiled and greased and looked after as she was on

her way from Seattle to southern California. These questions of fact were resolved in favor of the respondent by the jury. Without setting forth the evidence, which would only add unnecessarily to the length of this opinion, we think the testimony of the defendant, if accepted by the jury as correct, sufficient to sustain the verdict. Her testimony shows that she had the car oiled and greased, as often as a reasonable person would deem the same necessary, and used the same precautions in having the car oiled and greased as an ordinarily prudent person would do. This, we think, is all that the law requires, and as the facts were found in favor of the respondent, we have no recourse but to affirm the judgments, and it is so ordered.

All concur.

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111 Cal. App. 269

FEDERAL MUT. LIABILITY INS. CO. v. INDUSTRIAL ACCIDENT COMMISSION et al. (two cases).

Civ. 7569, 7570.

District Court of Appeal, Second District, Division 2, California.

Jan. 21, 1931.

1. Master and servant 🔑405(4).

Evidence *held* not to establish that refracture of employee's leg was caused by original fracture, hence employer at time original fracture was sustained was not liable.

2. Master and servant 🔑403.

Burden was on employee to establish employer's liability for expenses of bone graft performed after refracture of leg.

3. Master and servant 🔑405(4).

Evidence *held* not to establish liability of employer at time employee sustained fractured leg for expenses for bone graft made after refracture.

Proceedings under the Workmen's Compensation Act by George Engelbert for compensation for fracture of leg which was originally sustained while claimant was an employee of the Celite Company, against which the Federal Mutual Liability Insurance Company, insurer, filed objections. The Signal Oil & Gas Company, the employer at the time the refracture was sustained, and the State Compensation Insurance Fund, insurer of such employer, were made parties to the proceedings. On separate applications of the Federal Mutual Liability Insurance Company for certiorari to review an order of the Industrial Accident Commission awarding compensation. The two proceedings were consolidated for hearing and determination.

Award annulled.

Willis I. Morrison, of Los Angeles, for petitioner.

Edward O. Allen, of San Francisco, for respondent Industrial Accident Commission.

WORKS, P. J.

These two proceedings for the writ of review are directed at a single award made by the Industrial Accident Commission. Accordingly, they have been consolidated for hearing and determination.

On July 30, 1926, respondent Engelbert, then an employee of a corporation known as the Celite Company, was injured by a fracture of the tibia of his left leg. Petitioner in the two proceedings above entitled was the insurance carrier of the Celite Company. Engelbert made claim for his injury before the Industrial Accident Commission with the result that an award of compensation was made in his favor and against the Celite Company. This award has long since been paid in full.

Because of a certain casualty which occurred on February 27, 1930, which involved the fracture above mentioned and out of which arose a second controversy before the Industrial Accident Commission, it becomes necessary to particularize the condition of Engelbert's leg at various periods between July 30, 1926, and February 27, 1930, as well as to set forth a statement of the activities of the injured man during the same interval of time.

On November 21, 1928, Dr. Karshner, who had taken X-ray photographs of Engelbert's injured leg, reported to Dr. Stewart, who was acting as an expert for the Industrial Accident Commission, that "a.p. and lateral roentgenograms of the left leg show a healed fracture through the shaft of the tibia in its upper third. It is believed that there is a bony union at the present time although the fracture line is quite plainly visible in the lateral view. The alignment of the fragments is good in the lateral view. In the a.p. view there is a considerable outward bowing and slight torsion and the joint surfaces of the knee and ankle are, of course, parallel." This is the complete report of Dr. Karshner as it appears in the record.

Dr. Stewart made an examination of Engelbert's injured member on November 13, 1928, and on the 21st he thus reported to the commission, in part: "Mr. Engelbert gives a history of an injury to his left leg about 2½ years ago. * * * The injury was in the nature of a compound fracture of the leg near the knee joint and minor bruises. * * *

He was in the hospital about 8 months. He was then placed in a leg brace which he wore for 6–7 months, and he was then told to leave off the brace to strengthen the bone. The wound on his leg has been healed about 1½ years, and since the time of his rating he has been working at light duty in the oil fields. He states that while in the hospital Dr. Gaulden removed some infected bone. At the present time Mr. Engelbert is complaining of the leg being weak requiring him to wear his brace at all times, this weakness he blames on the deformity. An examination of the patient shows a very adherent scar in the upper third of his left leg. Near the center of the scar the bone is very prominent. * * * There seems to be some spring in the fracture. X-rays taken by Dr. Karshner * * * demonstrate apparently solid union although the fracture line is still apparent. * * * It is my opinion that Mr. Engelbert has a real and true disability that is permanent in character without surgical measures are instituted to alleviate it. It is my opinion further that in a man of his years and health that one would be justified in doing a tubular skin graft from the thigh to replace the dense scar over the crest of the tibia and that when this has taken to proceed with an osteotomy of the tibia and putting the leg up in traction or cast as circumstances would indicate in order to correct the present malalignment."

Dr. Gaulden made to petitioner, on January 9, 1930, a report which reads, in full: "Mr. Engelbert reported to our office today for check-up examination to determine whether or not it will be necessary to do a bone graft operation on his fractured tibia. On examination today I find apparent firm union in patient's injured leg. X-rays made of the leg show that the fracture line is still in evidence but there has been some bridging across by callous formation. This patient at the present time is working and has been working since Sept. 30, 1929. He still wears his brace as a support to his leg. He was instructed to report back at the end of three or four months at which time further X-rays will be made and patient will be examined. Inasmuch as he is apparently getting firm union at the fracture seat I do not believe at this time it will be necessary to perform an open operation on his leg."

On March 7, 1930, Dr. Gaulden made a report to the State Compensation Insurance Fund in which he said, in part: "Mr. Engelbert has been under my care for an old compound fracture of his left leg since July 30, 1926. He was last seen by me on Jan. 9, 1930, at which time his leg was X-rayed. These films showed the fracture line was still in evidence tho there was apparently some callous formation. On physical examination union was apparently firm."

Dr. Cade, under date March 19, 1930, made a report to the State Compensation Insurance Fund. In this paper the doctor first analyzes the showing made to him by an inspection of the four X-ray films of Engelbert's leg, taken by Dr. Gaulden. As to one of these, after stating certain particulars shown by it, Dr. Cade says: "Solid bony union does not appear to be complete in this particular X-ray film." As to a second, he remarks that, "although a great deal of the bony tissue has been replaced with callous formation, however solid bony union of the fracture is far from complete." As to the remaining two, the third and the fourth, which he treats together, the doctor observes that they "show the condition to be practically the same as revealed in the" second film.

This is a complete statement of the evidence respecting the condition of Engelbert's injured leg from July 30, 1926, to February 27, 1930, so far as it is pertinent here, and we now set down an account of Engelbert's activities during the same period. The injured man was under no employment between July 30, 1926, the day upon which he suffered his initial injury, and August 9, 1927, upon which latter date he again took up an employment with the Celite Company, this time at office work, although he was still compelled to wear a brace for the support of the injured leg. His earlier position with the company was as operator of a gasoline locomotive. Up to December 1, 1927, his compensation in this second employment was $100 per month, but on that date it was increased to $125 per month and so remained until August 4, 1928, at which time he voluntarily left the employment with the company. From that date to October 1, 1928, his leg bothered him and required some treatment, and he was consequently out of employment. On the last-mentioned day, however, he commenced work as a fireman with C. C. Julian at the oilfields at Santa Fé Springs, at a compensation of $125 per month, and retained the employment at that salary until July, 1929, when he underwent a skin graft operation for the purpose of relieving a scar over the site of the fracture of the tibia, an operation which had nothing to do with the fracture itself. From the disability occasioned by this operation he was recovered by September 29, 1929, when he entered the employ of respondent Signal Oil & Gas Company as a watchman, at a compensation of $42 per week of seven days. He retained this position, at the wage named, until February 27, 1930, the date of the second casualty involving the fractured tibia.

After the injury of 1930 Engelbert applied to the Industrial Accident Commission for an award of compensation therefor, and such proceedings were had thereupon that an award was entered against the Celite Company. Petitioner here, the insurance carrier of that company, now contends that the award should be annulled, insisting that any award in the proceeding should have gone against the Signal Oil & Gas Company. The State Compensation and Insurance Fund is before us for the reason that it was the carrier for the last-named company.

The manner in which Engelbert was injured while in the employ of the Signal Oil & Gas Company is shown by his testimony alone. The claimant said that he was walking down hill and "slipped and fell in a sitting position, my leg under me, injured leg under me," and "right away I felt a severe pain where the old fracture was. * * * I tried to stand and I couldn't. I whistled and called" the boss and the superintendent of the employer. These two men helped Engelbert up and carried him to a machine, by means of which he was taken to a hospital. On cross-examination Engelbert testified that when his leg doubled under him his "foot turned back", that when he came down on the leg he had "severe pain at site of old fracture", that "prior to that time" he had "not any more" pain in the leg "than just usually uncomfortable from wearing the brace." The record then shows:

"Q. When you came down on the leg * * * did you come down hard or easy or how, do you know? A. Well, just I slipped I guess down the hill, I would say four or five feet."

We pause for a moment to consider this state of the testimony. It is quite evident from the entire record that the witness said that he "slipped on the grass" and not "slipped I guess." This is made apparent from the fact that counsel, in later questions, as hereafter will be shown, without comment or objection from the witness, from other counsel or from the referee, used the expression "on the grass" in alluding to Engelbert's slipping. Moreover, it is not likely that the witness would have said "slipped I guess," as he had previously stated positively that he slipped, and he must have remembered positively whether he slipped as great a distance as four or five feet before he went down. These views are quite material to the case. If Engelbert slipped on grass, the possibility of his having fallen because of a "buckling" or giving way of his leg is set at naught, when we remember how natural it is for persons with sound legs to lose their footing on a grassy slope. It will be observed, also, that Engelbert has already said that he slipped and fell in a sitting position with his injured leg under him, and that "right away" he felt "a severe pain where the old fracture was." If his leg had buckled or given way the pain would first have been felt at the commencement of his slipping and not after he had fallen to the ground. From a consideration of the entire record, more of which is quoted below, we conclude that Engelbert fell because of a casualty—an "accident," to lapse into ordinary parlance—which might reasonably have happened to one of sound limb, and that the old fracture had nothing to do with his slipping or his falling. We think the record shows no conflict upon this point, but that it is established without dispute.

We resume our statement of Engelbert's testimony.

"Q. *You were still on your feet* (italics ours) during the four or five feet you were sliding, is that true? A. Yes.

"Q. Then you couldn't regain— A. Overbalanced and went down."

In explanation of what now follows it is to be remarked that Dr. Gaulden performed a bone graft operation on Engelbert's leg after the casualty of 1930. The question with which the following quotation opens has reference to the operation:

"Q. That was approximately a week after you *slipped on the grass* (italics ours), is that correct? A. Yes sir.

"Q. Now at the time the bone graft operation was performed so far as you could determine was the leg in approximately the same condition as it was before you had *slipped on the grass* (italics ours)? * * *" The answer is not material to our purpose.

We have above quoted from the reports of several experts, the extracts there set forth having a bearing upon the condition of Engelbert's leg between July 30, 1926, and February 27, 1930. Two of these reports also contain matter referring to his condition after the injury of the last-mentioned date. The following appears in Dr. Gaulden's report of March 7, 1930: "This patient was again admitted to my service at the Angelus Hospital on Feb. 27, 1930. He stated that he had slipped and fallen that same morning and refractured his left leg. He was working for the Signal Oil & Gas Company when this accident happened. Examination shows abnormal mobility in patient's left leg and X-rays taken of the leg show very little difference from the condition seen in the X-rays that were taken when patient was last seen by me in January, with the exception that there is apparently a fracture line through the small amount of callous that has formed. I had been contemplating doing a bone graft on this patient for some time but when I saw him in January as union was apparently taken [sic] place such an operation had been postponed. Yesterday morning under anesthetic a bone graft operation was performed on this patient." Dr. Cade says, in his report dated March 19, 1930, that he is "unable to see any difference as regards the bony condition existing" as between the first and second films examined by him, on the one hand, and the third and fourth, on the other, the latter two having been taken immediately following the casualty of February 27, 1930. From this state of affairs the doctor concludes that the injury which Engelbert incurred in 1930 "did not cause any aggravation or change in the preexisting condition."

We think there is no conflict in the evidence which lies before us. Much time is taken in the briefs in a discussion of the question as to whether or to what extent there was a bony union, on February 27, 1930, at the line of the fracture which Engelbert suffered in 1926. The only discordant note in the evidence on that subject is to be found in the report of Dr. Cade, which was made from an examination of X-ray photographs alone, while both Dr. Gaulden and Dr. Stewart report that on physical examination of the patient union at the line of fracture was apparently firm, and that note is not opposed alone by the concord in the evidence found in the reports of the other experts. It seems to us that the point is practically determined by the history of Engelbert's activities from the date of his re-entrance into the employ of the Celite Company in August, 1927, to the time of the casualty of 1930. For much the greater portion of the period, about sixteen months out of twenty, his leg was firm enough to allow him to be at work and to earn a considerable compensation. The injured leg stood the test imposed during the period by the ordinary course of his employments. This we are bound to conclude from the fact that his salary was increased by one employer and was not lessened by the others, that no employment was terminated except upon his volition, and that no evidence was introduced for the purpose of showing that his labors were inefficient or that he was handicapped by the condition of his leg in the performance in due and ordinary course of the duties of any position which he held. His employment with the Signal Oil & Gas Company appears to have been the most strenuous in which he engaged. He was in this post from September 29, 1929, to February 27, 1930, a period of five calendar months, less two days, and there is evidence in the record from which it must be inferred that the job was not a sedentary one. It was stipulated at the hearing before the Industrial Accident Commission that the casualty of 1930 arose out of and in the course of Engelbert's employment as a watchman. When he was injured he was therefore where he had a right to be. When he was hurt he whistled and called to two higher-up employees of the company. He therefore must have been on the premises of his employer, on a grassy slope, too, and in the discharge of his daily duties when he was injured. We are driven to state these conclusions, just and proper as they are, because, unfortunately, there is no specific evidence in the record to show what was Engelbert's line of duty as a watchman. Certainly, as we have already said, he worked under successive employments for nearly two years in an evidently satisfactory discharge of his ordinary duties. At last, by means of an accident which might have befallen the most sturdy, his ability to hold an employment was for the time being destroyed. If we add to these reflections, based upon the story of Engelbert's employments, considerations arising from the fact that the evidence of all the experts except Dr. Cade is opposed to his, we may safely conclude that Dr. Cade's report creates no substantial conflict in the evidence. Be it plainly understood, however, that we proceed upon the theory that all the evidence of the experts pales into insignificance beside the history of Engelbert's activities for so long a time.

[1] This all means that Engelbert's injured leg did not *cause* the accident which befell him. As a *result* of the casualty, however, the member was refractured at the old site of difficulty. Here is a distinction which must always be kept in mind. Does the mere fact that the leg was injured at the place of the initial fracture show that Engelbert was entitled to compensation from the Celite Company? We think not. The law is to the contrary. Engelbert's condition at the time of the casualty of 1930 may be likened to that of an employee who has a heart trouble which in no way affects his ability to discharge the ordinary duties of his employment, but whose physical difficulty is enhanced by undue strain or excitement. The Supreme Court has several times passed upon such cases. "If the disability, although arising from a chronic heart trouble, was brought on by any strain or excitement incident to the employment, the industrial liability still exists. Acceleration or aggravation of a pre-existing disease is an injury in the occupation causing such acceleration. * * * It can hardly be doubted under this rule that if decedent's incapacity to drive his truck was caused by a heart attack brought on by exertion or sudden shock or excitement incident to his employment on the highway, recovery could be had." George L. Eastman Co. v. Industrial Acc. Comm., 186 Cal. 587, 200 P. 17, 20; Knock v. Industrial Acc. Comm., 200 Cal. 456, 253 P. 712.

Respondent relies upon Head Drilling Co. v. Industrial Accident Commission, 177 Cal. 194, 170 P. 157, and Newton v. Industrial Accident Commission, 204 Cal. 185, 267 P. 542, 60 A. L. R. 1279, but we think neither of these cases is applicable in the present instance.

[2, 3] Respondent commission makes the point that it was proper to render award against petitioner for the expenses of the bone graft operation performed by Dr. Gaulden. There is no evidence in the record that this operation was necessary before the casualty of 1930, or that a performance of it was contemplated. The only showing on the question appears in the reports of Drs. Gaulden and

Stewart. The former said in his statement of January 9, 1930, that "I do not believe at this time it will be necessary to perform an open operation" on Engelbert's leg. This was for the reason, as stated by the doctor, that the patient was "apparently getting firm union at the fracture seat." This was but six weeks before the event of February 27, 1930. Dr. Stewart had said, only, with our italics, "that one *would be justified* in doing a tubular skin graft from the thigh to replace the dense scar over the crest of the tibia and that when this has taken to proceed with an osteotomy of the tibia and putting the leg up in traction or cast as circumstances would indicate in order *to correct the present malalignment.*" In addition to the fact that it is said merely that this procedure would be justifiable, it is to be observed that it was for Engelbert to say whether he desired the malalignment of his leg thus to be corrected. Dr. Stewart made his report on November 13, 1928. A year and two months later Dr. Gaulden, Engelbert's private attendant, said for him that from the evidence then at hand it was unnecessary to perform the operation. The burden was upon Engelbert to show that he was entitled to compensation from the Celite Company for the expenses of the operation which was actually performed after the casualty of 1930, and we think the record is barren of any evidence to support a finding to that effect. Certainly, as it appears to us, the mere fact that the operation was performed when it was, and under the conditions then existing would not justify such a finding.

Other points are discussed in the briefs, but we find it unnecessary to decide them.

Award annulled.

We concur: CRAIG, J.; IRA F. THOMPSON, J.

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111 Cal.App. 246

PEOPLE v. HEROD.

Civ. 4239.

District Court of Appeal, Third District, California.

Jan. 20, 1931.

1. Judgment 🔑279.

Prior to statutory amendment, affidavit for service of summons by publication constituted no part of judgment roll (Code Civ. Proc. § 670, as amended by St. 1895, p. 45).

2. Judgment 🔑99.

Record in action begun in July, 1890, for foreclosure of certificate of purchase, wherein judgment was entered in December, 1890, *held* not to disclose want of jurisdiction to enter default judgment (Code Civ. Proc. § 670, as amended by St. 1895, p. 45).

> The judgment roll showed the complaint, issuance of summons, order for publication of summons, and judgment by default, followed by a decree of foreclosure; that decree of foreclosure recited that defendant had been regularly served with summons, and had failed to appear and answer complaint; that time for answering had expired; and that defendant's default had been entered according to law.

3. Judgment 🔑518.

Motion to vacate default judgment for want of service of summons is "collateral attack."

> [Ed. Note.—For other definitions of "Collateral Attack," see Words and Phrases.]

4. Judgment 🔑495(1).

Where default judgment is collaterally attacked, every act necessary to be taken to obtain jurisdiction will be presumed to have been taken.

Appeal from Superior Court, Kern County; Erwin W. Owen, Judge.

Action by the People against James Herod. From an order denying a motion to vacate a judgment foreclosing a certificate of purchase, defendant appeals.

Affirmed.

T. R. Claflin, C. L. Claflin, and H. E. Schmidt, all of Bakersfield, for appellant.

U. S. Webb, Atty. Gen., for the People.

F. E. Borton, of Bakersfield, amicus curiæ.

Mr. Justice PLUMMER delivered the opinion of the court.

This is an appeal from an order denying a motion to vacate a judgment foreclosing a certificate of purchase.

The record shows that on or about January 11, 1887, James Herod became the holder of a certificate of purchase for section 16, township 28 south, range 29 east, M. D. B. & M. No payments were made as required, and on the 23d day of July, 1890, a complaint in foreclosure of the certificate of purchase was filed. On December 1, 1890, a decree of foreclosure was granted in said cause in favor of the plaintiff. On January 30, 1928, a little over thirty years after the judgment was entered, the appellant served a notice of motion to set aside the judgment on two grounds: First, that no service of summons, either personally or by publication, was ever made or had upon the defendant; and, second, that no legal service of summons, either personally or by publication, was ever made, or had upon the defendant.

The judgment roll shows a complaint, the issuance of summons, order for publication of summons, and judgment by default, followed by decree of foreclosure. The judgment or decree of foreclosure recites that the defendant had been regularly served with process, and had failed to appear and answer the complaint, that the time for answering had expired, and that the defendant's default had been entered according to law. The judgment and decree then proceeds to recite the purchase of the certificate by the appellant, failure to make payment as required by law, following which, judgment of foreclosure was entered in favor of the respondent.

The appellant relies principally upon the alleged insufficiency of the affidavit for publication of summons. The contention is made that the affidavit contains no probative facts and consists only of a statement of ultimate facts and conclusions.

[1] The judgment to which we have referred recites that the appellant was regularly served with summons, and, unless there is something in the record, which we can consider, that shows that this statement in the judgment is not well founded, the assertion that the judgment is void upon its face is without merit. We have reference to the appellant's contention concerning the affidavit for publication of summons. Whatever may be contained therein is entirely of no moment here. Prior to the amendment of section 670 of the Code of Civil Procedure in 1895 (St. 1895, p. 45), the affidavit for service of summons by publication constituted no part of the judgment roll. As we have stated, this action was begun in July, 1890, and judgment entered in December, 1890, some five years preceding the time when the affidavit for publication was, by the Legislature, made a part of the judgment roll.

[2] Disregarding the affidavit for publication, there is nothing in the record in this case disclosing want of jurisdiction to enter the judgment complained of. The cases of People v. Mullan, 65 Cal. 396, 4 P. 348, People v. Pearson, 76 Cal. 400, 18 P. 424, and People v. Greene, 74 Cal. 400, 16 P. 197, 5 Am. St. Rep. 448, are not controlling upon the questions here presented. In People v. Mullan it appears that the motion was based upon section 473, Code of Civil Procedure, while the cases of People v. Pearson and People v. Greene went off on the theory that the affidavit of publication of summons was a part of the judgment roll at the time that the decisions were rendered in those cases. Such, however, was not the case, and the later decisions practically overrule the Pearson and Greene Cases. The case of Rue v. Quinn, 137 Cal. 651, 66 P. 216, 70 P. 732, cited by appellant, went off on the theory that the judgment was void upon its face. The appellant overlooks three cases which are decisive of every question here presented.

In People v. Davis, 143 Cal. 673, 77 P. 651, dealing with a motion like that in the case at bar, the court said: "It is well settled that a court has no power to set aside or vacate, on motion, a judgment not void upon its face, unless the motion is made within a reasonable time; and it is definitely determined that such time will not extend beyond the limit fixed by section 473 of the Code of Civil Procedure, which in no case exceeds one year. It is also settled law that a judgment is not void upon its face, unless its invalidity is apparent from an inspection of the judgment roll. * * * The effect of these well-settled rules is that, unless the invalidity of a judgment is apparent from an inspection of the judgment roll, the court rendering it has no power, in the absence of application made within the time specified in section 473, Code of Civil Procedure, to make any order vacating or setting aside such judgment, and the sole remedy of the aggrieved party, who may not, in fact, have been served, is to be found in a new action on the equity side of the court." It is further held in that case that under the provisions of section 670, Code of Civil Procedure, as it stood prior to 1895, neither the affidavits for publication of summons, nor the order for publication of summons constituted any part of the judgment roll under the law then in force, and cannot therefore be considered, notwithstanding the fact that they had been placed in the bill of exceptions. That case also holds that there is no merit in the contention that the record does not show the issuance of an alias summons for the purposes of publication.

[3, 4] The cases of Lake v. Superior Court, 165 Cal. 182, 131 P. 371, and People v. Norris, 144 Cal. 422, 77 P. 998, show that proceedings such as we have here are collateral attacks. Being a collateral attack, nothing appearing to the contrary, every act necessary to be taken by the trial court in order to obtain jurisdiction will be presumed to have been taken. Hahn v. Kelly, 34 Cal. 391, 94 Am. Dec. 742.

In Fletcher v. Superior Court of Sacramento County, 79 Cal. App. 468, 250 P. 195, this court had occasion to review practically all the California cases having to do with presumptions in favor of a judgment. A complete answer to every contention made by the appellant will be found in the cases of Hahn v. Kelly, supra, and Fletcher v. Superior Court, supra.

The order appealed from is affirmed.

SIBERELL v. SIBERELL.*

Civ. 7514.

District Court of Appeal, Second District, Division 1, California.

Jan. 12, 1931.

Rehearing Denied Jan. 30, 1931. Hearing Granted by Supreme Court March 12, 1931.

1. Husband and wife 🔑14(3), 119(1), 249.

Deed to husband and wife "as joint tenants," vested property in spouses as joint tenants, interest conveyed to wife being her separate property, interest conveyed to husband retaining quality of community property (Civ. Code, §§ 161, 164).

> Civ. Code § 164, provides that, where property is conveyed to a married woman by a written instrument, the title is presumed to thereby vest in her as her separate property, and, where the conveyance is to a married woman and her husband, the presumption is that she takes the part conveyed to her as tenant in common, unless a different intention is expressed in the instrument. Civ. Code § 161, declares that a husband and wife may hold property as joint tenants, tenants in common, or as community property.

2. Husband and wife 🔑49½(8).

That deed was in form to husband and wife was evidence of husband's intention to make gift to wife of interest conveyed to her.

3. Husband and wife 🔑264.

Evidence sustained finding that deed of property by husband to wife was not intended to change community character of property.

> The husband testified that he made the deed to avoid inconvenience from potential judgments in suits pending against him, but also testified that he did not by his deed intend to make a gift of the property to his wife.

4. Divorce 🔑252.

Divorce decree giving party guilty of extreme cruelty all, or nearly all, community property, *held* improper (Civ. Code, § 146).

HOUSER, J., dissenting.

Appeal from Superior Court, Los Angeles County; H. G. Ames, Judge.

Action for divorce by Minnie V. Siberell against Harvey P. Siberell. From certain parts of an interlocutory judgment, plaintiff appeals.

Reversed and remanded, with directions.

Barker & Keithly, of Los Angeles, for appellant.

Schweitzer & Hutton, of Los Angeles, for respondent.

CONREY, P. J.

Appellant obtained an interlocutory judgment, whereby it was determined that she is entitled to a divorce from her husband. Her appeal is from only those parts of the judgment (entered on the 27th day of September, 1928) whereby it was determined that the defendant is entitled to an interest in certain described land, and whereby it was determined that, as between the parties to this action, a certain mortgage indebtedness constitutes a lien, charge, or incumbrance upon said land, or that as between the parties hereto such indebtedness or any part thereof is chargeable against or should be paid other than by defendant out of his separate property and funds.

In October, 1913, the real property, hereby designated as lots 29 and 30, was conveyed to appellant and respondent as joint tenants. The lots, as well as improvements later made thereon by these parties, were paid for with community funds. Afterwards, on January 19, 1918, respondent executed to appellant a grant deed of said lots and of other property. This deed recites a consideration of $10 paid by the grantee, but, in fact, nothing was paid.

The divorce was granted upon grounds of extreme cruelty. The court found that lots 29 and 30 are community property, and that there is no other community property except about $600 held by defendant, and certain tools, machinery, etc., which were awarded to the defendant, and the household furnishings and furniture, which were awarded to the plaintiff. The court found that lots 29 and 30 are of the value of about $40,000, and that this property is subject to a mortgage to secure an indebtedness in the principal sum of $6,000, for a loan, the proceeds whereof were received by the defendant. By its decree the court gave to the plaintiff an undivided one-half of lots 29 and 30, and gave to the defendant an undivided one-half of said lots, subject to the mortgage, and provided that said mortgage as between plaintiff and defendant shall be a lien only as against defendant's interest in the property. The defendant was required to pay to the plaintiff $50 per month for the support of plaintiff and one child (a son) given into the custody of the plaintiff, and the other three children (daughters) were left in the custody of the defendant. Plaintiff was given the right to continue to occupy said real property, without rent, so long as the allowance for support of plaintiff and said son does not "exceed the sum hereby awarded."

The court found that said land, lots 29 and 30, at the time it was acquired by plaintiff and defendant, was their community property, and ever since has continued so to be. This finding rests upon the more specific findings that the land was purchased and paid for with community funds; that the deed of October, 1913, conveyed the property to plaintiff and defendants as joint tenants; that the title remained as vested under the deed of October, 1913, until January 19, 1918; that the deed made by the defendant to the plaintiff on January 19, 1918, was made without consideration, and solely for the convenience of the parties, and not with the purpose or intent that its community character should be changed so as to make it the separate property of the plaintiff.

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*Hearing granted 3 P.2d 924.

In the bill of exceptions, the specifications of insufficiency of the evidence to justify the decision, in so far as the two deeds are concerned, relate entirely to appellant's claim that the evidence is insufficient to support the court's findings above mentioned concerning the purpose and effect of the deed of January 19, 1918.

Appellant now contends, in the first place, that by the 1913 joint tenancy deed she acquired as her separate estate an equal interest with her husband as joint tenant; that only the remaining half interest could have constituted community property; and that by the deed of 1918 her husband gave to her complete title to the entire property as her separate estate. (This deed, however, did not in terms declare that the property was conveyed to her as her separate property.)

[1, 2] There is no evidence in the record as to the circumstances under which the 1913 deed was made, other than the deed itself as proved by stipulation that prior to the 19th day of January, 1918, record title to the lots "stood in the names of plaintiff and defendant as joint tenants," and the fact that the property was paid for with community funds. But this last fact alone is not sufficient to change the legal effect of the deed. According to section 164 of the Civil Code as in force at date of the deed of October, 1913, it was provided that "* * * whenever any property is conveyed to a married woman by an instrument in writing, the presumption is that the title is thereby vested in her as her separate property. And in case the conveyance be to such married woman and her husband, or to her and any other person, the presumption is that the married woman takes the part conveyed to her, as tenant in common, unless a different intention is expressed in the instrument. * * *" Section 161, Civil Code, declares that a husband and wife may hold property as joint tenants, tenants in common, or as community property. In the light of these Code sections, it is certain that, if the deed of October, 1913, had conveyed the property to the husband and wife without specifying a joint tenancy, the presumption would have been that they became tenants in common, and that the wife would have held her part as separate property, and that the husband would have held his part as community property. Estate of Regnart, 102 Cal. App. 643, 283 P. 860. We think it is also very clear that, where the deed is to the husband and wife "as joint tenants," the presumptions above stated fully apply, except only that the incidents of joint tenancy take the place of the usual tenancy in common. Moreover, the fact that the deed was in form to both husband and wife was in itself evidence of his intention to make a gift to his wife of the interest conveyed to her. Estate of Regnart, supra.

We conclude, therefore, that under the first deed appellant owned an undivided one-half of lots 29 and 30 as joint tenant and as her separate property; and that the other one-half interest, vested in respondent as joint tenant, retained the quality of community property.

[3] From the foregoing conclusion, it follows that the deed of January 19, 1918, if it constituted a gift to appellant, was a gift of only the undivided interest of the grantor, and was effective only to the extent that it gave to appellant as her separate property that interest theretofore held by the grantor as community property. If, on the other hand, said deed was not a gift, then that undivided interest, although conveyed into the name of the wife, retained its status as community property. The court found that said deed was not made by respondent with the purpose or intent that its community character should be changed so as to make it the separate property of the plaintiff. This finding was in accord with testimony of respondent to the same effect. We are of the opinion that this testimony of respondent is sufficient evidence to sustain the finding. The testimony of respondent that he made this deed to avoid inconveniences which might result from his possible, but not yet certain, liability to pay damages on account of two automobile accidents, does not necessarily overcome the effect of his testimony that he did not by his deed intend to make a gift of the property to his wife. The conflict in the evidence left the question open to determination by the trial court, and its decision thereon will here be accepted as final.

[4] The court, having erroneously determined that the entire ownership of lots 29 and 30 was community property, made its decree accordingly, and gave to respondent an undivided one-half thereof, subject to the conditions stated, relating to possession, and relating to the mortgage. But, since only one-half interest was community property, the effect of the decree would be to give to respondent (the party guilty of extreme cruelty by reason of which the divorce is granted) all, or nearly all, of the community property. This is contrary to law. Civ. Code, § 146; Quagelli v. Quagelli, 99 Cal. App. 172, 277 P.

1089; McKannay v. McKannay, 68 Cal. App. 701, 230 P. 214.

That part of the judgment is reversed wherein and whereby there was awarded to the defendant an undivided one-half interest in and to said lots 29 and 30, and wherein and whereby it was provided that, as between the parties to this action, said undivided one-half interest is subject to the existing mortgage thereon to secure an obligation of $6,000 or any renewal or extension thereof, as stated in the decree.

It is directed that the findings of fact be amended by striking out therefrom the statement "that said land at the time it was acquired by plaintiff and defendant was their community property and ever since has continued so to be," and by substituting therefor the following: "That said land at the time it was acquired by plaintiff and defendant became and was as to an undivided one-half thereof the separate property of the plaintiff and as to the other undivided one-half thereof was their community property and ever since has continued so to be."

It is further directed that the trial court, taking into consideration the evidence now in the record and any additional evidence deemed necessary to enable the court to provide for an equitable distribution of the community property of the parties, amend its decree in terms which shall award to the plaintiff a portion to be fixed by the court, but which shall be not less than one-half of the community property, and shall award to the defendant that part of the community property, if any there be, not awarded to the plaintiff. The decree as amended shall further provide that said mortgage as between plaintiff and defendant shall be a lien only against that part or interest in the property, if any there be, awarded to the defendant.

I concur: YORK, J.

HOUSER, J.

I dissent. Without seriously questioning the basic statement of the law contained in the prevailing opinion herein, in substance that ordinarily a conveyance of property by a joint tenancy deed to a husband and wife has the presumptive effect of vesting a separate estate in the wife, nevertheless, from a consideration not only of the circumstances which apparently surrounded the immediate transaction, but as well those which followed the delivery of the joint tenancy deed in question, I am led to a conclusion differing from that expressed by my associates.

The greatest effect that may be accorded the joint tenancy deed is that on its execution it created a disputable presumption that title to an undivided one-half interest in the property therein described was thereby vested in the wife as her separate property. Concededly, such presumption may be overcome, not only by direct evidence to the contrary, but also by such inferences as may be deducible from the entire evidence in the case. A decision of the questioned fact depends primarily upon a determination of the question of what was the intention of the grantees at the time the deed was executed. And, as has been frequently decided, in determining an issue of fact, the power of the trial judge to rest his conclusion upon inferences, in opposition to a presumption, is unquestioned. If, then, the evidence adduced on the trial of the action presents such facts as from them an inference fairly may be deduced, which in its effect contradicts the presumption that, at the time the joint tenancy deed was executed, it was the intention of the husband and wife that the wife should take her moiety of the conveyed property as her separate estate, it would follow that the finding made by the trial court "that said land at the time it was acquired by plaintiff and defendant was their community property and ever since has continued so to be" was supported by the evidence, and cannot be disturbed by this court.

Ordinary experience of men indicates that the purpose of a husband and wife in having real property conveyed to them by a joint tenancy deed is that, in the event of the death of either of them, the survivor may succeed to the title to such property without the commencement and the carrying to termination of proceedings in the probate court which, after such institution, and after much inconvenience, expense, and delay, may eventuate in the identical result which may be accomplished by the original execution of the joint tenancy deed. In the absence of any direct evidence to the contrary, taking into consideration the fact that had the husband and the wife really intended that any interest in the real property should be presently vested in the wife, a simple grant deed, or a bargain and sale deed, might have been employed, which easily might have included the direct declaration that the wife should take a present one-half interest as her "separate property"—at least it may be surmised that the purpose of the joint tenancy deed, far from vesting any present estate in the wife, was merely to insure the future vesting of the entire title to the property in the survivor of the husband and the wife. In addition thereto, from the evidence adduced on the trial of the action it may be noted that the property was entirely paid for with community funds; that at the time the joint tenancy deed was executed the wife had no knowledge of the fact that any separate estate was either created or attempted to be conveyed to her, nor even became aware of the assumed fact until several years thereafter, when she was so informed by a banker from whom the husband was negotiating a loan which was proposed to be secured by a mortgage on, or a trust deed of, the property; that the property was occupied by the husband, the wife, and their family as a home, and that during such occupancy the wife never asserted nor exerted any dominion or control over the property; that with reference to the property the wife "always signed everything he (the husband) asked her to sign"; that, when the so-called gift deed of 1918 was executed by the husband, it included the entire estate, rather than an undivided one-half of it, which would have been all that would have been necessary if by the joint tenancy deed the creation of an estate in the wife had been intended; and finally, with reference to the so-called gift deed, the testimony of the husband is that "this property was in my name at the time, and I didn't know just what would happen about this and I wanted to protect the family in case anything came up on this matter and he (his attorney) advised me that I had better do that. It was deeded to her as a matter of protection so that the property would not be involved, but I never deeded the property with the intention of it being her own individual property; I had no intention of any shape or form or manner of that kind. It was no gift nor anything else; the fact is, that I didn't want to have that involved and that was the reason for the transfer."

Furthermore, as having some bearing upon the question of intent of the husband and the wife as grantees of the joint tenancy deed, it should also be noted that neither in the pleadings, during the course of the trial, nor in the proceedings on the motion for new trial, was the question directly raised by the plaintiff relative to the effect of such deed. The case was tried entirely on the theory that plaintiff's separate estate, if any, in the property described in the complaint, was created, not by virtue of the joint tenancy deed, but that it inured to plaintiff by reason of the so-called gift deed of 1918, which was executed by defendant to plaintiff several years after the joint tenancy deed was executed. The pertinent allegations of plaintiff's complaint which reflect her claim of an interest in the property in question are "that said real property is the separate property of plaintiff, having been conveyed to her by defendant after an automobile accident * * * (which accident, or the fear by defendant of a judgment against him by reason thereof, was the inducing cause of the execution of the so-called gift deed of 1918); * * * that plaintiff has no real or personal property other than as hereinbefore set forth."

From such considerations it appears to my mind that, in opposition to the presumption created by the statute of separate property in the wife, a proper legal inference might have been indulged by the trial court which would overcome and overthrow such presumption, and result in a finding of fact "that said land at the time it was acquired by plaintiff and defendant was their community property and ever since has continued so to be." As hereinbefore indicated, if the evidence before the trial court was legally sufficient to justify such an inference, this court is powerless to disturb the ensuing judgment.

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111 Cal. App. 119

EQUITABLE BUILDING & LOAN ASS'N v. WOLFANGLE et ux.

Civ. 4232.

District Court of Appeal, Third District, California.

Jan. 15, 1931.

1. Party walls 🔑8(2).

Subsequent ordinance respecting required width of brick walls did not become part of party wall agreement providing for extension or alterations uniform in material and dimensions with original wall (Civ. Code, §§ 1655, 1656).

> Since party wall agreement providing for sharing expense of extensions, alterations, or additions specifically provided that extensions should be uniform in material and dimensions with original wall, incorporation therein of subsequent ordinance providing for wall of different width would amount to creation of a new and different contract by mere operation of law, and would result in impairing obligations of contract.

2. Party walls 🔑8(3).

Property owners were not liable for any cost of party wall extension built over written protest and in violation of contract.

> Original party wall agreement provided for sharing expense of extensions, alteration, and additions which should be uniform in material and dimensions with original wall, while extension actually built over written protest of owners was a different width than wall as originally built and was for purpose of enlarging store building of adjoining owner for its sole benefit.

3. Contracts 🔑167.

Applicable laws in existence when agreement is made necessarily become part thereof.

4. Contracts 🔑**167.**

Rule to effect that applicable laws in existence become part of agreement applies with respect to city ordinance.

5. Contracts 🔑**167.**

Statutes and ordinances enacted subsequent to execution of contract, which add burdens or impair obligations, do not become part of agreement unless language clearly indicates such intention.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by the Equitable Building & Loan Association against L. R. Wolfangle and wife, wherein defendants filed a cross-complaint. Judgment for plaintiff, and defendants appeal.

Reversed.

J. G. Rossiter, of Los Angeles, for appellants.

Raymond G. Thompson, of Pasadena, for respondent.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

This is an appeal from a judgment which was rendered in favor of the plaintiff for one-half of the cost of extending a party wall pursuant to contract. It was also against the defendants on their cross-complaint for damages on account of performing the work in violation of the terms of the agreement. The judgment was rendered on the theory that a city ordinance specifying the required thickness of brick walls, which ordinance was enacted subsequent to the execution of the contract, became a necessary part thereof.

E. F. Lancaster and the defendants owned adjoining lots in the city of Pasadena. Upon these lots the respective parties each constructed one-story brick buildings. The intervening wall of these buildings was built along the dividing line of the adjoining properties as a party wall. This wall was built twelve inches thick, to conform to the city ordinance which was then in effect. An agreement was executed by the respective parties reserving to each of them and their grantees or heirs the perpetual use and enjoyment of this party wall and prohibiting either party from defacing, weakening, or destroying the wall without first obtaining the written consent of the other party therefor. This contract also contained the following clause:

"It is further agreed that if at any time either of said parties are desirous of extending said wall beyond its present limitations or to in any manner erect, construct or extend said wall for any reasonable height or depth or length, that the same shall be done at the expense of both parties hereto, share and share alike, and that said extension, alteration, addition thereto, or repair thereof shall be uniform in material and dimensions with the original wall."

Thereafter Lancaster sold and conveyed his said property to the plaintiff. In March, 1926, the plaintiff, over the written protest of the defendants, built an extension to said party wall at a total cost of $1,940. This addition to the party wall was of no benefit to the defendants. Demand was made upon the defendants to contribute one-half of this expense, which they refused to do. This suit was thereupon brought. The complaint alleges the execution of the contract and the construction of the extension to the wall at the reasonable cost of $1,940. The answer denies the material allegations of the complaint.

In a cross-complaint the defendants affirmatively allege that the addition to the wall was built without the consent and over the written protest of the defendants and in violation of the terms of the contract; that in making such addition the plaintiff did "extend said wall and add to the height and increase the depth of said wall and did alter and repair said wall; * * * that without leave or consent * * * plaintiff increased the thickness of said wall by from 4 inches to 8 inches," thereby encroaching upon defendants' premises to that extent, to their damage in the sum of $5,000.

The cause was tried with a jury. A verdict was rendered upon the contract in favor of the plaintiff for the sum of $960. A separate verdict was rendered against the defendants upon their cross-complaint. A judgment was accordingly entered in behalf of the plaintiff for the sum of $960 and to the effect that the defendants take nothing by reason of their cross-complaint. From this judgment an appeal has been perfected.

The evidence is uncontradicted to the effect that the extension to the wall was constructed as "a two-brick wall, in other words, about 16 inches (in width) up to the top of the required height for the Equitable Building and Loan Association Building."

This was in conflict with the unambiguous terms of the contract, which provides that any "extension, alteration, addition thereto or repair thereof shall be uniform in material and dimensions with the original wall." The original wall was but twelve inches in width, while the extension was at least sixteen inches thick. This fact is conceded. The respondent justifies this increased breadth of the wall by the fact that, subsequent to the execution of the agreement in question, the city of Pasadena adopted an ordinance requiring all brick walls of buildings in that district to be constructed at least sixteen inches in width. It was stipulated this ordinance was so enacted and that it was in force at the time the wall was extended.

[1] The sole question presented by means of this appeal is whether the change of the ordinance with respect to the required width of brick walls became a necessary provision of the agreement which was previously executed. The respondent argues that "not only did the ordinances in effect at the time this agreement was made in 1905 enter into it and form a part of it as fully as if they were expressly referred to and incorporated in its terms, but all reasonable amendments and modifications of such ordinance also entered into and became a part of such agreement." In support of the judgment, the respondent relies upon sections 1655 and 1656 of the Civil Code. These provisions are not applicable. Section 1655 provides that, "stipulations which are necessary to make a contract reasonable, or conformable to usage, are implied, in respect to matters concerning which the contract manifests no contrary intention."

But in the present case the contract does manifest a contrary intention. It specifically provides the extension "shall be uniform in material and dimensions with the original wall." To affirm the judgment in this case, it would be necessary to hold that substantial changes in statutes or ordinances subsequently adopted, which increase the obligations of a contracting party, may be imposed in violation of the very terms of the agreement. In effect this would amount to the creation of a new and different contract by mere operation of law. It would result in impairing the obligations of the contract. This is neither law nor justice.

[2] In the present case the plaintiff has constructed a two-story brick wall some 65 feet in length as an extension to a former party wall. The addition was for the purpose of enlarging the store building of the plaintiff for its sole benefit. It appears to be of no benefit to the defendants. It was built in violation of the terms of the contract. If the defendants may be held to contribute to this wall, it is solely because of the obligation imposed by the terms of the contract. Since the extension to the wall was built over the written protest of the defendants and in violation of the express terms of the contract, we are of the opinion the defendants are not liable for any part of the cost therefor.

[3-5] It is true that "all applicable laws in existence when an agreement is made, necessarily enter it and become a part of it as fully as if they were expressly referred to and incorporated in its terms." 6 Cal. Jur. 311, § 186. The same rule applies with respect to city ordinances. 13 C. J. 561, § 523; Wright v. Computing Scale Co., 47 Wash. 107, 91 P. 571. But statutes and ordinances enacted subsequent to the execution of a contract, which add burdens or impair the obligations of the contract may not be deemed to be a part of the agreement unless its language clearly indicates this to have been the intention of the parties. The rule in this regard is clearly stated in the case of Fuller v. Kane, 110 Mich. 549, 68 N. W. 267, 34 L. R. A. 308, 64 Am. St. Rep. 362, as follows: "Every contract (which does not expressly provide the contrary) must be considered as made with reference to the existing state of the law, and if, by the intervention of the legislature, a change is made in the law which in any degree affects the contract, such contract, made without some clear and distinct reference to the prospect or possibility of a change, does not hold with reference to the state of things as altered by the new law." 6 R. C. L. 856, § 243.

It may not reasonably be said that the increasing of the breadth of a brick wall from twelve to sixteen inches in width is not a material and substantial change in the dimensions thereof.

In the present case, far from an evident intention on the part of the contracting parties to adopt future legislation as a part of the agreement, it is apparent from the express language employed that they intended to limit the liability for any extension, alteration, or repair of the existing party wall to such changes as "shall be uniform in materials and dimensions with the original wall." The extension of the party wall was constructed in violation of the contract, and the defendants are therefore not liable thereunder. If the defendants were permitted to make use of this extension of the wall for their own benefit, they would be required to pay plaintiffs the reasonable value of such use. Under the circumstances of this case, the defendants are, however, not liable upon the contract.

The judgment is reversed.

112 Cal. App. (Supp.) 773

COWAN OIL & REFINING CO. v. MILEY PETROLEUM CORPORATION, Limited.

No. CA–276.

Appellate Department, Superior Court, Los Angeles County, California.
Jan. 28, 1931.

1. Jury 🔑31(7).

Statute providing for summary judgment *held* not to invade defendant's constitutional right to trial by jury (Code Civ. Proc. § 831d, as amended by St. 1929, p. 857; Const. art. 1, § 7).

2. Constitutional law 🔑315.
Judgment 🔑179.

Statute authorizing summary judgment *held* not to deny defendant due process (Code Civ. Proc. §§ 1005, 1010, and § 831d as amended by St. 1929, p. 857; Const. art. 1, § 13).

3. Constitutional law 🔑309(1).

Essentials of "due process of law" are that party proceeded against shall have reasonable notice and opportunity to be heard in orderly manner (Const. art. 1, § 13).

[Ed. Note.—For other definitions of "Due Process of Law," see Words and Phrases.]

4. Judgment 🔑181.

Under statute authorizing summary judgments, answer may be stricken out, although perfect defense is stated therein, unless defendant by affidavits shows facts to substantiate defense (Code Civ. Proc. § 831d, as amended by St. 1929, p. 857).

5. Judgment 🔑181.

Presence of counterclaim in answer is no bar to motion for summary judgment, where counterclaim is unsupported by statements of fact in affidavit tending to show that it is meritorious (Code Civ. Proc. § 437, and § 831d as amended by St. 1929, p. 857).

6. Pleading 🔑354(2).

In action for gas delivered to defendant under contract, defendant's counterclaim for plaintiff's use of unreasonable amount of gas *held* "counterclaim" within statute and not cross-complaint; as regards motion to strike (Code Civ. Proc. §§ 437, 438, and § 831d as amended by St. 1929, p. 857).

> The facts disclosed that the defendant operated certain oil wells and the plaintiff operated a plant for extraction of gasoline from natural gas; that under contract defendant delivered oil to plaintiff for extraction of gas; that plaintiff's action was based on claim for dry gas claimed to have been delivered to defendant, and that defendant's counterclaim was based on a clause in the contract authorizing the plaintiff to use a reasonable amount of gas received from defendant.

7. Judgment 🔑185.

Defendant's affidavit in response to motion for summary judgment in action for gas *held* insufficient as conclusion (Code Civ. Proc. § 831d, as amended by St. 1929, p. 857).

> The defendant's affidavit stated that the plaintiff, instead of using defendant's dry

gas in reasonable quantities, as permitted by the contract, fraudulently converted and appropriated to its own use and benefit large quantities of dry gas in excess of any reasonable quantity necessary to operate plaintiff's gasoline plant.

8. Judgment ⚿185.

Neither conclusions of law nor conclusions of fact set forth in affidavit in response to motion for summary judgment are sufficient (Code Civ. Proc. § 831d, as amended by St. 1929, p. 857).

9. Judgment ⚿186.

Evidentiary facts set forth in defendant's affidavit in response to motion for summary judgment must be accepted as true for purpose of motion (Code Civ. Proc. § 831d, as amended by St. 1929, p. 857).

Appeal from Municipal Court of Los Angeles; Joseph F. Chambers, Judge.

Action by the Cowan Oil & Refining Company against the Miley Petroleum Corporation, Limited. Judgment for plaintiff, and defendant appeals.

Affirmed.

McAdoo, Neblett & Clagett, of Los Angeles, for appellant.

M. D. Andrews, of Los Angeles, for respondent.

SHAW, J.

Defendant filed an answer in which is included a counterclaim. Thereafter plaintiff's motion to strike the answer and enter judgment under section 831d of the Code of Civil Procedure was granted, and judgment was entered against defendant for the amount sued for. From this judgment defendant appeals and in support of its appeal contends that section 831d is unconstitutional because it deprives the defendant of a jury trial (Const. art. 1, § 7) and does not provide due process of law (Const. art. 1, § 13); and, further, that if section 831d is valid, an answer containing a complete and well-pleaded defense cannot be stricken out thereunder, and the counterclaim is a bar to proceedings under that section.

Section 831d was amended into its present form in 1929 (St. 1929, p. 857) and, so far as material here, reads as follows:

"When an answer is filed in an action to recover a debt or liquidated demand, if it is claimed that there is no defense to the action, on motion of plaintiff, supported by a verified complaint, or if not verified then by the affidavit of the plaintiff or of any other person having knowledge of the facts, the answer may be stricken out and judgment may be entered, in the discretion of the court, unless the defendant by affidavit shall show such facts as may be deemed by the judge hearing the motion sufficient to entitle him to defend.

"Such affidavit shall be made by the defendant, or by any other person, having knowledge of the facts, and shall set forth facts showing that the defendant has a good and substantial defense to the plaintiff's action (or to a portion thereof) upon the merits, as the deponent verily believes, and it shall appear in the affidavit that the facts pertaining to the action have been fully and fairly stated to defendant's counsel, naming him, and that the defendant upon such statement has been advised by such counsel that he has a defense to the action (or to some portion thereof) upon the merits. The facts so stated shall be the personal knowledge of the affiant, shall be set forth in the affidavit with particularity, and the affidavit shall show affirmatively that the affiant, if sworn as a witness, can testify competently thereto. If all facts relied upon as tending to establish such meritorious defense are not within the personal knowledge of one person, then such as are not within the knowledge of the person making the affidavit of merits shall be supported by the affidavit or affidavits of the person or persons qualified, as above, and said supporting affidavits shall be drawn with like particularity.

"If it appear that such defense applies only to a part of the plaintiff's claim, or that any part is admitted, the plaintiff may have judgment entered forthwith for so much of his claim as such defense does not apply to, or as is admitted, on such terms as may be just, and the cause of action may be severed accordingly. A judgment entered under this section is an appealable judgment, as in other cases."

[1-3] While this section provides a form of procedure that is novel in this state, it is the same in general effect, but with some variations in details, as rules of practice established in New York and New Jersey, which require a defendant, on plaintiff's motion for judgment, to file in addition to his answer an affidavit showing "such facts as may be deemed, by the judge hearing the motion, sufficient to entitle him to defend." There is also a rule in the District of Columbia which is the same in purpose but varies slightly in its description of the contents of the required affidavit. All of these rules have been sustained by the courts against the objection that they infringe the constitutional right of trial by jury, on the ground that they do not provide for a trial of the issue but for the means of making an issue or determining whether there is an issue. General Inv. Co. v. I. R. T. Co., 235 N. Y. 133, 139 N. E. 216;

Hanna v. Mitchell, 202 App. Div. 504, 196 N. Y. S. 43; Dwan v. Massarene, 199 App. Div. 872, 192 N. Y. S. 577; Wittemann v. Giele, 99 N. J. Law, 478, 123 A. 716; Eisele v. Raphael, 90 N. J. Law, 219, 101 A. 200; Fidelity, etc., Co. v. United States, 187 U. S. 315, 23 S. Ct. 120, 47 L. Ed. 194; Cropley v. Vogeler, 2 App. D. C. 28.

In General Inv. Co. v. I. R. T. Co., supra, the court, upholding rule 113 of the New York Rules of Civil Practice above referred to said:

> "The argument that rule 113 infringes upon the right of jury trial guaranteed by the Constitution cannot be sustained. The rule in question is simply one regulating and prescribing procedure, whereby the court may summarily determine whether or not a bona fide issue exists between the parties to the action. A determination by the court that such issue is presented requires the denial of an application for summary judgment and trial of the issue by the jury at the election of either party."

In Fidelity, etc., Co. v. United States, supra, the court, sustaining the rule of the District of Columbia Supreme Court, said:

> "If it were true that the rule deprived plaintiff in error of the right to trial by jury, we should pronounce it void without reference to cases. But it does not do so. It prescribes the means of making an issue. The issue made as prescribed, the right of trial by jury accrues."

Appellant points out no particular in which this section is wanting in due process of law, and we see none. The District of Columbia rule was upheld against this objection also in Fidelity, etc., Co. v. United States, supra. Judgment can be rendered under section 831d only on motion of the plaintiff and after a hearing. While nothing is expressly said in the section about notice of such a motion, we think its intention is to require such notice because it does expressly afford defendant an opportunity to make a showing by affidavit, which he might not be able to do were the motion to be made without notice. Bohn v. Bohn, 164 Cal. 532, 536, 129 P. 981. This being so, sections 1005 and 1010 of the Code of Civil Procedure require the notice to be in writing and served at least five days before the motion, and provide how such notice must be served. The essentials of due process of law are that the party proceeded against shall have reasonable notice and opportunity to be heard, in an orderly manner. People v. Troche, 206 Cal. 35, 42, 273 P. 767. Due process may include new methods of procedure, provided they are in harmony with the accepted underlying principles of such procedure according to the traditions of the common law. Fidelity, etc., Co. v. United States, supra; People v. Troche, supra. Moreover, the notice essential to due process of law is the original notice whereby the court acquires jurisdiction—in this case the summons by which the defendant was brought into court. The party has no constitutional right to demand notice of further proceedings thereafter, the question whether such notice shall be provided being a matter of legislative discretion. Gray v. Hall, 203 Cal. 306, 318, 265 P. 246. We think section 831d is immune to attack on any of the constitutional grounds urged.

[4] Appellant cites a large number of cases holding that under the provision of our Code authorizing the striking out of answers as sham, an answer which states and properly pleads a good defense cannot be stricken out, and other cases holding that a judgment upon the pleadings cannot be given if the answer presents any material issue on the allegations of the complaint or sets up any affirmative matter constituting a defense. None of these cases, however, involve any such provision as that found in section 831d. That section provides an entirely new procedure, as far as the Codes of our state are concerned, the purpose of which is to eliminate all issues which have no basis in fact, no matter how well they may be pleaded in form. Under it, an answer may be stricken out, even though a perfect defense may be stated therein, unless the defendant by his affidavits shows facts to substantiate the defense.

[5] Appellant further suggests that the presence of a counterclaim in his answer prevents the entry of judgment under section 831d. This question has been several times considered by the courts of New York under the provisions of their rule 113 above referred to; and it has been held there that a counterclaim is a part of the answer, and its presence is no bar to a motion for a summary judgment where it is unsupported by statements of fact in the affidavit tending to show that it is meritorious or that the defendant is entitled to defend by reason thereof. Chelsea Exchange Bank v. Munoz, 202 App. Div. 702, 195 N. Y. S. 484; Goodman v. Wallack (Sup.) 195 N. Y. S. 328; Dell 'Osso v. Everett, 119 Misc. Rep. 502, 197 N. Y. S. 423; Smith v. Cranleigh, 224 App. Div. 376, 231 N. Y. S. 201. In Dell 'Osso v. Everett, supra, the trial court, while giving judgment, stayed execution of it until disposition of the counterclaim, and on appeal the Appellate Division reversed the part of the order staying execution, allowing the judgment to stand without any stay. 206 App. Div. 718, 200 N. Y. S. 840. Section 437 of our Code of Civil Procedure contains the same provision on which these New York authorities rely, making the counterclaim a part of the answer, and we are therefore satisfied with the rule of the New York cases and hold that the entire answer including the counterclaim may be stricken out by proceedings under section 831d.

[6] From the record in this case it appears that the defendant operated certain oil wells and the plaintiff operated a plant for the extraction of gasoline from the natural gas produced by oil wells, and that, under a contract made between predecessors in interest of the respective parties, defendant was delivering gas from its oil wells to the plaintiff for extraction of the gasoline therefrom. Plaintiff's action is based upon a claim for dry gas claimed to have been delivered by plaintiff to defendant in connection with the operations under this contract. Defendant's counterclaim is based upon a clause in the contract authorizing the plaintiff to use a reasonable amount of the gas received from defendant in the operation of the gasoline plant, and upon allegations to the effect that the plaintiff had used an unreasonable amount and thereby converted certain gas to its own use, for the value of which defendant sought judgment on its counterclaim. Appellant contends that the counterclaim, although so labeled by it, is really a cross-complaint, and therefore not subject to be stricken under section 831d. But the counterclaim is well within the provisions of sections 437 and 438 of the Code of Civil Procedure relating to counterclaims, and was properly labelled by appellant.

[7-9] In response to the motion for summary judgment, the defendant filed an affidavit by its secretary, to which he attached a complete copy of the contract above mentioned, and in which, after stating his construction of the contract, he made the following statement relating to the counterclaim: "That the plaintiff, Cowan Oil and Refining Company, a corporation, instead of using defendant's dry gas in reasonable quantities, as provided for in said lease, fraudulently converted and appropriated to its own use and benefit large quantities of dry gas in excess of any reasonable quantity or amount necessary to operate its gasoline plant; that the quantity of defendant's dry gas in excess of any reasonable amount necessary to operate plaintiff's plant, so converted by plaintiff to its own use, was of the value of $1,897.35." This language is a copy of the answer, except for the words, "necessary to operate its gasoline plant" and the equivalent words a few lines below, and is the only statement in the affidavit purporting to support the counterclaim. The affidavit contains nothing in support of denials of the complaint which are contained in the answer. We think the statements quoted are insufficient to defeat the motion for judgment under section 831d. They are manifestly mere conclusions of law, or, putting the most favorable construction upon them, they are perhaps conclusions of fact or ultimate facts. Neither conclusions of law, nor conclusions of fact, nor so-called ultimate facts are sufficient to satisfy the requirements of this section. Not only does it require the defendant to show "such facts as may be deemed by the judge hearing the motion sufficient to entitle him to defend," but it also requires that "the facts so stated shall be the personal knowledge of the affiant, shall be set forth in the affidavit with particularity, and the affidavit shall show affirmatively that the affiant, if sworn as a witness, can testify competently thereto." The effect of these provisions is to require a defendant, in order to defeat a motion for summary judgment, to present an affidavit or affidavits setting forth evidentiary facts sufficient, if accepted as true—as they must be for the purposes of the motion—to show that the defendant has a defense to the plaintiff's claim or to some part thereof. No witness could competently testify to the statements above quoted from the affidavit presented by defendant, in the form in which they are there made, and they are not evidentiary facts. To the rule just stated there may be exceptions in cases where a defendant presents to the court reasons sufficient to show that in the exercise of the discretion vested in it by the section, it should deny the motion for summary judgment even though the defendant is unable to make such a showing in opposition thereto as the section requires. Such a case is not before us, as there is nothing of that kind in defendant's affidavit, and hence we do not pass upon the matter further than to call attention to the provision as to discretion and suggest that there may be cases where a proper exercise of that discretion would call for a denial of the motion with a view to a trial upon the merits.

Substantially the same question has arisen upon the New York rule regarding summary judgments, which does not expressly require that the facts be particularly stated, be within the personal knowledge of affiant, or be such as he can competently testify to, and it is there held that statements of ultimate facts or mere general or specific denials or conclusions of law, or anything other than statements of evidentiary facts, are insufficient. O'Meara v. National Park Bank, 239 N. Y. 386, 146 N. E. 636, 39 A. L. R. 747; Sher v. Rodkin (Sup.) 198 N. Y. S. 597; Galusha Stove Co. v. Pivnik Construction Co., 132 Misc. Rep. 875, 230 N. Y. S. 720. A statute and rule the same as section 831d also exist in Michigan, and it is there held that mere conclusions in a defendant's affidavit are insufficient. Webster v. Pelavin, 241 Mich. 19, 216 N. W. 430.

The judgment appealed from is affirmed, with costs of appeal to respondent.

We concur: McLUCAS, P. J.; BISHOP, J.

112 Cal. App. (Supp.) 781

ADOLPH M. SCHWARTZ, Inc., v. BURNETT PHARMACY et al.

No. CA-287.

Appellate Department, Superior Court, Los Angeles County, California.

Jan. 28, 1931.

1. Courts 🔑24, 37(1).

Jurisdiction of subject-matter cannot be conferred on municipal court by consent, agreement, or waiver of parties (St. 1925, p. 658, § 29, as amended by St. 1929, p. 838, § 2).

2. Appeal and error 🔑185(1).

Court's jurisdiction of subject-matter can be questioned on appeal, although no objection was made in trial court.

3. Appearance 🔑19(1).

Court's jurisdiction of person is conferred by general appearance.

4. Courts 🔑37(1).

Objection to court's jurisdiction of person is waived by seeking relief on any other ground than want of such jurisdiction.

5. Courts 🔑472(6).

Municipal court had jurisdiction of assignee's action to recover less than $50, since action being brought by assignee was not cognizable in small claims court (St. 1925, p. 658, § 29, as amended by St. 1929, p. 838, § 2; Code Civ. Proc. §§ 927, 927f).

6. Courts 🔑472(6).

Cause of action arising within city or city and county wherein municipal court is established is excluded from jurisdiction of any other municipal court (St. 1925, p. 658, § 29, as amended by St. 1929, p. 838, § 2).

7. Abatement and revival 🔑3.

Demurrer to jurisdiction of court of general jurisdiction only lies where want of such jurisdiction appears affirmatively on face of complaint.

8. Courts 🔑33.

In court of limited and special jurisdiction, every fact essential to confer jurisdiction must be alleged.

9. Courts 🔑36.

In determining application of presumption as to jurisdiction, municipal courts are regarded as courts of superior or general jurisdiction (St. 1925, p. 658, § 29, as amended by St. 1929, p. 838, § 2; Const. art. 6, §§ 1, 12, as amended in 1924, and §§ 5, 13 as amended in 1928).

10. Courts 🔑33.

Jurisdiction of municipal courts in civil cases need not affirmatively appear from pleadings or other proceedings before them (St. 1925 p. 658, § 29, as amended by St. 1929, p. 838, § 2; Const. art. 6, §§ 1, 12, as amended in 1924 and §§ 5, 13, as amended in 1928).

11. Courts 🔑33.

Municipal court had jurisdiction to render summary judgment in civil case, although fact showing court's jurisdiction was not alleged, there being no showing of lack of jurisdiction (St. 1925, p. 658, § 29, as amended by St. 1929, p. 838, § 2; Code Civ. Proc. § 831d; Const. art. 6, §§ 1, 12, as amended in 1924, and §§ 5, 13 as amended in 1928).

Action by Adolph M. Schwartz, Inc., against the Burnett Pharmacy and others. From an order vacating and setting aside a summary judgment and dismissing the action, the plaintiff appeals.

Reversed.

Charles W. Humphreys and A. S. Goldman, both of Los Angeles, for appellant.

Thomas P. Cruce, of Los Angeles, for respondents.

SHAW, J.

The complaint in this action shows that plaintiff seeks to recover on an assigned claim the sum of $47.26. The cause of action is set forth in three forms, each of which is an action at law for breach of contract. The complaint is entirely devoid of allegations to show where the cause of action arose or where any defendant resides or has his place of business. The defendant Paschall filed an answer, and thereafter, by summary proceedings taken against him under section 831d of the Code of Civil Procedure, judgment was rendered against him. Thereupon he made a motion to vacate the judgment on the ground that the municipal court of the city of Los Angeles had no jurisdiction to hear and determine said cause. No showing outside of the pleadings was made in support of this motion. It was granted, and the plaintiff appeals from the order granting it and dismissing the action.

The sole question presented on the appeal is whether the municipal court had jurisdiction to render the judgment. The jurisdiction of municipal courts in civil cases is fixed by section 29 of the Municipal Court Act (St. 1925, p. 658) as amended in 1929 (Stats. 1929, p. 838, § 2), which, so far as material here, reads as follows:

"Each municipal court shall have exclusive original jurisdiction of all civil cases and actions, arising within the city or city and county in which such municipal court is established, of the following classes:

"1. All cases at law in which the demand, exclusive of interest, or the value of the property in controversy, amounts to two thousand dollars or less.

"2. * * *

"3. * * *

"In cities or cities and counties wherein such municipal court is established, and wherein an inferior court has been established and its jurisdiction determined as provided by law, such municipal court shall have concurrent jurisdiction with such inferior court to the extent of its jurisdiction.

"Each municipal court shall have original jurisdiction of all cases specified in subdivisions 1, 2, and 3 hereinabove, arising outside the city in which a municipal court is established, and within the county in which such municipal court is established, and also of all such cases arising outside the county in which a municipal court is established, in which any proper defendant named therein resides or has his place of business within the county wherein such municipal court is established.

"Each municipal court shall have original jurisdiction, concurrent with that of justices' or other inferior courts in the county in which such municipal court is established, of all civil cases of which such justices' or other inferior courts are given jurisdiction, excepting civil cases of which such justices' or other inferior courts are given exclusive jurisdiction, and excepting cases cognizable in such courts, sitting as small claims courts."

[1-4] By the terms of this statute, the jurisdiction of a municipal court may be affected by three matters: First, the nature (including in that term the amount in controversy) of the cause of action; second, the place where it arose; and, third, the place where the defendant resides or has his place of business. The first of the matters just stated no doubt goes to the jurisdiction of the subject-matter, and so does the second. Such jurisdiction cannot be conferred by consent, agreement, or waiver of the parties (7 Cal. Jur. 597, 598; 15 Cor. Jur. 894; Fritts v. Camp [1892] 94 Cal. 393, 398, 29 P. 867; King v. Kutner-Goldstein Co. [1901] 135 Cal. 65, 67 P. 10; Taylor v. Taylor [1923] 192 Cal. 71, 78, 218 P. 756, 51 A. L. R. 1074; Harrington v. Superior Court [1924] 194 Cal. 185, 188, 228 P. 15; Stimpson, etc., Co. v. Superior Court [1910] 12 Cal. App. 536, 539, 107 P. 1013; Lewis v. Shaw [1926] 77 Cal. App. 99, 102, 246 P. 86), and it can be questioned on appeal, although no objection was made in the trial court (2 Cal. Jur. 251; Hallock v. Jaudin [1867] 34 Cal. 167, 173; Stephens v. Weyl-Zuckerman Co. [1917] 34 Cal. App. 210, 167 P. 171; Maguire v. Cunningham [1923] 64 Cal. App. 536, 539, 222 P. 838). The third matter mentioned above unquestionably relates only to jurisdiction of the person, which is conferred by a general appearance and the objection to which is waived by seeking relief on any other ground than want of such jurisdiction. In re Thompson's Estate, 101 Cal. 349, 354, 35 P. 991, 36 P. 98, 508; Faxon v. All Persons (1913) 166 Cal. 707, 711, 137 P. 919, L. R. A. 1916B, 1209; Roberts v. Superior Court (1916) 30 Cal. App. 714, 720, 159 P. 465; Bogmuda v. Young (1922) 58 Cal. App. 19, 207 P. 915; Gulick v. Justice's Court (1929) 101 Cal. App. 619, 281 P. 1031. Since the defendant in the present case made a general appearance, no question can arise as to jurisdiction of his person.

[5] The complaint in this case shows that the plaintiff seeks to recover less than $50; and it is contended that by reason of this fact the case is cognizable in a small claims court, under section 927 of the Code of Civil Procedure, which fixes that sum as the maximum size of the claim which may be litigated in those courts. On this proposition is based the further contention that the case is excluded from the jurisdiction of the municipal court by the second exception contained in the last sentence above quoted from the Municipal Court Act. Passing other possible answers to this argument, it is provided by section 927f of the Code of Civil Procedure that "no claim shall be filed or prosecuted in such small claims court by the assignee of such claim." This action is brought by an assignee, and is therefore not cognizable in any small claims court.

The jurisdiction of a municipal court which is concurrent with justices' and other inferior courts in the county is also subject to an exception of cases in which such courts have exclusive jurisdiction. There is no such exclusive civil jurisdiction of justices' courts (Code Civ. Proc. §§ 103, 112), but certain police courts and other city courts are given exclusive jurisdiction of civil actions to collect licenses, forfeitures, and penalties imposed by city ordinances. As far as we have discovered, this is the only class of civil cases in which exclusive jurisdiction is conferred on the inferior courts, and this case is not of that class, so this exception does not affect it.

[6] Since each municipal court has exclusive jurisdiction of a cause of action arising within the city or city and county wherein it is established, all such cases must by necessary implication be excluded from the jurisdiction of any other municipal court. Consequently, the possibility suggests itself that the cause of action here sued on may have arisen in Long Beach or San Francisco, in each of which places there is a municipal court. An objection on this ground goes to the jurisdiction of the subject-matter, and is not waived by answer. The complaint in this

case is silent as to the place where the cause of action arose, and hence the real question is whether it is necessary for a complaint in a municipal court to show affirmatively that the court has jurisdiction of the subject-matter.

[7, 8] It is the rule that "a demurrer to the jurisdiction of the court only lies where the want of such jurisdiction appears affirmatively upon the face of the complaint. In a court of limited and special jurisdiction, the rule is otherwise; there, every fact essential to confer the jurisdiction must be alleged. In courts of general jurisdiction, the cause of action need only be stated, and the want of jurisdiction, arising from the insufficient value of the premises, must be taken advantage of in some other way." Doll v. Feller (1860) 16 Cal. 432. In that case a complaint in a district court showed that it related to real estate, but did not allege what was its value, and the demurrer for want of jurisdiction was based on this omission; the jurisdiction of the district courts being then limited to cases where the amount in dispute exceeded $200. Article 6, § 6, Constitution of 1849.

The question what courts are entitled to the benefit of the presumption in favor of jurisdiction has been much discussed, and the decisions on it are not entirely harmonious. This presumption applies to the judgments of the favored courts when they are collaterally attacked, as well as on a demurrer or motion directly attacking the jurisdiction; in fact, most of the decisions on the point arise out of collateral attacks. In Hahn v. Kelly (1868) 34 Cal. 391, at pages 409 to 415, 94 Am. Dec. 742, there is an extensive and well-reasoned discussion of the matter, from which it appears that the presumption has been variously declared to apply to superior courts, to courts of general jurisdiction, or to courts proceeding according to the course of the common law. The final conclusion reached in Hahn v. Kelly is that the presumption of regularity attaches to the proceedings of courts of record as distinguished from courts and tribunals not of record (page 414 of 34 Cal.); and, so far as we can discover, this rule has not been departed from in California. The Supreme Court there stated that district courts, probate courts, and county courts, which as then constituted were courts of record, should be considered as superior courts in the sense of this rule, while courts held by justices of the peace and various boards exercising judicial functions of a limited and special character are inferior courts.

In Vassault v. Austin (1869) 36 Cal. 691, 696, and McCauley v. Fulton (1872) 44 Cal. 355, 361, it was held that the superior court of San Francisco, which existed from 1850 to 1857, which was a court of record having a seal and clerk, and which had the same jurisdiction as the district courts, except that as to real estate it was limited to San Francisco, was a court of general jurisdiction so that its judgments imported absolute verity against collateral attack, although other decisions not questioned or overruled had upheld the power of the Legislature to create this court on the ground that it was an inferior court within the meaning of a constitutional provision authorizing the Legislature to establish "such municipal and other inferior courts as may be necessary." Both of these cases were decided in reliance upon the decision in Hahn v. Kelly, supra.

In People v. Blackwell (1864) 27 Cal. 65, 67; Barrett v. Carney (1867) 33 Cal. 530, 537; and Yenawine v. Richter (1872) 43 Cal. 314, it was held that county courts, being courts of record, were to be considered courts of superior jurisdiction and the presumption of regularity attached to their judgments. Accordingly, it was presumed in Barrett v. Carney, supra, the record being silent as to the place of residence of an insolvent who filed his petition in a county court, that he resided in the county where the court was held, this fact being necessary under the insolvency act to give that court jurisdiction over the proceeding. At the time these decisions were made, the county courts were given by the Constitution original jurisdiction of a few enumerated classes of cases and "of all such special cases and proceedings as are not otherwise provided for; and also such criminal jurisdiction as the legislature may prescribe," and appellate jurisdiction in cases arising in justices' courts and other inferior courts; but the district courts had general trial jurisdiction of all equity cases and of all law cases involving certain questions or in which the amount in controversy was $300 or more, and in all criminal cases not otherwise provided for. Constitution of 1849, art. 6, §§ 6 and 8, as amended in 1862. Thus the situation of the county courts in the framework of the judicial system was very much like that of the present municipal courts, which, although without appellate jurisdiction, have such jurisdiction as the Legislature may confer upon them, while the superior courts remain the courts of general trial jurisdiction without upper limit as to the amount in civil cases and have jurisdiction of all criminal cases amounting to felony. Constitution, art. 6, §§ 5 and 13, as amended in 1928.

In Simpson v. Payne (1926) 79 Cal. App. 780, 786, 251 P. 324, it was declared that municipal courts established under the amendment of 1924 to section 11, art. 6, of the Constitution, are not inferior courts as that term is used in section 7½, art. 11, of the Constitution. In re Luna (1927) 201 Cal. 405, 409, 410, 257 P. 76, the Supreme Court said the municipal courts just referred to, are "of some greater dignity than an inferior court," and, "although inferior to superior courts, are nevertheless superior to inferior courts." These two cases did not involve the question as to the presumption attaching to the proceedings of municipal courts, and they are, therefore, not authority for our conclusion in the matter, but they are at least consistent therewith.

Finally, the Constitution itself (article 6, § 12, as amended in 1924) provides that "the supreme court, the district courts of appeal, the superior courts, the municipal courts, and such other courts as the legislature shall prescribe, shall be courts of record." The only change made by this amendment was the insertion of the words "the municipal courts," and its purpose could only have been to make the municipal courts courts of record without action by the Legislature and beyond its power to provide otherwise. The Constitution nowhere declares what powers or attributes shall accrue to a court by reason of its being "of record." It is, however, instructive to note that the Constitution of 1849 contained no such provision as that last quoted, and that the case of Hahn v. Kelly, supra, declaring that the true distinction as to the presumption above mentioned is between courts of record and courts not of record, was decided before 1879. It is a fair conclusion that the framers of the Constitution of 1879 had this rule in mind when they declared certain courts to be courts of record, and intended thereby to make the decision in Hahn v. Kelly applicable to those courts; and it follows that the framers of the amendment of 1924 intended that the same rule should be applied also to municipal courts. This conclusion is strengthened by the fact that in none of the constitutional amendments which have been made to authorize the establishment of municipal courts or to regulate their jurisdiction have they been referred to as inferior courts, although that term appears at several places in the Constitution. Section 1 of article 6, as amended in 1924, lists the courts of the state as including "such municipal courts as may be established * * * and such inferior courts as the legislature may establish." Section 3 of article 6, as amended in 1928, refers in one place to "municipal or to justices' or other inferior courts," and in another place refers to cases arising "in municipal and in justices' and other inferior courts." Section 13 of article 6, as amended in 1928, refers to the "jurisdiction of municipal courts and inferior courts in cities having municipal courts." Neither in these provisions nor in any other part of the Constitution, as far as we have discovered, is language used which suggests that the municipal courts are to be classified as inferior courts.

[9-11] For the foregoing reasons, we hold that, for the purpose of applying the presumption as to jurisdiction, the municipal courts are to be regarded as courts of superior or general jurisdiction, that the same presumption attaches to their proceedings as is accorded to other courts of that class, and hence that the jurisdiction of the municipal courts need not affirmatively appear from the pleadings or other proceedings before them. It is sufficient that the lack of jurisdiction does not so appear. This statement refers only to civil cases; the rule perhaps being otherwise in criminal cases, even as to courts of general jurisdiction, at least when the territorial jurisdiction of the court is in question. See People v. Wong Wang (1891) 92 Cal. 277, 28 P. 270.

The order appealed from is reversed, with costs of appeal to appellant.

We concur: McLUCAS, P. J., and BISHOP, J.

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112 Cal. App. (Supp.) 769

PEOPLE v. J. M. ADAMS & CO. et al.

Cr. A. 525.

Appellate Department, Superior Court, Los Angeles County, California.

Jan. 27, 1931.

1. Usury 🔑149(2).

In prosecution for usury, evidence warranted conclusion purported assignments of wages were mere cloaks to conceal loans on unlawful rate of interest.

2. Criminal law 🔑858(1).

Court's refusal to send exhibits with retiring jury unless they request them, *held* not error (Pen. Code § 1137).

3. Criminal law 🔑1178.

Grounds listed in statement on appeal, but not touched on in appellant's points and authorities, were considered as abandoned.

Prosecution for usury against J. M. Adams & Co. and others. From a judgment of conviction, Lawrence J. Walters appeals.

Affirmed.

C. B. Conlin and Ray Brockman, both of Los Angeles, for appellant.

Charles P. Johnson, City Prosecutor, Joe Matherly and John L. Bland, Deputy City Prosecutors, all of Los Angeles, for the State.

BISHOP, J.

[1] This matter was initiated by the filing of two complaints, one charging in one count, the other charging in six counts, that the ap-

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

pellant, Walters, and his nonappealing codefendants had on seven specified occasions asked and received of the complaining witness usurious interest on loans varying in the principal involved from fifteen to twenty five dollars. The main question in the case is presented by appellant's contention that the several transactions were not loans but were payments for the assignments of earned wages, and that the sums received by him were these wages.

The prosecuting witness, Otto Neuman, testified that he first went to the office of J. M. Adams & Co. in April, 1929, and asked the appellant, who was an employee of the company, for a loan of more than $20 (Tr. p. 9), but was told that, on account of his salary, only $15 was forthcoming. His testimony continues: "This amount was to be paid back each week at the rate of $15.75. * * * You pay the full amount back each week, Your Honor. Pay the full amount back each week, including seventy-five cents. In other words, paying $15.75." Question by appellant's counsel: "What was the amount you borrowed?" Answer: "The full amount to be paid back weekly." (Tr. p. 10.) Later: "I received my money, in the amount of $15 and left, to be paid back from my coming pay day." "When was that?" "It was supposed to be on Saturday, and I explained to them also at the time in case I could not get in there on Saturday I would be in on Monday, which they accepted." (Tr. pp. 11, 12.) The prosecuting witness then related how for almost a year he returned every Saturday or Monday (with a few exceptions when he sent his wife), and paid back the sum he had received the week before, at first $15, then later $25, and in addition 75 cents or $1.25. (Tr. p. 22.) The few times his wife went for him she did not repay the principal sum received the week before, nor receive any money, but "all I did was to go and tell (appellant) who it was for and hand him the money," the money so handed being $1.25. (Tr. p. 46.)

At each weekly trip made by the prosecuting witness he signed two forms, physically attached together by a perforated line. (Tr. p. 26.) Sixteen of these documents were received in evidence. The first form was an application to assign to J. M. Adams & Co. salary or wages represented to have been earned during the month named. The name of the employer, I. X. L. Awnings, also appeared on this first form. In the second form, also signed by the prosecuting witness, it was recited that "my account for salary or wages already earned by me, during the month of ——192—, and amounting to $26.25, and due to me by ——," was assigned to J. M. Adams & Co. The blanks indicated were not filled in on any of the "assignments" in evidence. No written notice that any of these purported assignments had been made was received by the employer (Tr. p. 73), and each week the account for salary or wages was collected by the prosecuting witness himself and brought to the J. M. Adams & Co.

With this picture of events before them, the jurors were warranted in concluding that the assignments were but paper cloaks too thin to conceal the corpora delicti, loans on which an unlawful rate of interest was collected. Authority is not needed to support this conclusion, but, by way of cases illustrating by their facts the identical practice engaged in by defendant here, and regarded by the courts with the same disfavor, we find: Cotton v. Cooper (Tex. Civ. App. 1913) 160 S. W. 597; McWhite v. State (1921) 143 Tenn. 222, 226 S. W. 542; Tennessee Finance Co. v. Thompson (C. C. A. 1922) 278 F. 597.

[2] The sixteen assignment forms in evidence were offered by the people, with the expressed approval of the defendant, but were never, so far as appears, either read to the jurors or placed in their hands for perusal. After the court had instructed the jury, defense counsel stated that the jurors had not heard or seen the contents of these documents, and requested that they be sent to the jury room with the jurors who were about to retire. The court's reply was: "I have stated the jury may have them at their request. If they request them, they may have them, otherwise they will not be shown to the jury." Of this ruling defendant complains, relying upon section 1137 of the Penal Code, which begins: "Upon retiring for deliberation, the jury may take with them all papers (except depositions) which have been received as evidence in the cause."

In People v. Cochran (1882) 61 Cal. 548, the word "may" in this section was emphasized, and the court said (page 551): "The statute is not mandatory. It directs the Court to allow the jury to take with them any papers received as evidence which may be of service to them, * * * but none can be taken without permission of the Court. The matter is therefore left to the sound discretion of the Court, and its action is not revisable, unless there has been an abuse of discretion." The following quotation from the concurring opinion of Mr. Justice McKinstry in the Cochran Case appears in People v. Dunlop (1915) 27 Cal. App. 460, 470, 150 P. 389, 393: "It is not the absolute right of the prosecution or defense to have the papers or instructions sent with the jury, unless the jury demand it." We are of the opinion, therefore, that the defendant has no ground of complaint in the court's ruling. It should be noted, in this connection, that we are discussing the court's ruling on a request not made during the course of the trial. Appellant could have read the exhibits to the jury, of course, as a part of his case, but did not. He could have used them in argument, but he waived argument. Furthermore, we are satisfied that, had the jury both seen and heard read these exhibits, it would not have affected their verdict.

[3] We have considered the other arguments presented by appellant in his points and authorities, and find none with merit or worthy of consideration here. The grounds listed in his statement on appeal and not touched upon in his points and authorities we have considered as abandoned, and have not searched the record to see if they are well taken. People v. Mechler (1925) 75 Cal. App. 181, 188, 242 P. 503; People v. Williams (1929) 96 Cal. App. 215, 218, 273 P. 1087.

The judgment is affirmed.

We concur: McLUCAS, P. J.; SHAW, J.

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211 Cal. 398

UNION OIL CO. v. INDUSTRIAL ACCIDENT COMMISSION et al.

S. F. 13999.

Supreme Court of California.

Jan. 27, 1931.

Rehearing Denied Feb. 19, 1931.

1. Admiralty ⚷20.

Action for death of seaman, though ordinarily within admiralty jurisdiction, is within state jurisdiction, if injury is initiated and consummated on land.

2. Master and servant ⚷405(1).

Industrial Commission may base findings on inferences from circumstantial evidence.

3. Master and servant ⚷405(1).

Inference drawn from circumstantial evidence by Industrial Accident Commission must be probable and from evidence offering choice of inferences.

4. Admiralty ⚷20.

Inference that seaman seeking to board barge slipped on wharf, rather than on barge, *held* sufficient to sustain jurisdiction of Industrial Commission.

5. Master and servant ⚷375(1).

Death of captain while boarding barge at night occurred in "course of employment," though captain was not required to stay on barge, but did so to get out early in interest of employer.

[Ed. Note.—For other definitions of "Course of Employment," see Words and Phrases.]

6. Master and servant ⚷375(1).

Where employee must live on employer's premises by contract or necessities of work, injury received on premises may be compensable, though employee was not at work.

In Bank.

Proceeding under the Workmen's Compensation Act by Bertha Pelle and another for the death of Albert Pelle, their husband and father, claimants, opposed by the Union Oil Company, employer. To review an award of compensation to claimants, by the Industrial Accident Commission, the employer brings certiorari.

Award affirmed.

McCutchen, Olney, Mannon & Greene, of San Francisco, for petitioner.

Edward O. Allen, of San Francisco, for respondents.

PER CURIAM.

This is a petition by the employer to review an award of compensation made by respondent commission to the heirs of a deceased employee.

The employee was Captain Albert Pelle, master of the Union Oil Company's barge Santa Paula. His vessel was used to carry oil to ships and wharves in various parts of San Francisco bay. On January 15, 1928, she was brought to the foot of Seventeenth street, where the balance of her oil was discharged about 3 o'clock in the afternoon. There being nothing further to do on board until the following morning, the crew went ashore to spend the night. Captain Pelle also left the ship, spent the afternoon at his home in Oakland, and returned to San Francisco in the evening. He went to a water front hotel, played cards and had a few drinks, and at about 10 p. m., together with his friend Twigg, strolled down to the wharf where the barge was tied. Among other things, it appears that they intended to make a cup of coffee on board. The deck of the barge was about eighteen inches higher than the level of the wharf, and the usual method of getting aboard was to stand on the wharf, grasp the barge's stanchions, and then step on deck. Twigg preceded Captain Pelle and climbed on board in this manner. Shortly afterwards he heard Captain Pelle exclaim "Oh," and turning, saw his head disappear over the edge of the wharf, and heard a splash. The captain had apparently fallen through the open space between two piles. It was stipulated that the death was due to drowning.

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Respondent commission took jurisdiction and found that the death occurred in the course of the deceased's employment. Jurisdiction was based upon the ground that the act which gave rise to the cause of action took place on the land. The finding that the death occurred in the course of employment was made on the theory that the captain had gone to the barge to sleep there during the night, in order to arise early and direct its departure in the morning.

[1] The jurisdictional problem presented by this case is one on which our research has failed to disclose any authority directly in point. The deceased was a seaman, engaged in maritime work, and died as a result of drowning in navigable waters of the United States. The cause of action for his death would ordinarily come within the admiralty jurisdiction. See London Guarantee, etc., Co. v. Brooke, 279 U. S. 109, 49 S. Ct. 296, 73 L. Ed. 632. To this rule there is the well-settled exception that, if an injury is initiated and consummated on land, it comes within the state jurisdiction. Respondent commission proceeded upon the theory that Captain Pelle fell from the wharf, and that the injury was therefore initiated and consummated with reference to the wharf and not the barge or the navigable waters. The chief reliance is on the case of T. Smith & Sons, Inc., v. Taylor, 276 U. S. 179, 48 S. Ct. 228, 229, 72 L. Ed. 520, where an employee at work on a stage resting upon a wharf was struck by a sling operated on the vessel and knocked off the stage into the water. The court said: "Plaintiff in error * * * argues that as no claim was made for injuries sustained while deceased was on land and as the suit was solely for death that occurred in the river, the case is exclusively within the admiralty jurisdiction. But this is a partial view that cannot be sustained. The blow by the sling was what gave rise to the cause of action. It was given and took effect while deceased was upon the land. It was the sole, immediate and proximate cause of his death. * * * The substance and consummation of the occurrence which gave rise to the cause of action took place on land."

The correctness of this principle cannot be questioned, and it is clearly applicable to the situation presented by the instant case if the commission is correct in its determination, as a fact, that the injury was initiated and consummated on the wharf. There was no direct evidence as to how Captain Pelle met his death. Twigg, the only witness at the scene, said in his testimony: "* * * When we got to the vessel I said to the captain, 'Get aboard,' and he said, 'You get aboard first,' and I got on, and after I got on all I could hear was 'Oh,' and all I could see was his head and he went overboard." From this testimony it might be inferred that Captain Pelle had actually reached the barge, had his feet upon it, and slipped, falling from the barge; or that he slipped on the wharf, and fell from it. The commission chose the latter inference and contends that this determination is within its conclusive fact-finding power.

[2, 3] It cannot be denied that the commission may base its findings upon inferences drawn from circumstantial evidence. George L. Eastman Co. v. Industrial Accident Commission, 186 Cal. 587, 200 P. 17; United Dredging Co. v. Industrial Accident Commission, 92 Cal. App. 110, 267 P. 763; Mailman v. Record Foundry & Machine Co. et al., 118 Me. 172, 106 A. 606; Von Ette's Case, 223 Mass. 56, 111 N. E. 696, L. R. A. 1916D, 641; Vulcan Detinning Co. v. Industrial Commission et al., 295 Ill. 141, 128 N. E. 917; See Ross, Rules of Evidence Before Workmen's Compensation Commissions, 36 Harv. L. Rev. 263, 266. It is, of course, essential that the inference be a probable one; there must be something in the evidence which leads to the choice of one inference instead of another. In re Sanderson's Case, 224 Mass. 558, 113 N. E. 355; Sponatski's Case, 220 Mass. 526, 108 N. E. 466, L. R. A. 1916A, 333; Hills v. Blair et al., 182 Mich. 20, 148 N. W. 243; Madison Coal Corporation v. Industrial Commission et al., 320 Ill. 298, 150 N. E. 645; Allen v. Robert Gage Coal Co., 218 Mich. 347, 188 N. W. 388; Voelz v. Industrial Commission et al., 161 Wis. 240, 152 N. W. 830.

In Mailman v. Record Foundry & Machine Co. et al., supra, where the award of the commission was upheld, the court said at page 609 of 106 A.: "In cases wherein the evidence is circumstantial, and not direct, the line between inference and conjecture is sometimes obscure. * * * If, however, a state of facts is shown more consistent with the commissioner's finding than with any other theory, and the finding is supported by rational and natural inferences from facts proved or admitted, an appeal cannot be sustained." In Roebling's Sons Co. v. Industrial Accident Commission, 36 Cal. App. 10, 171 P. 987, 989, the award of the commission was annulled by a decision of the District Court of Appeal. This court, while in accord with the judgment, nevertheless rendered an opinion in denying a hearing which reads in part as follows: "* * * We deem it proper to say that *we do not understand the rule to be that if different conclusions may rationally and fairly be drawn from the evidence, one sustaining the right to compensation and the other being opposed thereto, the Industrial Accident Commission is not at liberty to adopt the conclusion favorable to the claim. Of course it is well settled that the commission can do this very thing, and that its conclusion in that regard is beyond the scope of our review.*" (Italics ours.)

[4] It thus appears that both in this court and in other jurisdictions the power of the

commission to draw reasonable inferences from the evidence has been liberally viewed. In the instant case, the commission concluded from the evidence before it that Captain Pelle had not reached the barge, but fell from the wharf. Is this a probable inference from the evidence? The record discloses that there was enough space between the piles on the wharf for the body of the decedent to slip through; that the deck of the barge was over a foot higher than the wharf; and that to attain the deck of the barge it was necessary to grasp the stanchions and climb onto it. There is no evidence that the deceased ever took hold of the barge's stanchions. The last place in which we find him, prior to his disappearing between the piles, is on the wharf; and, since there is no evidence that he had reached the barge, the inference that he fell from the wharf is sufficiently probable to warrant us in sustaining the award of the commission.

[5] With respect to the finding that the deceased met his death in the course of his employment, we are satisfied that the conclusion reached by the commission should be upheld. The record shows that Captain Pelle was not required to remain on board the barge that night by reason of the rules of his employer. It was permissible for him to go to his home in Oakland, and he might have stayed there and met the barge at Oleum, to which point it was to be towed in the morning. On the other hand, the tug was to take out the barge at about 6 a. m., and, if he desired to take charge of his ship at this time, it would have been impossible for him to stay at home, for the transbay transportation service would get him to the barge after 6:30 a. m. It appears that it was largely discretionary with the captain as to whether he would take the boat out or not, but his discretion was to be exercised for the best interests of his employer. The witness Rosland, clerk for the marine department of the company, testified that the captain was subject to duty "at any time"; that it was up to him where he thought it was best for him to be at the time the vessel departed; that the dispatcher would tell the captain what time the barge would leave, and that, if the captain's judgment was that he had to be there several hours before that time, it was up to him. Hence it appears that whether the work of the deceased demanded his presence on board that night was to a large extent subject to his own determination, and that whether he came to such a determination is the important question. On this point the witness Twigg testified: "I asked him why he was at the place at that hour. I thought he probably came in and was on the way home. He said, 'I am going aboard the ship because I have to get out early in the morning, and I could not make it if I stayed at home.'"

[6] It is well settled that, if an employee is required to live or board on the premises of his employer, either by the terms of his contract of employment or the necessities of the work, an injury received while on the premises may be compensable, though the employee is not at work at the time of the injury. State Comp. Ins. Fund v. Industrial Accident Commission, 194 Cal. 28, 227 P. 168; Giliotti v. Hoffman Catering Co., 246 N. Y. 279, 158 N. E. 621, 56 A. L. R. 500; 27 Cal. Jur. 392. Of course, if the employer's premises were chosen for mere convenience or comfort, with full opportunity to secure other quarters, a different situation is presented. See Associated Oil Co. v. Industrial Accident Commission, 191 Cal. 557, 217 P. 744. In the instant case, however, there was a definite compulsion upon the deceased to come on board that night. The fact that the compulsion did not arise out of a direct order from his employer is not conclusive; it was none the less a compulsion when it arose out of a required exercise of discretion by the employee himself. It can hardly be disputed that, when a captain of a vessel comes to board her at night for the purpose of directing her departure on time in the morning, he is rendering service in the course of his employment. The commission so found upon sufficient evidence, and we see no reason to disturb its conclusion.

The award is therefore affirmed.

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211 Cal. 381

CHRISTIN v. STORY.

L. A. 11597.

Supreme Court of California.
Jan. 26, 1931.

Appeal and error 🔑781(4).

Defendant's appeal in action to forfeit rights under land contract would not be dismissed because time for final payment had expired.

> Motion to dismiss was made on ground that since taking of appeal, time for final payment under contract had expired, and that whole matter was therefore moot; but appellant contended that plaintiff by her conduct had waived right to declare forfeiture, and reviewing court would not investigate and consider merits of appeal on motion to dismiss.

In Bank.

Appeal from Superior Court, Los Angeles County; Fletcher Bowron, Judge.

Action by Estelle Porter Christin against Charles W. Story to forfeit rights under a contract to purchase real property in which defendant appealed from an adverse judgment. On motion to dismiss.

Motion denied.

Clyde C. Shoemaker, of Los Angeles, for appellant.

Knight, Boland & Christin, of San Francisco, Horace S. Wilson, of Los Angeles, and Charles A. Christin and Arthur Dunn, Jr., both of San Francisco, for respondent.

PER CURIAM.

This is a motion to dismiss defendant's appeal from a judgment of forfeiture.

Plaintiff and defendant entered into a written contract by which the former agreed to sell, and the latter to buy, certain described real property for the sum of $100,000, principal and interest payments to be made in stated installments. The contract was executed in 1927, and the final payment was due on or before June 1, 1930. Time was of the essence, and provision was made for forfeiture in the event of default. Following defendant's default in the payment of certain installments of interest and taxes, the plaintiff brought this action to recover possession of the property and to have defendant's rights under the contract declared forfeited. Upon the trial defendant urged that by accepting a tardy and insufficient installment payment of interest, and thereafter repeatedly acquiescing in defendant's default to make payments as required, the plaintiff had waived the provisions making time of the essence and authorizing a forfeiture. The trial court found for the plaintiff on this issue, and gave judgment accordingly, whereupon defendant appealed. Since the taking of the appeal the time for making the final payment under the contract has expired, and respondent asks that the appeal be dismissed on the ground that the whole matter is therefore moot.

In United States v. Ackerman, 208 Cal. 99, 101, 280 P. 359, we declined to investigate and consider the merits of an appeal upon a motion to dismiss. This principle has application to the present motion. Appellant contends that respondent, by her conduct, has waived all right to declare a forfeiture. The determination of this point goes to the merits of the appeal, and we must therefore decline to pass on the point in advance of a consideration of the appeal on its merits. Therefore we cannot now say that appellant is precluded from asserting any and all rights under the contract, and the motion must, for this reason, be denied.

The motion is denied.

211 Cal. 367

CHURCH v. BOARD OF SUP'RS OF FRESNO COUNTY et al.

L. A. 12502.

Supreme Court of California.

Jan. 22, 1931.

Justices of the peace 🔑2.

City justice court for city of Fresno *held* to continue to exist, notwithstanding provision of city charter creating city police court (Fresno City Charter, art. 8, § 74; Code Civ. Proc. § 103).

Fresno City Charter, art. 8, § 74, providing for establishment of city police court with concurrent jurisdiction with township justices' courts and like authority, power, and jurisdiction in the city as township justices' courts, did not create such a court as would do away with office of justice of peace of city.

In Bank.

Application by Earl J. Church for a writ of mandate prayed to be directed to the Board of Supervisors of Fresno County and W. A. Collins and others, members of such board, to compel them to fill the office of Justice of Peace of the City of Fresno.

Writ granted.

Superseding opinions in 289 P. 651 and 290 P. 522.

B. W. Gearhart and David E. Peckinpah, both of Fresno, and Loren A. Butts, of Los Angeles, for petitioner.

Glenn M. De Vore, Dist. Atty., and Arthur C. Shepard, Deputy Dist. Atty., both of Fresno, for respondents.

John G. Groene, of Los Angeles, amicus curiæ.

RICHARDS, J.

Application for a writ of mandate to issue herein, directed to the board of supervisors of the county of Fresno and the members thereof, requiring them and each of them to take action in the matter of the appointment of some competent person as justice of the peace of the city of Fresno, to fill the vacancy alleged to exist in such office. The answer of the respondent to the order to show cause issued herein is to the effect that there is no such existing office in said city, and hence no vacancy to fill which the respondents should be commanded by said writ.

The single question presented for consideration herein is as to whether by the terms of the city charter of the city of Fresno a city police court has been created, the jurisdiction of which and of the judge thereof was made equal and coextensive with that which would be exercised, and prior to the enactment of said provision of the city charter had been exercised, by a city justice's court and judge thereof existing and acting under the provisions of section 103 of the Code of Civil Procedure. We do not deem it necessary to again review the recent decision of the District Court of Appeal in the case of Robertson v. Langford, 95 Cal. App. 414, 273 P. 150, or Ex parte Romero, 207 Cal. 341, 278 P. 430, or In re Lovall, 207 Cal. 544, 279 P. 452, or Proctor v. Justice Court of City of Berkeley, 209 Cal. 39, 285 P. 312, or Antilla v. Justice Court (Cal. Sup.) 290 P. 43, since it is conceded that the effect of these decisions is to establish the proposition that unless the charter of a city in its attempted creation of a city police court therein shall invest such court with a jurisdiction which shall in all respects be coextensive with that with which city justices' courts theretofore existing therein under the provisions of section 103 of the Code of Civil Procedure possessed and exercised, such city justices' court would not be supplanted thereby, but would continue to exist and function notwithstanding the provisions of such charter creating such police courts therein. The foregoing proposition having been thus established and conceded, it only remains for us to examine the provisions of the charter of the city of Fresno relating to the establishment of a city police court therein in the light of such provisions found in the city charters of those other cities which came under review in the foregoing decisions in order to determine whether and to what extent the provisions of the charter of the city of Fresno are affected thereby. The Fresno city charter by the provisions of section 74 of article 8, after providing for the establishment of a city police court within said city, proceeds to state: "Within the city limits, said court shall have concurrent jurisdiction with township justices' courts in all matters and things in which said justice courts now or hereafter may have jurisdiction; and said police court shall have in addition to the special jurisdiction conferred in this article, like authority, power and jurisdiction in the city as now or hereafter may be conferred upon township justices' courts." When the above provision is compared with the like provisions of those other city charters which came under review in the foregoing decisions, it will be found that it is substantially identical with the provisions of the charter of the city of Richmond, and to be quite similar in its substance and effect to the charter of the city of Stockton. The Fresno city charter and the Richmond city charter each employed the phrase "within the city limits said court shall have concurrent jurisdiction with township justice's courts," etc. The Fresno charter goes somewhat further in providing that the police court thereby established shall have "like authority, power and jurisdiction in the city as now or hereafter may be conferred upon township justices' courts." The Stockton charter employs a somewhat different phraseology in providing that the police court in said city "shall have exclusive jurisdiction of all misdemeanors * * * committed within the corporate limits of the city," and further providing that said police court shall have jurisdiction in all civil cases concurrently with the justice courts in "all actions and proceedings arising within the corporate limits of the city." We are unable to discover any substantial dissimilarity between the provisions of these three charters as the same are above set forth, and this being so, we are of the opinion that our decision in the matter of Ex parte Romero, supra, and particularly, our most recent decision in the matter of Ex parte Lovall, supra, have full and direct application to the question presented in the instant proceeding, and hence it must be concluded that the city justice court in and for the city of Fresno, created under the provisions of section 103 of the Code of Civil Procedure, continues to exist and should be permitted and equipped to function notwithstanding the aforesaid provision of the city charter of Fresno creating a city police court therein.

It follows that the petitioner is entitled to the issuance of a writ of mandate in accordance with the prayer of his petition. Let the writ issue accordingly.

We concur: WASTE, C. J.; SHENK, J.; SEAWELL, J.; PRESTON, J.; LANGDON, J.; CURTIS, J.

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211 Cal. 370

SQUIRES v. RIFFE et al.

S. F. 13613.

Supreme Court of California

Jan. 23, 1931.

1. Automobiles ⚷244(26).

Evidence establishing ownership of automobile, and that driver was operating automobile with owner's consent, *held* to give rise to inference that driver was owner's agent.

2. Trial ⚷127.

Admitting testimony that automobile owner had stated she had liability insurance *held* error in action for wrongful death.

In Bank.

Appeal from Superior Court, Lake County; Percy S. King, Judge.

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Action by Edna Leota Squires, as administratrix of the estate of George E. Squires, deceased, against Winnie Riffe and another. Judgment for plaintiff, and the named defendant appeals.

Reversed.

For opinion of District Court of Appeal herewith adopted, see, 287 P. 360.

J. Hampton Hoge, of San Francisco, and L. H. Honey, of Stockton (A. Dal. Thomson, of San Francisco, of counsel), for appellant.

W. H. Hazell, of Lakeport, for defendant Tallman.

M. H. Iverson, of Ukiah, and Benjamin C. Jones, of Lakeport, for respondent Squires.

PER CURIAM.

An order of transfer of this cause was made on account of the reference in the opinion of the District Court of Appeal to the cases of Smellie v. Southern Pacific Company (Cal. Sup.) 287 P. 343, and Krause v. Rarity (Cal. App.) 285 P. 879. At the time of the order of transfer, these two cases were before us, in the former of which a rehearing had been granted, and in the latter a transfer had been ordered. These cases were cited in support of the conclusion that section 141¾ of the California Vehicle Act (St. 1929, p. 1580) was not applicable to the instant case. Since the transfer of this case to this court, we have decided the case of Krause v. Rarity, which is reported in 293 P. 62, and have held therein that said section 141¾ does not affect pending actions. We deem it unnecessary, therefore, to further discuss that question. We have therefore eliminated from the opinion of the District Court of Appeal all reference to said question. We adopt the remaining portion of said opinion as the opinion of this court. It was written by Presiding Justice Finch, concurred in by Justices Plummer and Thompson, and with the exception above noted is as follows:

The plaintiff recovered judgment for damages in the sum of $5,000 for the death of her husband, George E. Squires, alleged to have been caused by the negligent operation of an automobile owned by the defendant Winnie Riffe and driven by the defendant Tallman. Winnie Riffe has appealed from the judgment.

At the time of and prior to the accident the appellant owned and conducted a hotel at Upper Lake, Lake county. Tallman is the appellant's brother. He had been doing "odd jobs and errands" for her for many years, sometimes using her automobile in going on such errands. She also permitted Tallman and his wife to use her automobile "on their private errands." Tallman's wife was a waitress in the hotel. Yee Ock was employed by the appellant as a cook in the hotel.

Tallman, his wife, Squires, and Yee Ock left Upper Lake in appellant's automobile shortly before 10 o'clock in the evening on September 15, 1928. It does not appear at whose invitation Squires rode in the machine. They drove to several places during the night, and as they were returning to Upper Lake between the hours of 4:30 and 5 the next morning, at a place where the road turns sharply to the right over a bridge, Tallman lost control of the automobile and it went over the left side of the bridge. Squires was crushed beneath the automobile and killed. Part of the road near the bridge was covered with loose gravel, and, in passing through it, the rear end of the automobile skidded so far to the left that, while the front wheels went upon the bridge, the left rear wheel missed it, thereby causing the machine to topple over into the bed of the creek below. The automobile was a Jewett sedan, equipped with balloon tires. The evidence shows that the right rear tire was flat, it having been punctured by a large nail, apparently as the machine was approaching the bridge, the nail being of the kind used in the structure of the bridge. One of the witnesses testified that the flat tire "would have a tendency to throw you back and to the left." Tallman testified that he slowed down to "10 or 15 miles an hour" as he approached the bridge. There is sufficient evidence to support a finding either that the accident was caused by the flat tire, or that it was due to the negligence of Tallman in rounding the curve at too high a speed.

Mrs. Tallman testified:

"Q. Did this Yee Ock ask to accompany you on this trip? A. No sir.

"Q. How did he happen to go? A. Mrs. Riffe said if we were going to take him with us. * * *

"Q. What words did she use in that connection, if you remember? A. Not exactly. She asked if we were going. I said the lights were not good in our car. She said if we were going any place in the evening to take her car and take the little China boy (Yee Ock) along with us."

Relative to the same matter, the appellant testified:

"Q. On the occasion of permitting your car to be used on the evening before the accident happened, did you give you any order to any person as to who should be taken in the car there or who should not? A. I told them to take Albert (Yee Ock), we called him Albert, if he cared to go. * * *

"Q. Did you order anybody to take him? A. No.

"Q. Did you make the use of your car dependent on them taking Albert? A. Not entirely, no."

[1] The evidence shows without conflict that the automobile in question was owned by the appellant, and was, at the time of the accident, being driven by Tallman with her

consent. From these facts an inference arises that he was her agent in driving the automobile. Ransford v. Ainsworth, 196 Cal. 279, 281, 237 P. 747. In addition to this inference, the foregoing evidence tends to show, as was said in the case cited, not only that Tallman was operating the automobile with the appellant's consent, "but that in doing so he was engaged in doing things which were matters of her * * * concern." While such proof of agency is not conclusive, it is sufficient.

[2] The following occurred during the direct examination of the plaintiff as a witness:

"Q. After the death of your husband, Mrs. Squires, did you have any conversation with Mrs. Riffe? A. I did. * * *

"Q. State what that conversation was, * * * relating to the bringing of this suit and making a demand upon Mrs. Riffe?

"Mr. Honey (counsel for defendants): We submit that it is immaterial whether she made demand on Mrs. Riffe when she brought suit. * * * I have an idea it is an attempt to bring in extraneous matter here that has no relation to this matter.

"The Court: I think I will overrule the objection. * * *

"A. I told Mrs. Riffe I was going to bring suit, that I thought I ought to get damages. * * * She said she didn't want it to cost her a lot of money but she realized it and that is the reason she had insurance.

"Mr. Honey: If the court please, I assign the asking of that question as misconduct on the part of counsel, injecting extraneous matter into this case, and I now move that this jury panel be discharged and this case adjudged a mistrial. * * *

"The Court: The testimony about the conversation will be stricken out and the jury admonished when a matter is stricken out it is not to be considered by you in any way, it is to be considered the same as if no such testimony had been given or called for. The balance of the motion will be denied."

At the close of the plaintiff's case in chief, counsel for the defendants renewed his motion for the discharge of the jury because of the prejudicial effect of the foregoing evidence. In denying the motion the court said: "I confess I am considerably worried about the question."

It must be presumed that counsel for the plaintiff knew the answer which his client would give to the objectionable question. Her answer could serve no purpose, except to get before the jury the fact that the appellant carried indemnity insurance. The language of the Supreme Court in Citti v. Bava, 204 Cal. 136, 138, 266 P. 954, 955, is applicable to the matter under discussion. Referring to proof of a settlement disclosing "the fact that the defendant was indemnified by a policy of insurance", it is there said: "The evidence of the settlement, alone, not connected up with any act or admission of the defendant, and concerning which he had nothing to do, was clearly inadmissible in evidence. The error in admitting it might not in and of itself require a reversal, but, coupled with the avowed purpose and successful attempt of plaintiff's counsel to get before the jury, not only the fact of the settlement, but also that the settlement was made by the insurance carrier of the defendant, puts the case in a position where section 4½ of article 6 of the Constitution will not save the judgment. The natural tendency of a line of examination that suggests to the jury that the defendant is indemnified against any judgment for damages against him is highly prejudicial to his rights, especially in a closely balanced case where the evidence otherwise would be easily sufficient on appeal to support a verdict either for the plaintiff or for the defendant. Such attempts on the part of counsel have frequently been held to be improper and prejudicial. * * * From an examination of the record in this case it is impossible for us to state that the jury would not have found a different verdict had the objectionable examination not taken place and the evidence not been admitted."

One of the instructions contains the word "presumption" where the word "inference" should have been used. Maupin v. Solomon, 41 Cal. App. 323, 183 P. 198. Another instruction states that it is negligence as a matter of law to "approach" a turn at a speed greater than 15 miles an hour under the conditions mentioned in section 113 (b), subd. 3, of the California Vehicle Act (St. 1917, p. 554). The limit fixed by that subdivision is "fifteen miles an hour in traversing or going around curves or corner."

The judgment against appellant, Winnie Riffe, is reversed.

211 Cal. 383

LA SANCE v. CASEY.

S. F. 13411.

Supreme Court of California.
Jan. 26, 1931.

Rehearing Denied Feb. 19, 1931.

1. Trial 🔑296(3).

Instruction on necessity for adequate brakes did not imply existence of evidence of undue delay in stopping automobile, in view of further instructions.

> The court further instructed that, if jury found that defendant was driving his automobile with ordinary care and prudence, and that the striking of pedestrian waiting for trolley car on safety station was entirely due to the fact that one of the brakes on the automobile dragged and thereby caused the defendant to run the automobile upon the safety station, and that, if the defendant was not careless or negligent in any manner, then he was exonerated from liability.

2. Trial 🔑255(15).

Failure to instruct that witness is presumed to speak truth *held* not error, in absence of request (Code Civ. Proc. §§ 1847, 2061).

3. Automobiles 🔑245(76).

In action for injuries sustained by pedestrian when struck by automobile while standing in safety zone, refusing to submit issue of contributory negligence *held* not error (St. 1923, p. 517, § 23½, as added by St. 1929, p. 510, § 6).

In Bank.

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by Christopher J. La Sance against James L. Casey, in which Catherine La Sance, as executrix of the last will and testament of Christopher J. La Sance, deceased, was substituted as plaintiff. Judgment for plaintiff, and defendant appeals.

Affirmed.

Redman & Alexander, of San Francisco, for appellant.

Daniel A. Ryan and Thomas B. Dozier, both of San Francisco, for respondent.

WASTE, C. J.

This action, instituted by plaintiff's testate, Christopher J. La Sance, hereinafter referred to as the plaintiff or respondent, for damages for personal injuries received by him when struck by defendant's automobile, resulted in a verdict and judgment for $9,000 in favor of plaintiff. Defendant appeals.

An extended statement of the facts of the case is unnecessary. It is sufficient to say that plaintiff and his wife had alighted from a street car at a transfer point, and were standing on a "safety station" awaiting the arrival of the car to which they intended to transfer, and that defendant, in changing the course of his automobile, made a turn in such manner that the front wheel of his car could not clear the safety station, but was carried over the curbing, the bumper of the automobile striking plaintiff and throwing him to the ground, causing the injuries which form the basis of this action. Defendant contended at the trial that he was not negligent in operating his automobile, but that the brake on the right wheel dragged and interfered with the turn, causing the car to swerve over the curbing of the safety station. He charged the plaintiff with being contributorily negligent. The only errors urged as grounds for reversal relate to the giving of certain instructions and the refusal of the court to give other instructions requested by the defendant.

Appellant's objections to the instructions of the court with reference to the burden of proof, preponderance of evidence, prima facie, negligence, and contradictory evidence are without merit. These instructions, read as a whole, appear to be full, clear, and, in our opinion, quite fair to appellant.

[1] The court stated the law as to the necessity for adequate brakes on a motor vehicle operated on the public highway. Appellant urges that this instruction implied that there may have been some evidence that there was undue delay in stopping his machine and that the giving of this instruction, without any qualification as to appellant's lack of knowledge of the defect in his brake, "led them [the jury] to believe that the appellant was an insurer of his brakes and to believe that this law applied to brakes which worked unevenly as well as to brakes inadequate to stop the machine," and was clearly erroneous. He also complains of the refusal of the court to give his requested instruction as to unavoidable accident. The court, however, did state to the jury that the mere fact that an accident occurred did not, of itself, raise any presumption that defendant was careless or negligent in driving his car. Furthermore, instruction X, which was decidedly favorable to appellant, fully answers both of the objections raised by him. It reads: "If you find that the defendant Casey was driving his automobile with ordinary care and prudence, and if you also find that the accident was entirely due to the fact that one of the brakes on the automobile dragged and thereby caused Mr. Casey to run the automobile upon the safety station; and if you further find that Mr. Casey was not careless or negligent in any manner, then he is exonerated from any

liability in this case and your verdict must be in his favor."

[2] Appellant next complains of the court's instruction with reference to the credibility of witnesses, wherein the court failed to instruct the jury that a witness is presumed to speak the truth (Code Civ. Proc. § 1847), for which reason, he contends, the instruction did not properly state the law. Counsel for respondent points out that appellant did not ask for such an instruction. Section 2061 of the Code of Civil Procedure, setting forth specific matters on which the court should instruct a jury, on proper occasions, does not provide for an instruction that a witness is presumed to speak the truth. Therefore, the instruction not having been requested, appellant cannot assign the mere failure of the court to give it as error sufficient for reversal. See People v. Fowler, 178 Cal. 657, 663, 174 P. 892.

[3] The appellant pleaded contributory negligence on the part of the respondent, and requested the court to instruct the jury on that point. The court, however, refused all instructions as to that issue. Appellant asserts that, under the facts of this case, "this was certainly reversible error." The safety station where the accident occurred was not uniformly constructed; that is, there was a gradual decline on the southerly end, on which portion the respondent and his wife stood awaiting the arrival of the street car. Appellant contends that it cannot be said that a person so standing upon this low end of the structure, "the one dangerous part of this station, the one place where he had no business, and maintaining no watch whatsoever, was exercising due care," and that the question of the negligence of respondent was a question for the jury. Under the undisputed facts of the case, we cannot see how the question of contributory negligence enters into the consideration. The traveling public has the right to assume that a safety zone or station is what its name implies, namely, a place of safety reserved for those waiting to board or depart from street cars at that point, "an area or space officially set apart * * * for the exclusive use of pedestrians. * * *" Section 23½, California Vehicle Act (added 1929), St. 1929, p. 510, § 6. Furthermore, it appears from the evidence that respondent, being unacquainted with the district, had inquired of the motorman of the K car before alighting where he and his wife should wait in order to board the M car to which they intended to transfer, and were told to remain where they were standing at the time of the accident. While it may not be said that a person on a safety station may stand idly by and make no attempt to avert or avoid threatened injury, we do not find in the evidence any indication that such was the fact in this case. It was not error, therefore, for the trial court to refuse to allow the question of contributory negligence on the part of the respondent to be submitted to the jury. The proximate and negligent cause of the accident appears to have been an error of judgment on the part of appellant in believing that the front wheel of his automobile would clear the curb, since the evidence indicates that the car stopped immediately when the brakes were applied.

The judgment is affirmed.

We concur: CURTIS, J.; LANGDON, J.; SHENK, J.; PRESTON, J.; SEAWELL, J.; RICHARDS, J.

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111 Cal. App. 372

PEOPLE v. ROGERS.*

Cr. 2020.

District Court of Appeal, Second District,

Division 2, California.

Jan. 27, 1931.

Rehearing Denied Feb. 11, 1931. Hearing Denied by Supreme Court Feb. 24, 1931.

1. Robbery 🔑26.

Identification of one charged with robbery *held* sufficient for jury.

2. Criminal law 🔑1137(5).

Defendant could not successfully object to any error in disclosure respecting prior criminal charge brought out by statement of own counsel in presence of jury.

Although police officer was permitted to testify to conversation between himself and defendant leading to unearthing of pistol which was received in evidence, which conversation occurred pending trial of prior charge on which defendant was acquitted, any error in respect thereto could have been harmful only in case evidence disclosed that defendant had been under prosecution upon another criminal charge, which disclosure was first made by statement of defendant's own counsel.

3. Criminal law 🔑1129(3).

Mere statement that court erred in refusing instructions without argument or citation of authority presents nothing for review.

4. Criminal law 🔑829(17).

Deleting portion of instruction to effect that defendant is presumed to speak truth was not error, in view of general instruction (Code Civ. Proc. § 1847).

General instruction was given by trial judge to effect that a witness is presumed

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*For opinion denying rehearing, see 296 P. 84.

to speak the truth, and followed with language that presumption might be repelled by manner in which witness testifies, his interest in the case, if any, or his bias and prejudice, if any, against one or any of the parties, by character of testimony, or by evidence affecting his character for truth, honesty, or integrity, or by contradictory evidence.

Appeal from Superior Court, Los Angeles County; Warren V. Tryon, Judge.

Glenn A. Rogers was convicted of robbery in the first degree, and he appeals.

Affirmed.

Ralph D. Paonessa and Alexander L. Oster, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

WORKS, P. J.

Defendant was found guilty under a charge of robbery in the first degree. He appeals from the judgment of conviction and from an order of the trial court denying his motion for a new trial.

[1] Appellant insists that the testimony of the witness Hansen was insufficient to show an identification of appellant as the individual who committed the alleged robbery. It is said that the witness claimed to identify appellant by means of a gray coat which the latter wore at the time of the commission of the offense, but that while on cross-examination the witness was shown to have no familiarity with the appearance of the coat. Hansen, however, did not identify appellant by the coat alone, for the following appears in a portion of the record quoted in appellant's brief:

"Q. [By counsel for defendant]: And the cap which the defendant had on his head was pulled down how far? A. Well, right above his eyes.

"Q. You could obtain then, could you, a clear view of his face? A. I could. * * *

"Q. That [by means of the coat and cap] is the only way you could identify him? A. No, sir. * * *

"Q. Well, what other way could you identify the defendant? A. By his features."

It is true that two impeaching witnesses testified that Hansen had said out of court that he could not identify appellant, or was not sure of his ability to identify him, but this testimony only gave rise to a conflict in the evidence, which the jury was privileged to resolve as it pleased. The point must therefore be determined against appellant.

[2] At some period prior to the time when appellant was charged with robbery, he had been tried on another criminal charge and had been acquitted. At the trial of the present action a police officer, over objection, was permitted to testify to a conversation between himself and appellant which led to the unearthing of a pistol which belonged to appellant, and the weapon was received in evidence. This conversation occurred and the gun was located pending trial of the first charge against appellant. Moreover, the police officer then knew nothing of the facts out of which arose the charge of robbery. It is contended that the trial court erred in allowing the conversation to go to the jury and in receiving the gun in evidence. But if there was any error in these respects—which we do not decide—the error could have been harmful only if the evidence disclosed to the jury the fact that appellant had been under prosecution upon another criminal charge. This disclosure, however, was not first made by the evidence in question, but by a statement of appellant's counsel made in the presence of the jury. Under these circumstances, appellant cannot successfully object to the error, if there was one. It is to be observed here that in order to fix the grade of appellant's offense under the charge now before us, pursuant to section 211a of the Penal Code, evidence went to the jury which showed directly that he was armed with a gun at the time of the robbery and pointed it at his victim.

Appellant presents several specifications of alleged misconduct on the part of the district attorney, but in view of the answer of respondent to the points made we think them so lacking in merit as not to require a separate treatment.

[3] It is contended that the trial court erred in refusing to give two instructions proposed by appellant for submission to the jury. No argument is presented nor is authority cited to show that the instructions should have been given. It is merely stated that the court erred in refusing them. Points so made give us nothing to decide. No authority need be cited to support this statement, as the cases upon the point are legion.

[4] It is also insisted that the court erred in modifying an instruction offered by appellant and in giving it as modified. The stricken portion of the proposed instruction was to the effect that "you should remember that the defendant is presumed to speak the truth, and unless this presumption is destroyed by the evidence in the case, your oaths require you to find that he has spoken the truth." Section 1847 of the Code of Civil Procedure is invoked as authority for the inclusion of this language in the instruction. The trial judge gave a general instruction to the effect that a witness is presumed to speak the truth, and followed it with this language: "This presumption, however, may be repelled by the manner in which he testifies,—his interest in the case, if any, or his bias and prejudice, if any, against one or any of the parties, by the char-

acter of his testimony, or by evidence affecting his character for truth, honesty or integrity, or by contradictory evidence, and the jury are the exclusive judges of his credibility." It is held in many cases that it is not proper to single out a defendant and to charge the jury upon the credibility of his testimony, while others appear to allow such an instruction. 16 C. J. 1018, § 2443. Without grasping either horn of this dilemma in its full force, we think that where a trial judge gives such a general instruction as we have set forth, applicable to all the witnesses, it is not error to delete such matter as the trial judge here eliminated from the proposed instruction.

Judgment and order affirmed.

We concur: CRAIG, J.; IRA F. THOMPSON, J.

SEABOARD ACCEPTANCE CO. v. SHAY, Sheriff, et al.*

Civ. 81.

District Court of Appeal, Fourth District, California.

Jan. 21, 1931.

Rehearing Denied Feb. 17, 1931. Hearing Granted by Supreme Court March 19, 1931.

Statutes ⟹74(1).

Statute making conditional sales contracts involving live stock or poultry void against third persons, unless acknowledged and recorded like mortgages on live stock, *held* unconstitutional, as not being uniform in operation (Civ. Code, § 2980, as added by St. 1927, p. 1567; Const. art. 1, § 11).

> Civ. Code, § 2980, as added by St. 1927, p. 1567, provides that any conditional sales contract reserving interest or lien on live stock or poultry not in possession of person having such interest or lien shall be void against other persons, unless acknowledged and recorded in same manner as mortgages on live stock, which are regulated by section 2957; it being further provided that sections 2959, 2965, and other provisions shall also be applicable.

Appeal from Superior Court, San Bernardino County; F. A. Leonard, Judge.

Action by the Seaboard Acceptance Company against W. A. Shay, as Sheriff, and another. Judgment for plaintiff, and defendants appeal.

Affirmed.

Nichols, Cooper & Hickson and A. L. Hickson, all of Pomona, for appellants.

Clement L. Shinn, of Los Angeles, and Leland S. Davidson, of Ontario, for respondent.

BARNARD, P. J.

One King sold 45 dairy cows to one Beard under three conditional sales contracts, dated respectively November 4, 1926, February 5, 1927, and July 28, 1927. On the date each of these contracts was executed it was assigned by King to the plaintiff herein. On November 15, 1927, a new conditional sales contract was executed by King, as seller, and Beard, as buyer, for the purpose, among other things, of combining all three of these transactions into one contract. This new contract covered only 42 cows, including 5 which had not been covered in the original contracts. Immediately after its execution this contract was assigned to the plaintiff herein by King, but was not recorded until December 10, 1927. In the meantime, on November 19, 1927, in a suit brought by one Loubet against Beard, who had possession of the cows at all times after the original contracts were executed, the sheriff of San Bernardino county attached most of these cows and later sold them to satisfy a judgment in that action, although the plaintiff herein had filed a third party claim. Each of the contracts mentioned provided that title to the cattle should remain in the seller until the stipulated price was fully paid. This action was brought to recover the value of the cattle sold by the sheriff, and from a judgment in favor of the plaintiff the defendants have appealed.

Appellants ask for a reversal of this judgment upon the ground that the last-mentioned conditional sales contract is void, as against this attaching creditor of Beard, under the terms of section 2980 of the Civil Code, which went into effect July 29, 1927 (St. 1927, p. 1567). This section reads as follows:

"Conditional Sales of Livestock and Poultry. Any conditional sales contract creating or reserving any interest in or lien upon livestock or poultry not in the possession of the person having such interest or lien shall be void against all others than the parties to the agreement unless acknowledged and recorded in the same manner as mortgages on livestock are required to be acknowledged and recorded.

"Sections 2959 and 2965 of the Civil Code, and sections 408, 4130, 4140 and 4300c of the Political Code, are hereby made applicable to conditional sales contracts involving livestock and poultry in the same manner as to mortgages on livestock."

The manner in which mortgages on live stock are required to be acknowledged and recorded is set forth in section 2957 of the Civil Code.

Respondent seeks to sustain the judgment upon two grounds, with which we cannot

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⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Hearing granted 5 P.2d 882.

agree, but a discussion of which is rendered unnecessary by our views upon a third point. This is, that section 2980 of the Civil Code is unconstitutional, being in violation of article 1, § 11, of the Constitution of California, in that it is not uniform in its operation, which point we think must be sustained.

In Ex parte Sohncke, 148 Cal. 266, 82 P. 956, 958, 2 L. R. A. (N. S.) 813, 113 Am. St. Rep. 236, 7 Ann. Cas. 475, the rule is thus stated: "A law which applies alike to all the subjects upon which it acts, or, in other words, a law which applies equally to all persons or things within a legitimate class to which, alone, it is addressed, does not violate the provision requiring laws of a general nature to have a uniform operation, and is neither local nor special." Citing cases.

In Hellman v. Shoulters, 114 Cal. 136, 44 P. 915, 918, 45 P. 1057, the court said: "It is only laws of a general nature which must have a uniform operation. And it has been uniformly held that a law is general which applies to all of a class, the classification being a proper one, and that the requirement of uniformity is satisfied if it applies to all of the class alike. In [People ex rel.] Smith v. Judge Twelfth District, 17 Cal. 547, it was said: 'The word "uniform" in the constitution does not mean "universal." The section intends simply that the effect of general laws shall be the same to and upon all persons who stand in the same relation to the law; that is, all the facts of whose cases are substantially the same.' "

In the case of In re Sumida, 177 Cal. 388, 170 P. 823, 824 the court said: "The sole question, therefore, is whether or not this ordinance is discriminatory, and class legislation within the principles of constitutional law applying to the subject. The rules upon the subject are well established by many decisions in this state. 'From necessity it has been held that the Legislature may classify in order that it may adapt its legislation to the needs of the people. If this cannot be done, laws will not always bear equally upon the people. This classification, however, must be founded upon differences which are either defined by the Constitution or natural, and which will suggest a reason which might rationally be held to justify the diversity in the legislation. It must not be arbitrary, for the mere purpose of classification, that legislation really local or special may seem to be general, but for the purpose of meeting different conditions naturally requiring different legislation.' Darcy v. City of San Jose, 104 Cal. 645, 38 P. 501. 'A law is general and uniform in its operation when it applies equally to all persons embraced within the class to which it is addressed, provided such class is made upon some natural, intrinsic, or constitutional distinction between the persons composing it and others not embraced in it. * * * The difference on which the classification is based must be such as, in some reasonable degree, will account for or justify the peculiar legislation.' Ex parte Miller, 162 Cal. 698, 124 P. 430. Other decisions supporting these propositions are cited in that case and need not be repeated here."

In Bruch v. Colombet, 104 Cal. 347, 38 P. 45, 47, the court said: "No absolute, inflexible rule has ever been formulated, and probably never will be, by which to determine what departure from uniformity is permissible and what will be fatal. The courts must determine each case as it arises, presuming in favor of the rightful exercise of the legislative power. Yet the inhibition should be enforced unless there is discoverable some reasonable ground for a distinction."

Applying these rules to the statute here in question, although this law applies equally to all persons embraced within the class to which it is addressed, that is to say, to all persons selling live stock or poultry upon conditional sales contracts, when the seller does not retain the possession thereof, on the other hand, we are unable to see that the particular classification is "founded upon some natural or intrinsic or constitutional distinction." We are unable to discover any reasonable ground for the distinction here drawn between live stock and other forms of personal property. It would appear to have been the intention of the Legislature, in adding this section to the Code, to apply to conditional sales contracts covering livestock or poultry, so far as their effect upon third persons is concerned, practically the same rules of law as apply to chattel mortgages upon such property. The section in question applies the recording provisions of section 2957 of the Civil Code to conditional sales contracts covering live stock or poultry, which leave the buyer in possession. But it will be noted that the last-named section applies not only to mortgages upon live stock, but to mortgages upon all kinds of personal property. And while section 2980 also makes applicable to conditional sales contracts covering live stock or poultry, the provisions of sections 2959 and 2965 of the Civil Code, these last-named sections are also very much broader in their scope than the section here in question. In the instant case, we are not concerned with the portions of these sections applying to removal of personal property to another county, or the recording provisions applicable thereto. We are here concerned only with the effect of this section where the property remains in the same county where it is originally sold under a conditional sales contract. It is at once apparent that section 2980, in regulating conditional sales contracts, draws a distinction that is not drawn in regulating chattel mortgages, and that, under its terms, in order to shut out attaching creditors of the party in possession, a conditional sales contract covering live stock or poultry must be recorded, while a similar contract, covering other kinds of personal property, need not be recorded.

While it may be conceded that a distinction may legitimately be drawn between such chattels as may properly be termed "migratory," and other forms of personal property which are not quite so moveable in nature, and while even greater reason might appear for making a separate classification of motor vehicles, in view of their nature and use under modern conditions, we are unable to see any such distinction between live stock or poultry, and for, instance, vehicles or farm implements. In modern business, radios, musical instruments, motor vehicles, furniture, and many other forms of personal property, are customarily sold upon conditional sales contracts. While such a law as we have here under consideration might, with propriety, be made to apply to all forms of personal property so sold, and even conceding that such a law might properly be applied to all such property which could properly be classed as migratory, we are unable to find a natural or intrinsic reason why such a provision should be made applicable to livestock and poultry alone, whether removed from the county or not, and why all other forms of personal property, whether removed from the county or not, and irrespective of whether it is equally susceptible of being removed or even more so, should be relieved from a similar obligation. This section not only gives an attaching creditor a right with reference to property the seller of which has not complied with the terms of the section, which he would not have in reference to other forms of personal property, similarly sold, but does this without regard to whether or not the creditor has relied upon or been misled by the debtor's possession. It seems to us that in so far as this statute declares void, so far as third parties are concerned, this class of contracts, covering a special limited kind of personal property, which is in fact a part of a much larger class which should be treated alike, it is not uniform and general in its scope, and that it constitutes an unreasonable infringement upon the rights of a part of a general class. And, further, that in so far as it vests in third parties a right to interfere with the performance of contracts covering live stock or poultry, it vests in such third parties rights that are not enjoyed by others in exactly the same position with reference to similar contracts covering other forms of property which are and belong in the same class. As we view it, there is no reasonable ground for placing live stock or poultry in a class separate and distinct from all other forms of personal property, for the purpose of subjecting such property and its owners to requirements and limitations, in the sale thereof, from which all other forms of personal property, and the owners thereof, are excluded. The distinction made by this section appears to us to be arbitrary rather than natural, intrinsic, or constitutional.

Appellants cite a number of decisions from other states, where, it is claimed, statutes similar to the one under consideration were upheld. In each instance cited the statute involved covered personal property in general rather than a named exception from a general class.

The judgment is affirmed.

We concur: MARKS, J.; WARMER, Justice pro tem.

111 Cal. App 282

COOPER v. TANNER et al.

Civ. 182.

District Court of Appeal, Fourth District, California.

Jan. 21, 1931.

1. Estoppel ⚿72.

Where face of stock certificate showed ownership in plaintiff, defendant accepting stock as collateral security from plaintiff's son could not rely upon statute respecting innocent persons suffering by act of third person (Civ. Code, § 3543).

> Owner's son had pledged water stock, with other stock belonging to owner, to bank as security for loan without owner's knowledge or consent, and when bank was about to foreclose pledge, pledgee loaned owner's son money with which to pay bank and was given possession of stock certificate representing water stock. The certificate had been issued in name of owner and the forged assignment on back was in favor of bank, and assignment by bank, after loan was paid, was in favor of owner, so that facts were sufficient to put pledgee upon his inquiry before accepting stock as collateral security.

2. Pledges ⚿6.

Pledgee does not acquire valid lien upon personal property against owner, where owner has merely intrusted pledgor with property for safe-keeping.

3. Trial ⚿397(5).

Findings which are unnecessary to support judgment may be regarded as surplusage.

Appeal from Superior Court, Riverside County; G. R. Freeman, Judge.

Action by Annie C. Cooper against J. M. Tanner and another. From a judgment for plaintiff, defendant named appeals.

Affirmed.

Macfarlane, Schaefer, Haun & Mulford, of Los Angeles, for appellant.

Estudillo & Schwinn, of Riverside, for respondent.

MARKS, J.

Respondent was the owner of an orange grove near the city of Corona in the county of Riverside. She was also the owner of 75½ shares of the capital stock of the Temescal Water Company. This stock was found in the possession of appellant, and upon his refusal to deliver it to her, this action was brought to compel the cancellation of certificate number 3725 issued for it, and the issuance of a duplicate by the water company. Judgment was entered for respondent, and appellant has prosecuted this appeal.

Appellant presents two grounds upon which he bases his claim for a reversal of the judgment: First, that the water stock in question was not appurtenant to the land owned by respondent; and, second, that "where one of two innocent persons must suffer by the act of a third, he, by whose negligence it happened, must be the sufferer." Section 3543, Civ. Code.

Under the conclusions which we have reached it makes no difference whether or not the water stock was appurtenant to the land. Therefore, we will assume, without deciding, that the contention of appellant is correct and that the stock was not appurtenant to the land.

The evidence discloses that respondent purchased this stock in 1912. On August 10, 1921, the records of the company show a receipt for it signed by F. P. Cooper, her son, and son-in-law of appellant. It does not appear that respondent ever had possession of the certificate. F. P. Cooper died in 1929, before the trial of this action.

In 1922, F. P. Cooper was indebted to the Long Beach National Bank in the sum of $3,500. He had pledged the water stock, together with other stock belonging to his mother, as security for the loan, without her knowledge or consent. In September of the same year the bank was about to foreclose the pledge. On October 7, 1922, appellant loaned Cooper $3,500 with which to pay the bank and was given possession of certificate No. 3725 representing this water stock. This certificate had been issued in the name of Mrs. Anna C. Cooper, admittedly the respondent, although the first name appears to be misspelled. On the back of the certificate was the following endorsement:

"For value received ——— hereby sell, assign and transfer unto Long Beach Natl Bank, Long Beach, Cal Shares of the Capital Stock represented by the within Certificate, and do hereby irrevocably constitute and appoint ——— to transfer the said Stock on the books of the within named Corporation with full power of substitution in the premises.

"Dated Sept. 13, 1922

"Mrs. Annie C. Cooper.

"In presence of ———"

The date of the indorsement shows an erasure under the word "Sept." and under the figures "22." The name "Mrs. Annie C. Cooper" was undoubtedly forged on the indorsement, probably by F. P. Cooper. This indorsement was on the certificate at the time it was received by appellant. About November 15, 1922, appellant took the certificate to the bank and had the following indorsement placed thereon:

"For Value Received we hereby sell, assign and transfer unto Mrs. Annie C. Cooper shares of the capital stock represented by the within certificate and do hereby irrevocably constitute and appoint to transfer the said stock on the books of the within named corporation with full power of substitution in the premises.

"Dated No. 15, 1922.

"Long Beach National Bank, Long Beach, Cal.

"By C. R. Davis."

A short time after this transaction, respondent and another son, Reul Cooper, went to Long Beach in search of the stock certificate. F. P. Cooper was at this time in the state of Texas and they knew that he had intrusted appellant with some of his private papers. Respondent told appellant that she had intrusted this certificate to her son F. P. Cooper for safe-keeping, but that she was now looking for it because it might be necessary for her to renew a loan upon her orange orchard in Riverside county and she would need to use it as further security. Appellant told respondent that he had possession of the certificate and that it was in his safe-deposit box in the bank, but that as it was after banking hours he could not show it to her that day. In this conversation appellant told respondent that F. P. Cooper owed him money and that he was holding the stock certificate for the loan. Respondent replied that he could not hold her stock for her son's indebtedness. Several days later respondent and her son Reul returned to Long Beach and were taken to the safe-deposit box and shown the certificate of stock. Respondent and Reul Cooper both testified that the certificate was wrapped in a newspaper with other private papers belonging to F. P. Cooper and was not mingled with the private papers of appellant; that appellant told respondent that these papers had been given to him for safe-keeping by F. P. Cooper before he left for Texas. This particular portion of the conversation was denied by appellant, but the court found the facts in accordance with the testimony of respondent and Reul Cooper.

[1] Under the circumstances of this case as disclosed by the evidence, the provisions of

section 3543 of the Civil Code do not apply. The face of the certificate of stock showed ownership in respondent. The forged assignment on the back was in favor of the Long Beach National Bank. The assignment by the bank was in favor of respondent. These facts alone are sufficient to have put appellant upon his inquiry before accepting the stock as collateral security, if he did so accept it. In his first conversation with respondent, she asserted ownership of the stock and told him that he could not hold it as security for her son's indebtedness. Notwithstanding these circumstances, appellant had continued to advance considerable sums to his son-in-law. He produced a note signed by F. P. Cooper and Helen Cooper, his wife, payable to J. M. Tanner, dated July 1, 1928, in the principal sum of $21,412.31. This note was in the usual form of an ordinary promissory note and not in the form of a pledge or collateral security note. Security was not mentioned therein. It had been taken for various advances made by appellant to F. P. Cooper over a period of years on and after October 7, 1922, the greater part of which had been made after respondent told appellant that she claimed title to the stock.

[2] Under the principles announced in 1 Cal. Jur. pp. 734 to 737, and the cases therein cited, appellant has not brought himself within the provisions of section 3543 of the Civil Code. It has been repeatedly held that a pledgee does not acquire a valid lien upon personal property against the true owner where the true owner has not allowed the pledgor to assume the apparent ownership of the pledged property but had only entrusted him with it for safe-keeping. Shafer v. Lacy, 121 Cal. 574, 54 P. 72; McLean v. Mooser, 59 Cal. App. 345, 210 P. 827; Bastheim Co. v. Schultz, 46 Cal. App. 24, 188 P. 841. Respondent testified that her son, F. P. Cooper, had the stock certificate for safekeeping, and that when she saw it among his private papers in the possession of appellant she allowed it to remain there believing that it would be safe with him and that her son would return it to her upon his return from Texas. The evidence fails to disclose that respondent clothed her son with any apparent ownership of the stock, and furthermore it shows that appellant had notice that F. P. Cooper had no interest in the stock or in the certificate.

[3] Appellant complains of a number of the findings of fact made by the trial court. All of these findings against which he directs his attack are unnecessary to support the judgment and may be regarded as surplusage. There are sufficient findings supported by the evidence to support the judgment.

Judgment affirmed.

We concur: BARNARD, P. J.; WARMER, Justice pro tem.

MIDDLETON v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY.*

Civ. 7619.

District Court of Appeal, Second District, Division 2, California.

Jan. 23, 1931.

Rehearing Denied Feb. 20, 1931. Hearing Granted by Supreme Court March 24, 1931.

1. New trial 🔑165.

Trial court is limited to single ruling on motion for new trial after decree on material issues presented by pleadings.

2. Judgment 🔑294.

Court may modify decree only in exceptional ways prescribed by statute (Code Civ. Proc. § 473).

> Modification may be made only by proceeding under Code Civ. Proc. § 473, or by proceeding for an entry nunc pro tunc in the event of an erroneous entry at variance with its rulings.

3. New trial 🔑157.

Motion for new trial, if entertained and considered in disregard of statutory methods of procedure, was erroneous, but not void.

4. New trial 🔑165.

Trial court overruling motion for new trial after decree determining respective interests of partners was without authority after supplementary judgment to grant new trial (Code Civ. Proc. §§ 956, 963).

> By the findings, conclusions of law, and decree made and entered at conclusion of trial, all of issues were finally and definitely settled and determined, leaving for ascertainment no more than amounts of certain already adjusted reciprocal obligations, a mere question of arithmetic, and all that remained for court to do upon receipt of the account was to adopt and embody report in a supplemental decree which adjudged holdings of each party and amounts of a portion of obligations of each of parties to others under requirements of original judgment.

Original application by Charles O. Middleton for certiorari to review orders of the Superior Court of Los Angeles County.

Writ granted, and orders annulled.

Call & Murphey and Anderson & Anderson & Sheahan, all of Los Angeles, for petitioner.

McAdoo, Neblett & Clagett, of Los Angeles, for respondent.

CRAIG, J.

Upon a complaint filed in the superior court of Los Angeles county by the petitioner, cer-

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*Hearing granted 6 P.2d 93[illegible]

tain defendants joined issue, the action was dismissed as to others, and, after the introduction of evidence, a decree was entered in favor of the plaintiff determining the issues between the parties and directing an accounting. Thereafter, upon the rendition of the accounting, a "supplemental" decree was rendered, adopting recommendations of the accountants and directing distribution of certain funds in accordance therewith, which decree also was entered. The plaintiff has petitioned this court for a writ of certiorari to review the proceedings below, and for annulment of subsequent orders of the trial court purporting to vacate the decree first mentioned and granting a new trial upon the issues determined thereby.

At the conclusion of the trial findings of fact, conclusions of law, and a decree dated July 19, 1929, determined the respective interests in certain described properties of the plaintiff, and of defendants T. L. Dudley, F. P. Newport, and the Security Trust & Savings Bank, a corporation. Referees or accountants were appointed, and the court directed that Dudley render an accounting of certain trust funds, liens, etc., and that Newport render an accounting to Dudley and to the plaintiff, reciting in its decree that "thereupon this court shall decree the amount of money due" from each to the other, namely, from Newport to Dudley as trustee, to Middleton & Newport, a copartnership, and to Middleton personally; from Dudley to the trust and copartnership, and as to any mortgages or liens created to secure the payments of moneys claimed to be due to Newport. It was further decreed that the defendant Newport bear the expense of such accounting, and that the plaintiff and the defendant bank recover their costs from the defendant Newport. A motion for a new trial was presented by the defendants Dudley and Newport, which was denied. On July 31, 1930, upon the return and filing of the accountants' report, the trial court made its "supplemental judgment" heretofore mentioned, reciting that said report had been filed in accordance with the decree, and adopting the report.

On August 8, 1930, the defendants Newport and Dudley caused to be served a notice of motion "to vacate and set aside the first or interlocutory judgment heretofore rendered in said action on July 19, 1929; * * * and * * * to vacate and set aside the second or final judgment heretofore rendered in this action on July 31, 1930." Said motion was based upon the same grounds and upon the affidavits "heretofore filed herein on or about the 30th day of July, 1929," which were presented in the first instance. This latter motion was "granted on the grounds of insufficiency of the evidence to sustain the decision, and that the decision is against law." On September 24, 1929, the defendants appealed from the decree of July 19, 1929, and on August 29, 1930, they appealed from the decree of July 31, 1930. Pursuant to the order granting a new trial there is pending a motion to set the case for trial "of all of the issues involved therein, including all of the issues decided and determined in and by said judgment therein of July 19, 1929."

The respondent demurs to the instant proceeding upon the ground that the stated facts do not authorize the relief sought, and by answer it is contended that the decree first rendered was interlocutory, that the motion for a new trial then presented was premature, and that the order denying it was a nullity; that the motion for a new trial which was interposed after rendition of the later and so-called "supplemental judgment," designated by respondent as the "final judgment," was timely, that the order granting a new trial was valid, and that petitioner is not without a plain, speedy, and adequate remedy at law, for the reason that he may abide the event of another trial and appeal from any adverse judgment, if such be rendered.

By the findings, conclusions of law, and decree made and entered in July, 1929, at the conclusion of the trial, all of the issues were finally and definitely settled and determined, leaving for ascertainment no more than the amounts of certain already adjusted reciprocal obligations, a mere question of arithmetic. It was found that a partnership existed between the plaintiff and the defendant Newport, and the same was by said decree dissolved. It was determined that Middleton was the owner of an undivided one-half interest in all the assets and properties of said copartnership, the title to a portion of which stood in the name of the defendant Dudley; that the partnership interest was subject to the interests of a certain syndicate for which the latter should receive the sum of $150.000; that a certain adjudged interest of the plaintiff was subject to the rights of the defendant bank as trustee for assignees of Middleton, and that the bank should receive the sum of $27,657.64, with interest, for such assignees. These facts were all thereafter reargued upon a motion for a new trial, were considered by the trial court, and the motion was denied. Upon the motion then presented the court decided, in effect, that there were no errors occurring at the trial, that the evidence was not insufficient to justify the decision, that it was not against the law or against the evidence, and that the defendants were not prevented from having a fair trial. Upon receipt of the account, all that remained to do or that was done consisted of its adoption and embodiment in a supplemental decree, which adjudged the holdings of each party and the amounts of a portion of the obligations of each of the parties to the others under the requirements of the original judgment.

While the authorities upon which the respondent relies may at first blush apparently tend to sustain its contentions, they are analogous only to the extent that they hold that an interlocutory decree is not final. An analysis of them all is not necessary to a complete consideration of the question before us. None of them pretends to hold that in a case such as the instant one a ruling upon a motion for a new trial is not conclusive upon the trial court. So far as they differ in character or in result they are not in point, but so far as they express pertinent principles, even by obiter dictum, they are in harmony with controlling authorities which recognize the finality of orders denying new trials. Selected examples are sufficient to reveal the extent of their persuasive value in this proceeding. In an action to quiet title it was said that an interlocutory judgment, reserving for future determination the amount of rents, issues, and profits, is appealable, and that proceedings upon a motion for new trial do not apply. Yet, the Supreme Court held: "The very fact that the judgment in question was interlocutory left the whole case before the court for final adjudication, and even if it be conceded that the order vacating the interlocutory judgment and granting a new trial was erroneous, it was but an order in the exercise of its jurisdiction over the cause and the parties, to be corrected, if need be, upon an appeal from the final judgment in the action. Code Civ. Proc. § 956." Pomper v. Superior Court, 191 Cal. 494, 216 P. 577, 578. Following this authority it is clear that, even if conceded that the order of the court denying the first motion for a new trial was erroneous, it could not be corrected by a motion of the same character, but, aside from certain statutory exceptions with which we are not concerned, this could be accomplished only in the course of an appeal to be taken from the judgment when rendered. This is the remedy indicated by the foregoing decision in such an instance. In Doudell v. Shoo, 159 Cal. 448, 114 P. 579, 582, and Clement v. Duncan, 191 Cal. 209, 215 P. 1025, 1028, both involving partnership accountings, the interlocutory decree was in each instance based upon findings which, as stated in the Doudell Case, determined none of the issues except the fact of partnership and the existence of mutual undetermined claims and demands, and certain property, and a conclusion of law which declared no more than that an accounting was necessary. In neither of the cases were there findings fixing the relative rights of the parties as there are in the one here under consideration. In the former a stay of execution upon appeal from the final judgment without sureties was denied, and in the latter the right of appeal from the interlocutory judgment was denied. In each of these two cases elaborate findings of fact and conclusions of law were requisite to the final judgment after an accounting. But in Doudell v. Shoo, supra, it was remarked: "If the first decree was a final adjudication of the rights of the parties with respect to any matter contained in it, it might well be claimed that the appeal from that order, together with the giving of the bond required by the order of the trial court, would stay the power of the court to take any further proceedings with reference to the matter covered by the judgment appealed from while the appeal remained undisposed of." In the instant case we have every issue covered in the findings upon which the interlocutory decree is based, and, when the so-called "final judgment" was made, it was unnecessary to make further findings, and none were made, except that approving the report of the referees. In both of the above-mentioned cases it was observed: "There may, however, be cases not coming within the purview of said section [Code Civ. Proc. § 963] in which an interlocutory decree may involve a full, complete, and definite adjudication of all the material or vital issues of fact arising in the case." We think that this is such a case.

[1-4] We are aware of no authority in this state in conflict with the rule first announced herein which limits a trial court to a single ruling upon the motion for a new trial, after suspension of a hearing and the rendition of findings, conclusions of law, and a decree upon the material issues presented by the pleadings. The court may modify its decree only in exceptional ways prescribed by the statute, that is, by a proceeding under section 473 of the Code of Civil Procedure, or by a proceeding for an entry nunc pro tunc in the event of an erroneous entry at variance with its rulings. Frost v. L. A. Ry. Co., 165 Cal. 365, 132 P. 442. The court here had jurisdiction of the subject-matter and of the parties, and jurisdiction to grant or to deny a new trial. If the motion was entertained and considered in disregard of statutory methods of procedure, it was erroneous, but not void. Hutchinson v. Inyo County, 61 Cal. 119; Yenawine v. Richter, 43 Cal. 312. Subject to exceptions not here appearing, the order denying a new trial was reviewable only upon appeal, and the subsequent action of the court in rendering a contrary decision of the same issues, upon the same grounds, was accomplished through an attempted exercise of an exhausted authority. Holtum v. Grief, 144 Cal. 521, 78 P. 11, 12. The statute authorizes but one motion for a new trial, and makes the ruling thereon final, so far as the superior court is concerned. Dorland v. Cunningham, 66 Cal. 484, 6 P. 135. In an instance not dissimilar to that here presented the Supreme Court observed: "The decisions of this court are numerous and uniform to the effect that a judgment or order once regularly entered can be reviewed and set aside only in the modes prescribed by statute. If they have been entered prematurely or by inadvertence, they may be set aside on a proper showing (Odd Fellows' Savings Bank

v. Deuprey, 66 Cal. 170, 4 P. 1173, and cases cited), * * * but, subject to these exceptions, the order is reviewable only on appeal, and, the decision of the trial court having been once made after regular submission of the motion, its power is exhausted. It is functus officio. * * *" Holtum v. Grief, supra. The same rule was applied in Bloomquist v. Haley, 204 Cal. 258, 268 P. 364. In Drinkhouse v. Van Ness, 202 Cal. 359, 260 P. 869, 872, these principles were considered in passing upon the validity of an order granting a new trial and a subsequent order amending the first and denying a motion for new trial as to one of the defendants, and the rule applied in the following language: "When a motion for a new trial has been made in due form, upon a settled statement, and the court has passed on the motion, the order regularly made is conclusive so far as the court making it is concerned. It cannot afterwards, even on motion, vacate the order and decide the matter anew." We think further consideration of the matter would be unwarranted.

The writ is granted, and orders annulled as prayed.

We concur: WORKS, P. J.; IRA F. THOMPSON, J.

111 Cal. App. 109

PEOPLE v. BATEMAN.

Cr. 1590.

District Court of Appeal, First District,
Division 2, California.
Jan. 15, 1931.

Rehearing Denied Jan. 30, 1931. Hearing Denied by Supreme Court Feb. 9, 1931.

1. Receiving stolen goods 🔑1.

Defendant's knowledge property was stolen and his receiving it for purpose of gain of himself, or himself and others, covered all elements of "receiving stolen goods" (Pen. Code, § 496).

[Ed. Note.—For other definitions of "Receiving Stolen Goods," see Words and Phrases.]

2. Criminal law 🔑564(1).

Evidence *held* to show defendant received stolen goods in San Francisco, so as to support prosecution in such county (Pen. Code, § 496).

3. Conspiracy 🔑45.

On counts for conspiracy and for completed offense, issue of conspiracy was present until acquittal on such count; hence statements by third person out of defendant's presence were admissible.

4. Criminal law 🔑673(2).

Evidence of statements by third person to conspiracy having been properly admitted under circumstances, and court having instructed jury on limited use it might make thereof, there was no error.

5. Criminal law 🔑1144(15).

In absence of showing to contrary, appellate court is bound to assume jury followed instructions.

6. Criminal law 🔑511(1).

In prosecution for receiving stolen goods, testimony of alleged accomplice *held* sufficiently corroborated (Pen. Code, § 496).

Appeal from Superior Court, City and County of San Francisco; James G. Conlon, Judge.

L. L. Bateman was convicted of receiving stolen goods, and he appeals.

Affirmed.

Superseding opinion in 293 Pac. 870.

Frank P. Doherty, William R. Gallagher, and H. A. I. Wolch, all of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

STURTEVANT, J.

The grand jury presented an indictment against L. L. Bateman, Raymond Bateman, James Arp, and W. C. Dorris. The indictment was framed in two counts. In the first count it was charged that the defendants conspired to commit the offense of receiving stolen goods. In the second count it was charged that the defendants committed the offense of receiving stolen goods. The defendants pleaded not guilty. A trial was had before the trial court sitting with a jury. The jury returned a verdict acquitting the defendant L. L. Bateman on the conspiracy charge, and it returned a verdict convicting him on the other charge. From a judgment entered on the verdict and from an order denying a motion for a new trial, that defendant has appealed.

The transcript contains unwards of 1,000 pages. During the trial 50 or 60 witnesses were called and examined. Some of the witnesses gave evidence regarding acts and declarations of the alleged conspirators. Other witnesses testified to other facts and circumstances, but the defendant does not claim that the trial court erred in ruling on the admission of evidence or in giving instructions.

[1, 2] The defendant claims the trial court had no jurisdiction because the property was

not received in San Francisco. The defendant states that: "(a) A person charged must receive or buy the property; (b) he must know that the property was stolen; (c) the purpose or intent to prevent the owner from again possessing the property, or for the receiver's own gain, must also exist." State v. Pray, 30 Nev. 206, 94 P. 218, 221. He then asserts that the jurisdiction of the charge rests in the court of the place where the property was received. People v. Zimmer, 174 App. Div. 470, 160 N. Y. S. 459; 16 C. J. 168, § 214. We do not understand the prosecution to dispute any one of these claims except as to the correctness of the facts on which they are based. It is an admitted fact that the property was stolen from the owner in San Francisco June 1, 1929. This defendant and W. T. Davis both came from Bakersfield to San Francisco, and on July 2, 1929, they occupied adjoining rooms at Hotel Holland. On July 17, 1929, Ray Bateman telegraphed $2,300 to L. L. Bateman at San Francisco and the draft was paid on the same day. Early in July the jewelry was in Bakersfield and was from time to time either as a lot, or piece by piece, exhibited as in the hands of W. T. Davis, James Arp, Ray Bateman, or others. Each one attempted to make sales of the articles. In Ray Bateman's restaurant in October, 1929, the defendant L. L. Bateman, his son Ray, Dorris, and Smith were having breakfast. Dorris said to the defendant: "It looks like you will have to make another trip to Chicago, and if you do, take the string along, you can raise more money on that than anything we have got." Later, on January 21, 1930, Jackson and Tatham, detective sergeants on the police force in San Francisco, went to Bakersfield and called at the house of Ray Bateman, the son of this defendant. When they were admitted to the house Mrs. Bateman had on her finger a guard ring set with many diamonds. That ring had been reset by order of Ray Bateman and had one more diamond thereon than the guard ring which had been stolen from Mrs. Dinkelspiel. The detectives took possession of it, gave Mrs. Bateman a receipt therefor, and left to call on Ray Bateman. When Tatham called on Ray Bateman, he told the latter that he had just got the ring from Mrs. Bateman and that the ring had been stolen in a burglary in San Francisco. Ray Bateman made an appointment for Tatham to see the defendant. When Tatham went to the house of L. L. Bateman, Detectives Jackson and Kays and Shannon of the Bakersfield police force accompanied him. As they approached the house the screen door was locked. Attorney Dorris, who was inside with the defendant, asked if they had a warrant. Tatham said no. Then Dorris started to curse and threaten them. The defendant interrupted saying: "Let me at em; I will put nine bullets into the sons of bitches; they pulled that Hoosier on the little girl." After that incident Mrs. Wells acted as a go-between. Tatham wrote on a paper a statement that if Mrs. Wells was allowed to take the jewelry to Lloyd's appraiser, and if a satisfactory arrangement was not made, Mrs. Wells could return the jewelry and would not be arrested. In one conversation the defendant asked her to make an appointment with the detectives to take the jewelry to San Francisco, saying, at the same time: "I paid my money for this jewelry. I bought it legitimately, and I want my money out of it." Such arrangements were made by the defendant, his son, and James Arp, that the defendant and Mrs. Wells came to San Francisco. Arp shipped the jewelry by express to J. M. Sullivan. The defendant brought Mrs. Wells north, he driving a Chevrolet coupé. He took her to the house of one of his lady friends in Oakland. The next morning he called and took her to San Francisco. On arriving there he told her that he had had the jewelry forwarded by express. He asked her to go at once to see Lloyd's appraiser and then to come back to him. She did so and reported to the defendant. He then gave her the box of jewelry and told her to take it to the appraiser who would pay her $3,800 for it. Otherwise it was to be returned. Later she reported to the defendant what the appraiser said he would pay. The defendant told her to tell the appraiser to go to hell and directed her to get the jewelry and return it to him. As a part of the same conversation the defendant stated to Mrs. Wells: "It was Ray's money, he will have to be the loser. I did not have anything in it myself." Later she was instructed to collect $2,000 if she could, but otherwise to bring the jewelry back. She attempted to do so, but, as she came out of the store, she was arrested. The jewelry had been forwarded to San Francisco in a package from James Arp. It was addressed to J. M. Sullivan. When Mrs. Wells was released from jail Mr. Sullivan was present, was introduced to her by the defendant, and presented a wrist watch to her.

At the time of the trial Wm. Davis was dead. J. M. Sullivan was not called as a witness. Ray Bateman testified that in the latter part of July, 1929, W. T. Davis brought the jewelry and put it in witness' safe. Afterwards witness loaned him over $2,000. In the last part of October he was given possession of the jewelry by W. T. Davis, who said the witness could sell it and repay himself for the moneys borrowed and account to Davis for the balance of the moneys received from sales. The witness had the guard ring made over, an additional diamond put in, and gave it to his wife. In December, 1929, he traded to Arp one bracelet, one pendant watch, one string of pearls, and one jade ring. Arp testified to about the same facts regarding his trade. But he also testified that about the first of July, 1929, Wm. Davis approached him and tried to sell him some of the stolen jewelry. When Tatham and Jackson were in Bakersfield, it does not appear that any single piece of the jewelry was in the possession of the defendant. However, such agreements were made that it was arranged that the defendant and Mrs. Wells were to go, and did go, to San Francisco, and that Arp and Ray Bateman were to send, and they did send, all of the jewelry to J. M. Sullivan to be turned over to, and it was turned over to, the defendant in San Francisco. It is clear that there was some circumstantial evidence that about July 1, 1929, the defendant and Davis bought the jewelry in San Francisco. However, there was the further showing that both disposed of their interests. Later the defendant, acting for himself or for himself and others, on January 27, 1930, at San Francisco, received the stolen property. He then knew it was stolen property. He received it for the purpose of the gain of himself or of himself and those others. These facts covered all of the elements of the offense. Pen. Code, § 496; Ellison v. Com., 190 Ky. 305, 227 S. W. 458, 461, 462.

In other words the case at bar is not a case in which stolen goods have been unlawfully received by one who then takes them to another place for the purpose of selling them. People v. Zimmer, 174 App. Div. 470, 160 N. Y. S. 459. It is not so simple in its facts. There is some evidence that the defendant received the stolen goods as early as the first day of July, 1929, but he then disposed of them. Later, being pressed with criminal proceedings, he negotiated for and did again receive the same goods for the same unlawful purpose. The uncontradicted evidence is that he so received the goods in San Francisco.

[3, 4] The defendant claims that in the absence of evidence of a conspiracy, statements or conversations by third persons out of the presence of the defendant and not a part of the res gestæ are inadmissible. Conceding that such is a correct statement of the law, the point is not presented by the facts in the record. Here there was some evidence of a conspiracy, and the rule contended for has no application. The issue of conspiracy was present at all times until the jury brought in a verdict of not guilty as to the count charging conspiracy. Hence, evidence on that subject was admissible. When instructing the jury the court gave an instruction which limited the use the jury might make of the evidence of declarations and acts of the alleged conspirators. Hence there was nothing on which the defendant may predicate error on the part of the trial court in admitting the evidence.

[5] In this connection the defendant claims the verdict was contrary to the evidence. The point rests on the fact that the defendant was acquitted on the count charging conspiracy, and the defendant asserts that there is no evidence in the record proving the other count. This contention assumes there is no other evidence in the record. We think that there is and hereinabove we have stated some of that evidence. But the real point of the defendant is this. He complains that perchance the jury used and acted on the declarations of the alleged conspirators for purposes other than those stated in the instructions of the court. The record does not show that the jury did so. In the absence of some showing to the contrary, we are bound to assume the jury followed the instructions given by the court.

[6] Much of the evidence given during the trial was given by Mrs. Wells. Some statements were made in the briefs to the effect that she was an accomplice. Whether she was or was not an accomplice we need not pause to determine. Hereinabove we have set forth evidence which fully complies with the rules concerning the corroboration of an accomplice.

We find no error in the record. The judgment and order appealed from are affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

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111 Cal. App. 351

HIGGINS v. GRANT et al.

Civ. 340.

District Court of Appeal, Fourth District, California.

Jan. 26, 1931.

Rehearing Denied Feb. 17, 1931. Hearing Denied by Supreme Court March 26, 1931.

Mines and minerals ⚿109.

Measure of damages for breach of contract to drill oil well *held* not cost of completing work, where owner of prospecting permit was to give well driller lease only in event oil was discovered.

Appeal from Superior Court, Kern County; Robert B. Lambert, Judge.

Action by Fanny Higgins against J. C. Grant and another. Judgment for defendants, and plaintiff appeals.

Affirmed.

Siemon & Garber, of Bakersfield, for appellant.

Anderson & Anderson and A. G. Ritter, all of Los Angeles, for respondents.

BARNARD, P. J.

This is an action for damages for breach of contract. The plaintiff was the owner of 160 acres of land in Kern county, acquired under an agricultural patent which reserved the oil rights to the government. She was also the owner of a "Prospecting Permit" issued by the Department of the Interior, giving her the right to prospect for oil or gas on this same property. As first party, she entered into an agreement with one J. C. Grant, as second party, which agreement was later assigned by Grant to Julian Petroleum Corporation. This agreement, after reciting that the first party is the owner of the surface rights in the property, and also of a prospecting permit issued by the Secretary of the Interior, provides that the second party shall drill a well on said premises to a depth of not less than 3,000 feet, unless oil in paying commercial quantities is discovered therein at a lesser depth. In the event oil is discovered in paying quantities, the second party agrees to provide the first party with all necessary affidavits and proofs to enable her to obtain a lease to said land from the Secretary of the Interior, and the first party agrees to then obtain such a lease from the Secretary of the Interior, and assign the same to the second party. Thereafter the second party is to pay to the first party a royalty of 5 per cent of any oil and gas produced from the land.

The Julian Petroleum Corporation commenced to drill a well on the property, but, after going down 562 feet, abandoned the project. The evidence shows that the plaintiff's land was near a proven oil field, there being many producing wells about 2½ miles distant, in one direction; that about the same time at least three other wells were drilled within 1½ miles of plaintiff's land, some of them showing some oil, but none of them being put on production; that two other wells were drilled and abandoned in the neighborhood, although their distance from plaintiff's land is not set forth; and that the well begun on plaintiff's land lay between two dry holes, one of which, 1½ miles away, showed some oil, but was not put on production, while the other, known as the Miller well, one mile away, was drilled to depth of 4,360 feet, but never put on production. Two geologists expressed an opinion that oil could not be produced on plaintiff's land, although both had thought the chances were favorable at the time the contract here in question was executed. One said it took the Miller well to determine the possibilities of the plaintiff's land, and the other testified that he had changed his mind because of another drilling operation in the vicinity. It was stipulated by the parties that the cost of completing the well on plaintiff's land to depth of 3,000 feet would be $50,000. The case was submitted to the trial judge, without a jury, on this stipulation and on certain written testimony. The court found that the defendants had breached the contract by refusing to drill the well to the agreed depth, and that the cost of completing the well would be $50,000, but further found that the plaintiff had suffered no detriment from the breach of the agreement, and entered judgment for the defendants. From this judgment the plaintiff has appealed.

The appellant raises but one question, which, in the language of the brief, is thus stated: "Is the cost of doing the work the proper measure of damages for breach of this contract? If it is not, for any reason at all, whether it has been stated or not, then the judgment should be affirmed." It is argued that, the work having been fully paid for in advance, the cost of completing the well is the measure of damages. In support of this contention, appellant cites certain California cases, which we will now consider. In Taylor v. N. P. C. R. R. Co., 56 Cal. 317, the plaintiff had deeded a right of way across his land to a railroad company upon the agreement that the company should build for him a certain wagon road in lieu of another road destroyed, and should build fences on both sides of the right of way. The court held that the plaintiff had fully paid for the road and the fences, and was entitled to recover what it would cost to construct them. In Wallace v. Ah Sam, 71 Cal. 197, 12 P. 46, 48, 60 Am. Rep. 534, which involved an agreement to build certain levees to reclaim land, although the court discussed the measure of damages which ordinarily would apply for the breach of a contract to construct such an improvement, the case was decided upon the ground that the plaintiff was not entitled to recover loss of profits from a lease executed without the defendant's knowledge, after a breach of the contract had already occurred. In Fabian v. Lammers, 3 Cal. App. 109, 84 P. 432, certain parties owning adjoining lands had agreed that each would build a levee across his particular land; the entire project being to the mutual advantage of all. The plaintiffs built their part, but the defendant failed to build his. His portion being necessary to the success of the whole plan, after notice, the plaintiffs filled in the gap across the defendant's land. The court held that the plaintiffs had paid in full by building their respective portions, and that they were entitled to recover the cost of doing what the defendant had agreed to do, under the rule laid down in Taylor v. N. P. C. R. R. Co., supra. In Turner v. Howze, 28 Cal. App. 167, 151 P. 751, the defendant agreed, in connection with a subdivision proposition, to put in certain street improvements. He failed to do so, and the court held the measure of damages was the cost of doing the work. It appears that the plaintiff had fully performed, and had nothing more to do, so far as the defendant was concerned.

While appellant concedes that the rule contended for has in no California case been applied to a contract for the drilling of an oil well, she cites certain cases from other states in support of her theory that this measure of damages applies to such a contract, which cases we will now consider. In Ardizonne v. Archer, 72 Okl. 70, 178 P. 263, it was held that the measure of damages for the breach of an agreement to drill an oil well to a certain depth, under the facts and circumstances of that case, was the cost of doing the work. It appears that the plaintiff had already delivered to the defendant a lease to the land in question, and nothing remained to be done by him. The court said the situation was analogous to a contract to build a house, where the other party has been paid in advance. In U. S. F. & G. Co. v. Gray, 106 Okl. 222, 233 P. 731, the court applied the same rule, under the facts and circumstances there existing. One circumstance was that the plaintiff, before the work was begun, had executed and delivered leases of the land to the defendant, who, in turn, had sold some of them to other parties. In Okmulgee v. Baugh, 111 Okl. 203, 239 P. 900, 902, a similar rule was followed. The court said: "The object of the contract was to put down two test wells for oil and gas in 'Wildcat' territory. For this purpose the assignment of the leases were made. The defendant received full pay to put down the test wells." In Fraley v. Wilkinson, 79 Okl. 21, 191 P. 156, the court states that, where lots were deeded to the defendant in consideration of some cash and an agreement to erect a brick building thereon, in order to benefit other lots owned by the plaintiff, the measure of damages would be the cost of the building, the consideration having been fully paid. In Knupp v. Bright, 186 Pa. 181, 40 A. 414, the plaintiff agreed to assign his interest in a certain lease to the defendant, who agreed to drill an oil well on the property. The trial court instructed the jury to find for the defendant, if they found that the assignment of the lease had not been delivered, but, if they found the assignment had been delivered, they should find for the plaintiff, for the amount it would cost to do the work. On appeal, this instruction was approved. Appellant also cites Johnstown R. R Co. v. Egbert, 152 Pa. 53, 25 A. 151; Gibson v. Oliver, 158 Pa. 277, 27 A. 961; and Mollohan v. Patton, 110 Kan. 663, 202 P. 616, 205 P. 643, none of which are of assistance here; the first two being actions to recover rent agreed to be paid, and the last being an action to recover damages for failing to reconvey leased land, and definite damages were proved.

In Wallace v. Ah Sam, supra, the court states the general rule as follows: "Ordinarily, the measure of damages for the breach of a contract to construct levee, a fence, or any similar work is: (1) If payment has been made, the cost of constructing the work. (2) If payment has not been made, the excess of the cost of the work over the contract price."

Assuming, but not deciding, that the rule ordinarily applied to contracts for the construction of houses, levees, fences, etc., that the measure of damages is the cost of doing the work, is applicable to contracts for the drilling of oil wells, this rule applies only where full payment has been made in advance. If payment has not been made in advance, as pointed out in Wallace v. Ah Sam, supra, the measure of damages is the excess of the cost of the work over the contract price, or, if part of the contract price has been paid, as pointed out in 8 California Jurisprudence, 832, the measure of damages is the excess of the cost of completing the work over the unpaid portion of the contract price. It will be noted that in all of the cases relied upon by appellant, as above referred to, the full contract price had been paid by the plaintiff, and nothing remained for him to do.

The appellant here rests her entire case upon the ground that she had paid in advance all of the compensation which respondents were to receive for drilling the well, and that, under the authority of the cases cited. the measure of her damages is the cost of completing the work, the amount of which is not in dispute. Our first question then is whether appellant had, in the instant case, fully paid for the work in advance. Appellant argues, "Had she made a contract with respondents to pay a certain sum of money in cash for a well to a depth of 3000 feet, and paid them the cash in advance, there could not be the slightest doubt as to the legitimacy of the contract; and if they had thereafter failed to drill the well she could have recovered damages, and the measure of those damages would be, not the price paid, but the cost of doing the work." She also argues that the only compensation respondents were to receive for drilling the well consisted of the right given them to enter upon the land and prospect for oil—of her agreement to obtain a lease from the government after the discovery of oil, and assign the same to respondents—and of her agreement that respondents might then take all oil or gas produced on the land, after paying the government rentals and her royalty. It is argued that, by these agreements upon her part, appellant had fully paid and compensated the respondents for the work they were required to do.

There is a wide difference between agreeing to do something, and doing the same. Agreeing to pay a fixed sum for erecting a house would hardly be considered full payment in advance. Paying in advance a fixed sum for drilling a well 3,000 feet deep, as referred to in the illustration used by appellant, is quite different from agreeing that, after such a project is completed, if a certain result is obtained, payment will then be made by obtaining something from a third party, and then conveying it to the party doing the work. In each of the oil cases from other states cited by appellant, it will be observed that the court particularly points out that the plaintiff had either deeded the land or assigned a lease to the other party, in advance. In each of those cases, the plaintiff had done everything he was to do; in other words, had fully paid. In the instant case, while the appellant agreed to do certain things, these were not done in advance, and much remained for her to do. She did not even agree to compensate respondents for drilling by giving them a lease to the land. She only agreed to do this in the event certain results should be obtained. The results never having been obtained, she was neither required to, nor did she, deliver to them any such lease. If respondents had performed, and if successful results had been obtained, the contract would then have called for further compensation to them. Like an owner who agrees that, if a building is built, and if it proves successful for a certain purpose, he will secure the money from a third party and pay it to the builder, this appellant agreed that, if the well should be drilled, and should prove successful, she would obtain a lease from the government, and would assign the same to respondents, thereby compensating them for the work done. In effect, this contract provides that, if the work is not done or is unsuccessful, appellant does not have to pay, but, if it is done and is successful, she is to pay by securing and assigning to the respondents what would then be a valuable lease. This presents a different situation from the cases cited by appellant, where nothing remained to be done by the plaintiff, not even so much as a scratch of a pen, and where the defendant had received all that he was ever to receive from the plaintiff, whether the results were successful or not. We conclude that, under the facts and circumstances shown here, the appellant had not paid in advance for the drilling of this well. For the reason that the facts show that the respondents had not been fully compensated in advance for the work to be done, we think the rule contended for does not apply, and that the measure of damages in the instant case is not the cost of completing the work. If we are correct in this, under appellant's statement in raising the point, the judgment should be affirmed.

If, as appellant contends, a contract for the drilling of an oil well comes under the same rules of law as govern building and construction contracts, then, under those rules, as above stated, the measure of damages in the instant case would be the excess of the cost of completing the work, over the unpaid portion of the purchase price. While the cost of completing the work mentioned was stipulated to by the parties and found by the court, the record contains no evidence from which a court could determine what portion of the contract price remained unpaid. There is no evidence as to what was the value of the right presently given by the contract in question, being the part of the compensation paid in advance, nor what was the value of the lease to be secured and assigned to respondents, being the portion that was not paid in advance. And this last item would vary according to whether or not the results were successful. The apparent difficulty of securing such evidence is indicative of the speculative nature of this undertaking. Not only was there no evidence before the court to justify an award of damages upon that basis, but the appellant recognizes how any such element of damages, under the circumstances of this case, would run into the speculative, uncertain, and remote, when, after discussing the general matter of damages, she says: "The foregoing considerations, and other rules not especially noticed, exclude every other measure except cost of drilling." For that reason, apparently appellant's entire case has been based, both at the trial and upon this appeal, on the theory that the measure of damages contended for was and is applicable to the facts of this case. Whether or not any damages could have been shown by appellant, in the absence of a provision in the contract providing for liquidated damages, nothing appears in the facts before the trial court, as shown by the bill of exceptions, which would have justified other than nominal damages. Not only should the case not be reversed because of the failure of the trial court to find in favor of the plaintiff for nominal damages only (Liljefelt v. Blum, 33 Cal. App. 721, 166 P. 384) but appellant, in her statement above quoted, has waived any such reversal.

For the reasons herein stated, the judgment is affirmed.

We concur: MARKS, J.; JENNINGS, J.

111 Cal. App. 318

WARREN et al. v. HILTSCHER et al.

Civ. 7718.

District Court of Appeal, First District, Division 2, California.

Jan. 26, 1931.

1. Evidence 🔑376(1).

Rule as to laying foundation for admission in evidence of account books stated.

> In order to lay the foundation for the admission of such evidence, it must be shown that the books in question are books of account kept in the regular course of the business; that the business is of a character in which it is proper or customary to keep such books; that the entries were either original entries or the first permanent entries of the transactions; that they were made at the time, or within reasonable proximity to the time, of the respective transactions; and that the persons making them had personal knowledge of the transactions, or obtained such knowledge from a report regularly made to them by some other person employed in the business whose duty it was to make the same in the regular course of business.

2. Evidence 🔑354(22).

Account book, in which deceased contractor kept record of workers' time *held* properly admitted to account for expenditure of builder's payments to contractor.

> There was evidence to show the account book, or time book, was used by the contractor to enter time reports as given him by his foreman. The foreman identified it, and the handwriting in it, and testified he saw the contractor at various times enter time reports in the book, which he carried continuously. In addition, all the names, together with the amounts credited them, tallied when compared to canceled checks issued to all the workmen.

3. Evidence 🔑355(7).

Minute or memorandum, made at time when fact it records took place, by person since deceased, in ordinary course of business, corroborated by other circumstances, is admissible in evidence.

Appeal from Superior Court, Los Angeles County; Caryl M. Sheldon, Judge.

Action by Hiram Warren, as administrator with will annexed of the estate of James E. Dawson, deceased, and another, against John F. Hiltscher and another. Judgment for plaintiffs, and defendants appeal.

Affirmed.

A. E. McManus, of Los Angeles, for appellants.

George S. Hupp and Ben F. Gray, both of Los Angeles, for respondents.

BURROUGHS, Justice pro tem.

The plaintiff Hiram Warren is the administrator with the will annexed of the estate of James E. Dawson, deceased. The plaintiff Minnie L. Engle is the executrix of the last will and testament of Bertha Dawson, deceased. The plaintiffs, acting in their representative capacity as aforesaid, commenced this action to recover from the defendants certain commissions alleged to be due on a contract of employment made and executed between the defendants and James E. Dawson. The court rendered judgment in favor of the plaintiffs, and the defendants appeal therefrom.

[1, 2] This appeal is based upon the claim that the admission in evidence of the book of account, called the "time book," was reversible error, that it should have been excluded, and that without it there was no evidence upon which the court could predicate its findings.

It is undisputed that the defendants entered into a written contract with said Dawson. By its terms the defendants employed Dawson to construct a certain building, and for such services he was to receive as compensation 10 per cent. of the cost of construction, the same to be paid upon completion of the building. Acting under said contract, Dawson constructed the building at a cost of $50,372.80, and he thereby became entitled to a commission of $5,037.28. During the course of the construction of said building, the defendants paid to Dawson $12,312.90, which sum, according to the time book received in evidence, was accounted for by payments for labor and material used in said building. A balance of $2,128.25 was found to be due the plaintiffs. This sum, together with interest allowed by the court, made a total of $2,434.80, the amount for which judgment was rendered. Appellants, as heretofore stated, claim that the time book was not properly proved so as to entitle it to admission in evidence. The rule governing the admission in evidence of books of account is clearly stated in Chan Kiu Sing v. Gordon, 171 Cal. 28, 151 P. 657, where it is held that, "in order to lay the foundation for the admission of such evidence it must be shown that the books in question are books of account kept in the regular course of the business; that the business is of a character in which it is proper or customary to keep such books; that the entries were either original entries or the first permanent entries of the transactions; that they were made at the time, or within reasonable proximity to the time, of the respective transactions; and that the persons making them had personal knowledge of the transactions, or obtained such knowledge from a report regularly made to him by some other person employed in the business whose duty it was to make the same in the regular course of business. 1 Elliott on Evidence, §§ 458 to 463, inclusive; 2 Wigmore on Evidence, § 1554; 2 Jones on Evidence, § 322."

To establish the authenticity of the time book, the respondents called as a witness Lester A. Daniels, who testified that he was the foreman of the carpenters who worked on the job, and that it was his duty to see that all the men were at work; that he kept the time of the men and gave it to Mr. Dawson; that he generally checked up the time each Saturday morning; that whenever he gave the time to Mr. Dawson the latter would enter it in his time book; that he (Mr. Dawson) carried the time book continuously; that sometimes the witness would pay off the men and sometimes they were paid by Dawson; that they were paid by check. The witness was then shown the time book and asked if he had ever seen it before, to which he replied: "I have, I would say it was this time book that Mr. Dawson carried with him continuously." The witness also testified that he was familiar with the handwriting of Dawson at the time of the transaction. The witness was further asked the following questions and gave the following replies:

"Q. Now examine that book and state whether or not you can say that is Mr. Dawson's handwriting or not? A. It is like I said before, I would say yes.

"Q. That is your best? A. That is the best of my knowledge. I would say that handwriting resembled Mr. Dawson's handwriting enough—I would say it was Mr. Dawson's handwriting."

The witness also identified the book by certain peculiarities in Dawson's handwriting; also by the personal account of the witness appearing in the book. On cross-examination the witness admitted that he "couldn't absolutely identify that book, as the book," and he made some similar expressions which threw some possible or imaginary doubt upon his identification of the book.

It is further claimed by the appellant that the items for painting were not in any manner identified. On this subject the witness Daniels testified that he knew that some money was paid to the painters on the job; that he saw Mr. Dawson give them a check, but did not know the amounts due them; that Dawson kept the entire—that the book he carried kept the entire time of all. The witness also said: "I know he kept the time of everything in the book that he carried * * * because I saw him putting the time down." The witness admitted he did not always see him put it down, but that he kept the time in that one book; that he did not know whether the time of the painters was correct, because the witness did not write it down himself; he did know some of the painters whose names appeared in the book. In addition to the foregoing, all of the names together with the amounts thereof were compared with the canceled checks issued to all of the workmen, and they tallied. In 10 Ruling Case Law, p. 1175, it is said: "The admissibility of books of account, is in the first instance a question for the court, to be determined upon the preliminary proof made as required either at common law or by statute." In the instant case the court held the time book admissible, and we think the ruling was correct.

[3] In Jones on Evidence, § 323, the rule is stated that: "It has long been a settled rule of law both in England and in this country that a minute or memorandum in writing made at the time when the fact it records took place by a person since deceased, in the ordinary course of business corroborated by other circumstances which render it probable that the fact occurred is admissible in evidence." In Austin v. Wilcoxson, 149 Cal. 24, 31, 84 P. 417, 419, it was claimed the court erred in admitting in evidence the cashbook and two ledgers kept by the deceased, but it was shown that the books were kept in the regular course of business, the entries were contemporaneous with the facts they represented, and they were in the handwriting of the deceased. The court said: "It may not be doubted that the books were admissible in evidence."

Section 1946 of the Code of Civil Procedure declares that such entries may be read as prima facie evidence of the facts stated therein. We believe the book was properly received in evidence. No other point is presented for a reversal of the judgment.

It follows that the judgment must be affirmed, and it is so ordered.

We concur: NOURSE, P. J.; STURTEVANT, J.

111 Cal. App. 346

RASMUSSEN v. PACIFIC FRUIT EXCHANGE et al.

Civ. 282.

District Court of Appeal, Fourth District, California.

Jan. 26, 1931.

Rehearing Denied Feb. 17, 1931. Hearing Denied by Supreme Court March 26, 1931.

1. Appeal and error 🔑989.

Evidence most favorable to prevailing party, if sufficient to sustain judgment, is conclusive on appeal.

2. Appeal and error 🔑1002.

That verdict and judgment are based on conflicting evidence does not alone justify reversal.

3. Customs and usages 🔑17.

Under testimony that contracts, guaranteeing minimum price to sellers, required factor to sell grapes for cash f. o. b. California loading points, evidence of alleged trade custom to consign grapes to eastern markets for sale at auction *held* inadmissible.

4. Factors 🔑30.

Evidence showed that factor guaranteed, but failed to pay, certain minimum price for grapes, justifying recovery by sellers.

Appeal from Superior Court, Fresno County; Denver S. Church, Judge.

Action by H. Rasmussen against the Pacific Fruit Exchange, a corporation, with a cross-complaint by defendant against plaintiff and others. From an adverse judgment, defendant appeals.

Affirmed.

G. L. Aynesworth and L. N. Barber, both of Fresno, for appellant.

N. Lindsay South, of Fresno, for respondents.

MARKS, J.

The complaint in this action contains eleven separate causes of action. Plaintiff and his father, M. Rasmussen, were engaged in the joint enterprise of raising Thompson seedless grapes for market. M. Rasmussen and ten others assigned their causes of action against the defendant corporation to the plaintiff, who thereupon brought suit against defendant upon his own and the assigned causes of action. Except for the several amounts of grapes delivered, and the several amounts of indebtedness claimed, the causes of action are identical.

It is alleged by plaintiff that on or about the 5th day of July, 1928, defendant entered into a verbal contract with plaintiff and M. Rasmussen whereby they agreed to deliver to defendant Thompson seedless grapes, and defendant agreed to pack and sell said grapes, f. o. b. Miley, Cal., guaranteeing to the growers the sum of $1.10, less 46 cents charges, for the grapes so delivered; that 861 crates were delivered to defendant at said price; that a few days later defendant entered into another and similar agreement with plaintiff and M. Rasmussen whereby they agreed to deliver Thompson seedless grapes to defendant and defendant agreed to pack and sell the same f. o. b. Miley, California, guaranteeing the sum of 90 cents a crate, less 45 cents packing and other charges; that 204 crates were delivered under the terms of this contract; that defendant accepted the delivery of the grapes and advanced plaintiff and his father $238.30 on account thereof, leaving a balance due and unpaid in the sum of $864.86.

Defendant denied the guaranty of a fixed price for the grapes, and alleged that they were delivered to it as brokers to sell for the growers upon a commission basis. Defendant further alleged that at the time of making the contract with plaintiff and his assignors it had the grapes sold f. o. b. points of loading, but that the prospective purchasers rejected them, forcing defendant to send the grapes to, and sell them at, auction. It is admitted that this was done without the knowledge or consent of plaintiff and his assignors. Defendant pleads a custom of the trade in justification of such action on its part. The grapes did not sell for sufficient money to pay the advances made by defendant and costs of packing, shipping, inspection, and sale.

Defendant filed a cross-complaint to recover its losses from the cross-defendants. The case was tried before a jury which returned a verdict in favor of plaintiff and against defendant on its cross-complaint. Judgment was entered for the plaintiff, and the defendant and cross-complainant has prosecuted this appeal.

The sole point made by defendant and cross-complainant, and upon which it relies for a reversal of the judgment, is that the evidence does not sustain the judgment, in that it does not show any guaranty on the part of the defendant and cross-complainant that the plaintiff and his assignors would receive the sums claimed by them, and, further, that the evidence shows that defendant had the right, by a custom of the trade which constituted a part of its contracts, to ship the grapes to auction and sell them for the best price obtainable after they had been rejected at the California loading points, and charge the losses resulting therefrom to the sellers.

[1, 2] As the sole question on this appeal is whether or not the evidence sustains the judgment, it will only be necessary for us to set

forth a synopsis of the evidence most favorable to plaintiff and cross-defendants. If such evidence is sufficient to sustain the judgment, it is binding and conclusive upon this court. We cannot set aside the verdict of the jury and reverse the judgment because the evidence is conflicting.

[3] Plaintiff and his father were both called as witnesses to their contracts with defendant. It appears that the contracts were oral and were made with the authorized agents of defendant. They testified that the agents promised to receive their grapes, and guaranteed that the growers would receive $1.10 per crate, less charges thereon amounting to 46 cents. The manager of defendant gave M. Rasmussen the following memorandum: $1.10 f. o. b. 35 cents packing and 11 commission, 46, and deduct from $1.10 leaving 64 cents net." There was a second agreement under which additional grapes were delivered by plaintiff and his father to defendant and under which defendant promised to sell the grapes f. o. b. Miley, Cal., and guaranteed that the growers would receive 90 cents a crate less 45 cents charges of packing and sale. Plaintiff and his father were positive in stating that defendant guaranteed these prices to them; that the grapes were to be sold f. o. b. Miley, Cal., and were to be paid for in cash at the shipping point, and that the grapes were subject to state and county inspection only, which they passed. The testimony of all the other growers was substantially to the same effect except as to the loading points. Two witnesses added the detail that defendant promised to pay for the grapes as soon as they were loaded on the cars.

All of the growers had had considerable unfortunate experience in former seasons in consigning grapes to eastern auction markets through brokers. All refused to consign the grapes in question and insisted that defendant sell them for cash f. o. b. California loading points. None of the growers knew that defendant had shipped the grapes on consignment to eastern auction markets until all of them had been sold there.

Under this testimony, the custom of the trade relied upon by defendant is not applicable. Instances in which customs of the trade may be considered as a part of contracts are clearly set forth in 6 California Jurisprudence, 315, as follows: "Parties who contract on a subject matter concerning which known usages prevail, by implication incorporate them into their agreements, if nothing is said to the contrary. Evidence may be given of usage to explain the true character of a contract or instrument, where such true character is not otherwise plain. In such case usage is an instrument of interpretation. The rule has also been stated as follows: 'Evidence of usage is admitted to annex incidents to contracts where it is apparent that the parties have omitted to state important parts of their agreements, and the incident so annexed is consistent with the express terms and its inclusion can fairly be presumed to have been intended by the parties.' But usage is admissible only as an instrument of interpretation. Usage should not be regarded at all, unless it be of such a character as may be supposed to have influenced parties; and none can be ordinarily presumed to do this, but such as is public and continued. A usage, of course, cannot be given in evidence to relieve a party from his express stipulation, or to vary a contract certain in its terms. It has been said that the gate to a limitless field for the exercise of chicanery and deceit would be opened if parties were permitted to nullify a contract by evidence of a custom at variance with its terms."

In the instant case the contracts were definite and contained the distinct agreement that the grapes were to be sold f. o. b. California loading points, subject only to state and county inspection. These contracts would by their terms exclude the purchasers from consigning the grapes to auction without the consent of the growers.

The case of Glantz v. Freedman, 100 Cal. App. 611, 280 P. 704, presents a state of facts almost identical with the one which we are considering. In the Glantz Case the court went further than we are required to go in the instant case. It held that the plaintiff could sue the defendant for the reasonable value of his grapes instead of basing his suit upon a guaranteed price. It was held there that the principal may treat the unauthorized sale of his property by a broker as a conversion of the goods. We think that the evidence in the instant case will bring it within the rule of the Glantz Case.

[4] Plaintiff and his assignors delivered their grapes to defendant to be sold by it f. o. b. California loading points subject only to state and county inspection. Defendant guaranteed plaintiff and his assignors minimum cash returns for these grapes. Defendant did not sell the grapes f. o. b. California loading points, but consigned them to itself at eastern markets. It was not authorized to do this. Under the express terms of its contracts it therefore becomes liable to plaintiff and his assignors for the minimum price it guaranteed for the grapes. The record amply supports the judgment.

Judgment affirmed.

We concur: BARNARD, P. J., JENNINGS, J.

111 Cal. App. 327

BUFFUMS' v. CITY OF LONG BEACH.

Civ. 4233.

District Court of Appeal, Third District, California.
Jan. 26, 1931.

1. **Municipal corporations** ⚷845(4).

In action for damages caused by bursting of water main, evidence that city controlled main and that ordinarily main would not have bursted, under proper care, established prima facie case.

2. **Appeal and error** ⚷1011(1).

Findings of court could not be disturbed on appeal, where evidence was conflicting.

Appeal from Superior Court, Los Angeles County; Wilber F. Downs, Judge.

Action by Buffums', a corporation, against the City of Long Beach. Judgment for plaintiff, and defendant appeals.

Affirmed.

Nowland M. Reid and George W. Trammell, Jr., both of Long Beach, for appellant.

Denio, Hart, Taubman & Simpson, of Long Beach, for respondent.

Mr. Justice Pro Tem. **JAMISON** delivered the opinion of the court.

This is an action for damages caused by the breaking of appellant's water main, thereby flooding the basement of respondent's building and causing loss and injury to said building and to the property of respondent contained therein.

Briefly stated, the facts are as follows: During the years 1923 and 1924 appellant was supplying water to the city of Long Beach, and for that purpose was maintaining an eight-inch water main in the alley in the rear of respondent's building, through which it distributed water to its consumers. On the 27th of April, 1924, there was a breach in said water main from which a large volume of water found its way into respondent's building, causing damage to the basement of said building and to the property contained therein. Some time prior to the break a connection had been made with the main in said alley at a point behind respondent's building, and it was at this place that the break occurred.

Appellant admitted by its answer that it had the management and control of the said main and caused to flow through it a great quantity of water under high pressure.

At the trial of the case respondent produced proof of the breaking of the main and the resultant flooding of its building and damage to its property therefrom, and that a break of this character does not occur in the usual course of things, if those having the management thereof use proper care, and upon this proof rested its case. Appellant then moved the court to grant a nonsuit upon the ground that respondent had not made out a case, that it had failed to show that appellant was negligent, but, upon the contrary, had shown that respondent was guilty of contributory negligence. The motion was denied by the court, and appellant then produced evidence tending to show absence of negligence on its part and contributory negligence upon the part of respondent. Thereupon respondent produced evidence in rebuttal tending to prove affirmative negligence on the part of appellant.

[1] The appellant claims that the court erred in denying its motion for a nonsuit, for the reason that, when respondent rested its case, the only evidence of appellant's negligence was the presumption of negligence arising from the doctrine of res ipsa loquitur, and that the facts proven in this case in no wise warranted the application of this doctrine.

R. L. Wentz testified that he examined the building and premises of respondent the morning after its flooding and found that the water which entered the building came from a break in this main.

Clark H. Shaw, appellant's chief engineer of its water department, testified that there was an eight-inch main, owned and managed by appellant, located in the alley in question, and that in his opinion a water main of the kind and character of this would not, with proper care and management, in the ordinary course of events, break or burst. In a recent case decided by our Supreme Court, that of Michener v. Hutton, 203 Cal. 604, 265 P. 238, 239, 59 A. L. R. 480, the court said: "The courts of this state have long since adopted the rule as expressed in 1 Shearman and Redfield on Negligence (6th Ed.) p. 132, viz.: 'Where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of proper care'"—citing O'Connor v. Mennie, 169 Cal. 217, 223, 146 P. 674, and many other decisions of the Supreme Court. The case of Esberg-Gunst Cigar Co. v. City of Portland, 34 Or. 282, 55 P. 961, 43 L. R. A. 435, 75 Am. St. Rep. 651, cited by respondent in its brief, the facts are similar to those in the instant case. That was an action for damages caused by the bursting of a water main belonging to the city of Portland and managed and controlled by it. The

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

court held that, it being shown that the main was under the management of the city and that the accident is such as, in the ordinary cause of things, does not happen, if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from a want of care.

In the case now under consideration, the things which contributed to the accident, that is to say, the water which entered respondent's building and the main which broke, permitting water to escape therefrom, were both managed and controlled by appellant.

Appellant's chief engineer, who by reason of his official duties was familiar with this main and of its construction, testified that, in the ordinary course of things, the main would not have burst, if those having management of it used proper care.

We are of the opinion that the evidence produced by respondent established a prima facie case, and that the trial court did not err in denying the motion for a nonsuit.

Appellant next contends that the evidence shows that the accident was entirely owing to the negligence of respondent. During the year 1923, respondent had a building under construction which adjoined its old building and which abutted upon the alley in which the said main was located; said main being about five feet from the west wall of said building. Appellant produced testimony to the effect that, in preparing the foundation and basement for the said building, respondent made an excavation, some forty feet in depth, that said excavation caused a part of the alley in which the main was located to cave in, leaving the main without support, and that by reason thereof the weight of the main caused it to sag down, and that this sagging produced the break and consequent flooding of respondent's building.

The evidence shows that a connection was made with the main, according to appellant's witnesses in October, 1923, but respondents' witnesses testified it was done about two months preceding the break, and that at the point where this connection was made the break occurred, and that this connection was made by the insertion of a T pipe in the main, that in inserting a T pipe in a main it is necessary to cut the main at a joint and place the T in the cut place, caulking one end of the T into the main; the other end being made a part of the main by placing a sleeve over the cut end of the main and the end of the T and caulking it in. This sleeve was about sixteen inches in length and was cast iron and was cut from a piece of pipe with a cold chisel and sledge. This connection was made at a point in the alley opposite the south corner of the old building and at the north corner of the new building, and was made for the purpose of conducting water into the new building.

Respondent produced evidence to the effect that, for the purpose of installing this connection, the employees of appellant dug a ditch ten feet long, four feet wide, and two feet below the main; that the ground where this ditch was dug was solid, and that, when the ditch was filled, the dirt was thrown back loosely and was not tamped down under the main and rendered solid so as to furnish support for the main, and the leakage from the main softened the loose earth underneath the main and caused it to sag and break; that a main with a sleeve is stronger than the joints in a main unless the sleeve is defective, and that a sagging pipe will pull out at the joint before the sleeve will give way, if the sleeve is properly made; that only a practiced workman can cut a sleeve without cracking it; that there were five joints exposed when this break occurred and none of them had pulled out.

There is no evidence indicating which one of appellant's employees cut this sleeve, but the foreman who superintended the putting in of the sleeve testified that it was not defective or cracked. A piece of the sleeve was seen by one of appellant's employees after the accident, and he testified that it split lengthwise.

On rebuttal R. L. Wertz, a witness for respondent, the superintendent of construction of respondent's building, testified that he had full charge of the work done in the construction of the building; that when the excavation for the foundation and basement reached a depth of eighteen or twenty feet, a sluffing off of the ground next to the alley took place; that this sluffing extended over a distance of twenty-five or thirty feet, extending into the alley from a minimum distance to three and one-half feet; that he immediately shored up the alley where the sluffing occurred and then back-filled to keep the alignment intact. This witness further testified that the cause of the sluffing of the dirt from the alley resulted from moist condition of the ground produced by leaks from the main. When the wall of the building next to the alley was completed, the shoring was removed and the space where the sluf had taken place was back-filled and tamped so that the surface of that part which was back-filled was slightly above other portions of the surface of the alley; that this back-filling was done more than a year before the break in the main.

There was evidence on the part of respondent that on several occasions appellant was notified that its said main was leaking, and at said times it had its employees repair the main.

The court found, in substance, that the main leaked and caused the soil to become soft and left the main without support, so that it sagged and settled, and by reason thereof, broke and permitted water therefrom to escape to respondent's damage; that appellant had full knowledge of the dangerous condition of said main, and, having such knowledge, permitted it to remain in that condition until the break occurred; that the appellant was guilty of negligence in using defective material and making the connection and in failing to properly repair and support the main and that this negligence was the proximate cause of the breaking of the main; and that the respondent was not guilty of negligence.

Respondent's proof that the breaking of the main was caused under circumstances which raised the presumption of negligence on the part of appellant can only be counteracted by proof on the part of appellant that it in no wise had been guilty of negligence. This the appellant endeavored to do by proof that the break was caused by the removal of the supporting earth from the main in making the excavation for respondent's building.

In refutation of this evidence, the respondent, in rebuttal, produced evidence to the effect that more than one year before the break it had replaced and tamped the earth which had broken away from the alley at the time of the excavation, and that the withdrawal of the supporting earth from the main was done by appellant's employees in making repairs on said main and repairing leaks therein.

In this connection, it was said by the Supreme Court, in Michener v. Hutton, 203 Cal. 604, 265 P. 238, 240, 59 A. L. R. 480, that "it is for the jury, or for the court when sitting without a jury, to determine from all the evidence in the case whether the defendant has successfully met and rebutted the prima facie case made out by the plaintiff in an action wherein the mere proof of the happening of the accident and the circumstances surrounding it give rise to an inference of negligence. That the inference of negligence created by the application of the doctrine of res ipsa loquitur constitutes evidence which may not be disregarded by the jury, but is to be weighed and considered as against the evidence adduced by the defendant in rebuttal thereof, has been announced in numerous cases." Further along in this same decision the Supreme Court quotes with approval the following words used in the opinion rendered in the case of Travers v. Murray, 87 App. Div. 552, 84 N. Y. S. 558, where, after stating that the mere fall of a chimney was sufficient to give rise to an inference of negligence, the court held such inference "alone is enough to sustain the verdict, even in face of the attempted explanation on the part of the defendant."

[2] The respondent, in the case now under consideration, having established a prima facie case of negligence on the part of appellant, it then became the duty of the appellant to rebut that presumption by evidence showing that it exercised the requisite degree of care and that it was not negligent. There is a decided conflict between the evidence produced by the appellant to the effect that the break in the main was without its fault and the rebutting evidence of respondent to the contrary. There is substantial evidence that it was due to the negligence of appellant that the main broke. Such being the case, the findings of the court cannot be disturbed. 2 Cal. Jur. 921.

Appellant devotes considerable space of his rather voluminous brief to a discussion of the relative rights of coterminous landowners.

In view of the decision we have reached, we think it unnecessary to give consideration to those matters.

The judgment is affirmed.

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111 Cal. App. 841

McMURRY v. PACIFIC READY-CUT HOMES, Inc., et al.

Civ. 167.

District Court of Appeal, Fourth District, California.

Jan. 26, 1931.

1. Principal and agent ⚷14(2).

Act or omission on part of alleged principal is necessary to create liability on theory of ostensible agency (Civ. Code, § 2300).

2. Principal and agent ⚷23(5).

Evidence *held* insufficient to sustain finding that contractors were ostensible agents of lumber manufacturing concern in entering into building contract (Civ. Code, § 2300).

Appeal from Superior Court, Inyo County; Wm. D. Dehy, Judge.

Action by Henry H. McMurry against the Pacific Ready-Cut Homes, Inc., and others, wherein Jessie F. McMurry, as administratrix, was substituted as plaintiff in place and stead of original plaintiff who had died before trial. Judgment for plaintiff, and defendant named appeals.

Reversed.

Hubert Starr, of Los Angeles, for appellant.

Jess G. Sutliff, of Independence, for plaintiff-respondent.

MARKS, J.

This action was brought by Henry H. McMurry to recover damages against defendants for breach of contract. After the action was instituted, and before the trial, he died, and Jessie M. McMurry, the administratrix of his estate, was substituted as plaintiff in his place and stead.

The contract upon which the action is based was entered into by Henry H. McMurry and Jessie F. McMurry, his wife, with Frey & McIntyre for the construction of a house at Big Pine in Inyo county. Frey & McIntyre abandoned the contract, and McMurry completed it. Plaintiff claims $740.88 damages, as money expended in completing the house over and above the contract price, and $300 special damages for its rental value for the period of the delay in construction. A judgment was entered against all defendants for the damages prayed for.

Appellant presents several assignments of error upon which it relies for a reversal of the judgment. Under the view we take of the case it will be necessary for us to consider but one of them. The court found that Frey & McIntyre were the ostensible agents of appellant in entering into the contract with deceased and his wife. If the evidence fails to support this finding, the judgment must be reversed.

Section 2300 of the Civil Code provides as follows: "An agency is ostensible when the principal intentionally, or by want of ordinary care, causes a third person to believe another to be his agent who is not really employed by him."

In 1 California Jurisprudence, at page 739, the elements essential to the creation of an ostensible agency are clearly set forth as follows: "There are two essential features of an ostensible authority, viz., the third person must believe that the agent had authority, and such belief must be generated by some act or neglect of the person to be held. To state the same requirements in different terms and in reverse order, there must be some intentional conduct or neglect on the part of the alleged principal creating a belief in the minds of third persons that an agency exists, and a reasonable reliance thereon by such third persons. Attention will be given in the following sections to the rules that the third person must believe that the agent possessed the authority assumed, and that this belief must have arisen by reason of the acts and declarations of the principal, recognizing the authority of the agent in similar previous transactions. In addition to these more important elements, there is a further requirement that the third person, in relying on the agent's apparent authority, must not have been guilty of negligence."

In the case of Pacific Ready-Cut Homes, Inc., v. Seeber, 205 Cal. 690, 272 P. 579, 581, the court said: "All parties to this controversy concede that it is settled law that ostensible agency cannot be created alone by the representations of the purported agent himself, but that there must be some act or conduct on the part of the principal by which he either intentionally or by want of ordinary care causes or allows a third person to believe that the agent possesses the authority to bind him as principal (Civ. Code, §§ 2300, 2317, 2334)."

[1] From these rules of law it is apparent that in this case there would have to have been some act or omission on the part of Pacific Ready-Cut Homes, Inc., to make Frey & McIntyre its ostensible agents. The evidence fails to disclose any intentional act on the part of appellant by which respondent and her husband could have been led to believe that this relation existed. If the ostensible agency existed, its source must be found in some neglect of duty or want of ordinary care on the part of appellant.

[2] Appellant was a manufacturing concern, with its principal place of business in the city of Los Angeles. It cut and prepared lumber for buildings at its factory, and delivered the material at the building sites ready to be placed in the structure. It had entered into a contract with E. R. Frey whereby he became an independent contractor for the use of such materials in the construction of buildings in Inyo county.

Respondent and her husband desired to erect a home in Big Pine. Douglas Joseph, one of their neighbors, had written a letter to appellant stating his desire to erect a dwelling, and had received a reply in which he referred to Frey as "our Builder who is maintaining a complete building service for Pacific Ready-Cut Homes, in your territory." Joseph informed deceased of this communication, and deceased and his wife got into communication with Frey. R. K. McIntyre, Frey's partner, called upon them in Big Pine, and left with them a pamphlet issued by appellant describing its mode of operation, and containing plans, specifications, and pictures of a large number of houses. In the center of one of the pages of this pamphlet, in a type distinctive from the other type on the page, and surrounded by brackets, appeared the following:

"Construction Service Outside of
Los Angeles

"If your home is to be built distant from Los Angeles, outside of the traveling radius of our crews, arrangements can be made with nearest builder of Pacific Homes (name on request) to assume the responsibility."

The evidence shows that the pamphlet given to respondent and deceased by McIntyre was placed upon many news stands and in bookstores for sale, and was in many free libraries.

Negotiations resulted in a written contract bearing date the 22d day of May, 1928, "between Frey & McIntyre, contractor, and Henry H. McMurry, buyer, address, Big Pine, California." It was also signed by Jessie F. McMurry as buyer, though her name did not appear in the body of the agreement. The parts of this contract material here are as follows:

"That as between the parties to this agreement, and any assignee or successor in interest of either or both parties, said R-C building and equipment shall be regarded as personal property, and title to same and the right to immediate possession of same without any writ, process or order of any court, shall remain in aforesaid contractor, until the entire purchase price has been paid. * * *

"All orders are taken subject to approval of and acknowledgment by the company.

"The initial payment received under the terms of this contract is to be applied on account of preparing sketches, estimates on building, and general office charges of the contractor. Upon commencement of building operations the initial payment is to be applied on account of the purchase price as specified in said contract, the sketches, estimates, etc., to remain the property of the corporation."

On May 31, 1928, respondent and deceased made a payment of $2,288 by check payable to Pacific Ready-Cut Homes, Inc. This check bears the indorsement of the corporation, and was paid on July 26, 1928. The second payment was made in the sum of $1,095, and was by check payable to Pacific Ready-Cut Homes. It bore the indorsement "Pacific Ready-Cut Homes by R. K. McIntyre." On August 29, 1928, a third payment was made in the sum of $1,100 by a check payable to Frey & McIntyre, and indorsed by them. Another check in the sum of $587 was drawn in favor of Pacific Ready-Cut Homes, Inc. It was indorsed "Pacific Ready-Cut Homes by Frey & McIntyre." Appellant had no knowledge of the issuance or payment of any of these checks except the first.

Rafael Rossi testified that he had written appellant concerning the building of some houses for him, and had been called upon by Frey in reply to his letter. It does not appear that either respondent or deceased had any knowledge of this transaction prior to the completion of their home.

We have summarized all of the evidence in the record upon which respondent must rely to support the finding of ostensible agency. We believe that this evidence fails to support such a finding. Under the terms of the contract, appellant was entitled to receive and retain the money obtained on the first check issued by respondent and deceased. It had no knowledge of the other checks, and therefore could not be bound by their issuance. While the form of the contract between respondent and her deceased husband and the contractors was furnished to Frey by appellant, its name did not appear therein, and under its terms respondent and her husband were dealing with Frey & McIntyre as their contractors. In the letter from appellant to Joseph, Frey was referred to as a builder and not as the agent or other representative of Pacific Ready-Cut Homes, Inc. We find from these facts no evidence of a neglect or omission to perform a duty on the part of appellant upon which respondent and her deceased husband could have relied to establish an ostensible agency on the part of Frey & McIntyre or either of them.

Judgment reversed.

We concur: BARNARD, P. J.; JENNINGS, J.

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111 Cal. App. 322

ANDERSON v. SCRANTON et al., Board of Trustees.

Civ. 6098.

District Court of Appeal, Second District, Division 1, California.

Jan. 26, 1931.

1. Mandamus ⚷168(4).

Evidence showed that permanent school teacher was discharged without hearing or statutory cause, justifying writ of mandate for reinstatement (Pol. Code, § 1609).

> There was no evidence that it had become necessary to decrease number of permanent teachers on account of decrease in number of pupils, or on account of discontinuance of particular kind of teaching service, which would have authorized discharge of teacher in view of Pol. Code, § 1609, which was in force at time cause of action arose.

2. Schools and school districts ⚷141(6).

That permanent school teacher, discharged without statutory cause, failed to protest until after trustees' employed new teacher, did not estop him to assert statutory rights (Pol. Code, § 1609).

Appeal from Superior Court, Los Angeles County; Hugh J. Crawford, Judge.

Petition by John F. Anderson for a writ of mandate against Charles G. Scranton and others, to compel respondents, as the Board of Trustees of the Lugo Elementary School District, to reinstate petitioner as a school teacher. The trial court granted a peremptory writ, and respondents appeal.

Affirmed.

Everett W. Mattoon, Co. Counsel, and Gordon Boller, Deputy Co. Counsel, both of Los Angeles, for appellants.

Fall & Fall, of Los Angeles, for respondent.

CONREY, P. J.

[1] Respondent by his petition alleged facts showing that he had been first employed as a probationary teacher of the elementary grades in Lugo elementary school district and had continued in that employment from the 7th day of August, 1924, until May 31, 1926, when he was re-employed as a permanent teacher for the next ensuing school year, to wit, September 13, 1926, to June, 1927, and under this employment did teach in this school throughout the school year. Petitioner further alleged that by virtue of the facts above stated, and by virtue of the laws of the state of California and particularly section 1609 of the Political Code, commonly known as the Teachers' Tenure Law, he became and was a permanent teacher in said Lugo school district, and by virtue thereof, was deemed employed in said district until legally discharged or resigned. The foregoing facts are not only alleged but are conceded to be true.

Petitioner further alleged facts which in substance are to the effect that on May 26, 1927, the board of trustees, without the presentation of any charges against him in relation to any of the matters set forth in section 1609 of the Political Code, and without any public hearing or any opportunity to be heard, attempted to discharge him from service and by its secretary notified him in writing as follows: "At a meeting of the Board of Trustees of the Lugo School Dist. on May 26, 1927, the Secretary was ordered to express the appreciation of the Board for your past work and to inform you that your services for the coming year would not be needed as it is found necessary to obtain some one who can handle the physical education as well as the sloyd work."

Petitioner further alleged that he has not resigned from his said employment, nor has the board of trustees found it necessary to decrease the number of permanent teachers employed by the school district on account of the decrease of the number of pupils attending, nor on account of the discontinuance of the particular kind of teaching service such as petitioner was engaged in in said district. The last-mentioned negative statements have relation to those grounds of removal of a teacher which are permitted without the filing of charges under the terms of said section 1609 of the Political Code, and in force at the time of said action taken by the board in May, 1927. In this case we are not concerned with the fact that said section was again amended in 1927 (St. 1927, p. 1913), nor with the fact that the provisions of the Political Code on this subject have been superseded by the School Code adopted in the year 1929.

Defendants having answered the petition, the proceeding was brought to trial, and pursuant to findings duly made, the court entered its judgment granting a peremptory writ of mandate, which requires that defendants reinstate the petitioner and pay his accrued salary. The defendants appeal from the judgment. The grounds of appeal as stated in the brief are: That the petitioner was not discharged but, on the contrary, his contract of employment was terminated by mutual consent; that petitioner did not voluntarily terminate his employment, but by his conduct was estopped to deny a voluntary termination; that petitioner waived his right to a formal dismissal under the Teachers' Tenure Act; that the board of trustees discontinued the particular kind of service rendered by petitioner and therefore might dismiss him without filing charges or holding a hearing; that petitioner has not been dismissed, but has merely been granted a vacation for a year without pay, pursuant to the right reserved in the contract; that the writ of mandamus does not lie in this case; that the judgment is erroneous in ordering payment of salary when the services have not been rendered.

The evidence is sufficient to sustain the finding that petitioner was discharged, and such discharge was in violation of the provisions of said section 1609 of the Political Code. In that section, in addition to the grounds of dismissal upon charges after a hearing thereon, it is provided "that whenever it becomes necessary to decrease the number of permanent teachers employed by a school district on account of the decrease in the number of pupils attending the schools of such district, or on account of the discontinuance of a particular kind of teaching service in such district, the governing board may dismiss such teacher or teachers at the close of the school year." There is no evidence that either of these conditions existed. The excuse offered was that it was found necessary to "obtain someone who can handle the physical education as well as the sloyd work." It thus appears that the sloyd work (which seems to have been the actual employment of petitioner) was to be continued in the school. In fact that board proceeded to employ another teacher of sloyd together with physical education. It is a fact shown by the evidence, although perhaps not material here, that petitioner was qualified as a teacher not only for sloyd but as a teacher in physical education work. It was stipulated at the trial that the certificate of petitioner on file in the county superintendent's office is sufficient to enable him to teach all subjects in the schools of California, and so far as the records go, he is entitled to teach every subject.

[2] The answer of the defendants alleged that neither upon receipt of notice given him in May, 1927, nor at any time prior to October, 1927, did petitioner protest against his dismissal or raise any objection thereto, but, on the contrary, petitioner at all times prior to the 24th day of October, 1927, consented to and acquiesced in his dismissal and intended respondents to rely upon his acquiescence; that respondents did so rely and act thereon and before the commencement of the school term in September, 1927, duly employed another teacher to fill petitioner's place and do his school work for the school year; that their action in so employing a successor was a direct result of petitioner's consent and acquiescence; and that petitioner is by his said consent estopped to deny that he is legally discharged. Upon this paragraph of the answer the court made no finding, and it is now contended by appellants that without a finding thereon the judgment cannot be sustained. We are of the opinion that under the evidence such finding if made would have been in favor of the petitioner, and if it were deemed necessary we would make that finding now. While the status of petitioner as a permanent teacher originated in contract, together with service under those contracts, it also appears that thereafter petitioner had been regularly classified and employed as a permanent teacher. Thereafter, by virtue of the statute, he was entitled to continue in the service as a permanent teacher unless and until some condition should arise which, under the provisions of the law, would authorize his dismissal. Saxton v. Board of Education, 206 Cal. 758, 276 P. 998.

Since it thus appears that at the time of his dismissal by the respondent, the petitioner was in possession of a right created by statute, and the term for which such position might be held was fixed by that statute, we think that the rule of estoppel relied upon by appellants has no application to the case. If in fact respondent without proper excuse failed to report for work at the opening of the school term, and if in that or any other way he was guilty of any misconduct which would justify his removal, the statute provides an appropriate proceeding whereby, after due notice and hearing, he might have been dismissed. But the board chose to stand upon the attempted dismissal, and respondent is entitled to have his rights determined directly upon the issue thus presented.

There is no merit in the claim of appellant that respondent was merely granted a vacation. He never asked for a vacation, and there is nothing in the proceedings of the board which can fairly be interpreted as having anything to do with a vacation.

The judgment is affirmed.

We concur: HOUSER, J.; YORK, J.

111 Cal. App. 448

FEDER v. BRYSON et al.

Civ. 7719.

District Court of Appeal, First District,
Division 2, California.
Jan. 29, 1931.

1. Evidence 🔑158(28).

In action for landlord's violating lease by failure to repair hotel after fire, tenant properly testified from own knowledge regarding income; production of tenant's only book, lost by landlord, being unnecessary.

2. Appeal and error 🔑1048(5).

Overruling objection to question *held* harmless, in absence of answer.

3. Evidence 🔑271(19).

Letter to plaintiff from defendants' counsel *held* properly excluded, where defendants failed to segregate self-serving and immaterial statements.

4. Appeal and error 🔑201(2), 1046(5).

Where juror asked what jury were to learn from particular evidence, court's reply, "Do the best you can," *held* not prejudicial; alleged error not being mentioned to judge.

5. Evidence 🔑543(4).

Insurance adjuster, who had adjusted losses and knew value of secondhand furniture, *held* competent to testify regarding value of hotel furniture involved in fire.

6. Trial 🔑46(1).

Excluding apparently immaterial question *held* not error; court not being advised of purpose.

7. Appeal and error 🔑206(2).

Having failed to enlighten court regarding subject of desired cross-examination, counsel could not complain court prohibited further cross-examination.

8. Trial 🔑89.

Unresponsive answer could be stricken out by court, in absence of showing that answer was otherwise admissible.

9. Trial 🔑29(2).

Court's remarking on futility of cross-examination, and stating what witness had said, *held* not objectionable as comment on weight of evidence.

10. Appeal and error 🔑207.

Statement by plaintiff's counsel regarding defendant's physical condition *held* not prejudical, in absence of motion to strike out, or to instruct jury to disregard it.

11. Landlord and tenant 🔑152(3).

Under agreement that, if fire damage could be repaired within 90 days, landlord should make repairs, landlord *held* obligated to make entire hotel tenantable.

12. Trial 🔑243.

Instruction that landlord must make every part of hotel tenantable after fire *held* not to conflict with instruction that hotel must be placed in condition to be used for purpose intended.

Jury could not construe language in either instruction in question as meaning more than that landlord had duty of placing entire building in tenantable condition.

13. Landlord and tenant 🔑154(5).

In action for landlord's violating lease by failure to repair hotel, evidence showing tenant's profits before and at time of fire *held* to authorize instruction regarding future profits.

14. Appeal and error 🔑699(4).

Refusal to give instruction on credibility of witnesses, *held* not prejudicial, at least where transcript failed to show instructions given.

15. Landlord and tenant 🔑152(10).

Where lease obligated landlord for repairs, no duty devolved on tenant to repair and deduct cost from rent.

Appeal from Superior Court, Los Angeles County; Walton J. Wood, Judge.

Action by Kohos Feder against Theodore Ruberg and another, in which Frank Bryson, after the death of defendant named, was appointed administrator of his estate and substituted as one of defendants. Judgment for plaintiff, and defendants appeal.

Affirmed.

Harry K. Cohen, of Los Angeles, for appellants.

L. Frank Ottofy, of Los Angeles, for respondent.

BURROUGHS, Justice pro tem.

This is an action for damages. The first count of the complaint is for the sum of $10,800, alleged to have been suffered by the plaintiff by reason of a violation of the terms of a lease. The second cause of action is for the sum of $2,685, alleged to have been suffered by the plaintiff because of the wrongful conversion of certain personal property by the defendants. The cause was tried by a jury and a verdict rendered in favor of the plaintiff for the sum of $2,500. Judgment was entered in accordance with said verdict. Defendants made a motion for a new trial. Said motion was denied, and the defendants have appealed. The defendant Theodore Ruberg has died, and the administrator of his estate has been substituted as one of the defendants.

It appears from a bill of exceptions that on November 7, 1923, said defendants Theodore Ruberg and Elizabeth Ruberg leased to the plaintiff Kohos Feder the Globe Hotel in the city of Los Angeles for a term of five years. The rental price thereof was to be paid in monthly installments of $175, payable in advance. On the same day the plaintiff purchased from the defendants the furniture and equipment used in connection with said hotel, for the sum of $3,500, which amount was paid in cash. The plaintiff entered into possession of said property, and, so far as the record discloses, everything proceeded satisfactorily to all concerned until June 8, 1926, when a fire partially destroyed the building and damaged the furniture. Because of the fire the plaintiff vacated the premises and left his furniture in the hotel. The failure of the defendants to repair the building or to allow plaintiff to have his furniture is the subject of the action. There is a provision in the lease that, if the premises are damaged by fire and the damage be of such a nature that the building can be repaired within ninety working days from the date of the fire, the lessors shall repair and replace the same as soon as reasonable, deducting the rents for the time it takes to repair the same. There is no claim by the appellants that the evidence is insufficient to support the verdict. It is their contention that the court erred in its rulings upon evidence and misdirected the jury on questions of law. There are thirty specifications of error in the bill of exceptions.

[1] The first specification of error is based upon the contention that the court erred in allowing the plaintiff to testify to the amount of income derived from the hotel at the time

of the fire; that the court should have compelled the production of plaintiff's books. There are two answers to this claim. They are that plaintiff was testifying to facts within his own knowledge, and it is further shown by the record that the only book kept by the plaintiff was a schedule of the prices of the rooms; that this book was left in the hotel and the defendant Mrs. Ruberg had it in her possession thereafter, but did not know what she had done with it.

[2] The next error assigned was the overruling of the defendants' objection to a question asked of a witness. As there was no answer to the question, no error could follow the ruling of the court.

[3] It is next claimed that the court erred in excluding from the record a letter written by one Wells, an attorney for the defendants. This letter purported to be an offer to return articles of furniture that were in the hotel building and which it was claimed were part of the furniture belonging to plaintiff. This letter was written eight days after the commencement of this action. It also contained many self-serving declarations that were not proper evidence even had the letter been material to the issues, which it was not. The court was justified in excluding it from evidence in view of the failure of the defendants to segregate the immaterial matter.

[4] Another claim of error is based upon alleged misconduct of the trial court. Counsel for defendants asked the plaintiff where he kept the money he had made from the hotel business. At this point a juror asked what the jury were to learn from this evidence. The court replied: "Do the best you can." It is claimed that this remark reflected upon the weight of the evidence and influenced the jury against the defendants. Counsel has failed to point out the prejudicial effect of this statement, and we perceive none, nor was the alleged error called to the attention of the trial court.

[5] Another assignment of error is to the effect that one Nevins, an insurance adjuster, was permitted to testify as to the value of the furniture in the hotel. The witness made a schedule of all the furniture in the house and adjusted the furniture loss. The witness testified that he had never bought or sold secondhand furniture, but that he had adjusted such losses and knew the market value. He was, therefore, qualified to testify on that subject. However, an examination of the bill of exceptions shows that the only value placed on the furniture by this witness was $2,182.09, its value prior to the fire, therefore it was not responsive to the issue as to value subsequent to the fire.

[6] The next assigned error is the ruling of the court sustaining an objection to the following questions asked Morris Feder, a son of the plaintiff: "Q. Did you hear the testimony of Mary Alcazar given here, the housekeeper? A. Part of it. Q. Did you hear her testimony to the effect that there were cases where water had run from toilets and stained the walls and rooms of the building?" It is claimed by appellant that this question was merely preliminary to some later questions concerning damage done prior to the fire, by reason of defective plumbing. Standing alone this question was immaterial. It does not appear that the court was advised of its purpose. However, the information could have been elicited from the witness by direct questions for that purpose had it been proper cross-examination.

[7] The next assignment of error is also without merit. The plaintiff was called as a witness in his own behalf and testified that all the furniture in the premises belonged to him. His counsel then asked him: "What do you estimate the value of the furniture in that place after the fire?" To which the witness replied: "The furniture what I had without the lease is not worth much but with the lease is worth." Thereafter counsel for defendants undertook to cross-examine the witness, whereupon the court said: "Why do you want to cross-examine? What did he say except he didn't know. Do you want to cross-examine him on that?" To which counsel for defendant answered: "This matter I had in mind has already been answered, something I had overlooked." Then, referring to another matter, addressed counsel for plaintiff as follows: "Are you going to introduce this?" It is now claimed that by such conduct the trial court prohibited further cross-examination of the witness upon the question of value of the furniture. Had counsel stated to the court that the matter he desired to cross-examine the witness upon, and which he had overlooked, related to the value of the furniture, the court would no doubt have permitted him to do so. Having failed to enlighten the court, he should not at this time be permitted to take advantage of his failure to do so.

[8] It is also claimed that the court erred in striking out an answer to a question propounded by the attorney for the defendants to a witness on the ground that the answer was not responsive. It is claimed that the only one who can move to strike out an answer is the person asking the question. Appellants cite Hirshfield v. Dana, 193 Cal. 142, 223 P. 451, in support of this claim. The case cited would be in point if the answer struck out were otherwise admissible, but no such showing has been made.

[9] Appellants also claim that the court erred in making the statement to counsel: "Once in a while I suggest to counsel, what is the use of cross-examining? She said she was in there four months before the fire to see

a friend." It is claimed that by this statement the court was passing upon the weight of the evidence. We do not believe the remark made by the court is subject to the interpretation placed upon it by appellant.

[10] The next exception goes to the claim that a motion to strike an answer can only be made where no prior opportunity is had to object, and only the questioning party can move to strike an answer as nonresponsive. This objection is answered by what has heretofore been said upon that subject. It is also objected that a statement made by counsel for respondent relative to the physical condition of defendant Theodore Ruberg was prejudicial error. The answer to this claim is that no motion was made to strike out the remark or to instruct the jury to disregard it.

[11] Appellants contend that the court erred in its instruction to the jury that, after the fire, if they found that the place could have been repaired within ninety working days, and if they further found that such repairs were not made within said time so as to make "the same and every part thereof tenantable," then they should find for the plaintiff, etc. It is claimed that this instruction was erroneous because the only obligation upon the appellants was to make the house "tenantable" not each and every part of it. We think it was the duty of the appellants, under the terms of the lease, to make the entire hotel tenantable. There is sufficient evidence in the bill of exceptions to sustain the implied finding by the jury that the hotel was never placed in "tenantable" condition.

[12, 13] It is next claimed that the following portion of another instruction is conflicting with the instruction last above referred to, in that the former instruction states that it was the duty of appellants to place the hotel and each and every part thereof in tenantable condition. The latter instruction states that it must be placed in such a condition so as to "be used by plaintiff and respondent for the purpose for which it was intended, namely, an hotel." We are of the opinion that the instructions are not conflicting. We do not believe a jury could possibly construe the language in either instruction as meaning more than it was the duty of the appellants to place the entire building in a tenantable condition. Complaint is also made that the court committed error in instructing the jury as to future profits to be derived from the hotel business upon failure to repair, it being the claim that there is no evidence upon that question. On this subject the evidence shows the profits made by the respondent prior to and at the time of the fire. This we believe is a sufficient basis for the jury to consider future profits.

[14, 15] The court refused to give a certain instruction on the credibility of the witnesses. It does not appear what general instruction the court gave. The transcript does not purport to contain all of the instruction. In any event, the instruction was upon a matter of common knowledge and does not constitute prejudicial error. Complaint is also made that, where the landlord fails to repair the premises, the remedy of the tenant is to repair and deduct the cost thereof from the rent. It is sufficient to say that, under the terms of the lease, the defendants obligated themselves to make the repairs, and therefore no duty devolved upon the plaintiff to make them.

The foregoing disposes of all the objections presented in the brief of appellants. There is no reversible error in the record presented.

The judgment is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

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111 Cal. App. 263

GULLICK v. INTERSTATE DRILLING CO. et al.

Civ. 6446.

District Court of Appeal, Second District, Division 2, California.
Jan. 21, 1931.

1. Appeal and error ⚷419(1).

Notice of appeal, referring only to judgment signed four days after granting of nonsuit, *held* sufficient as appeal from judgment of nonsuit.

2. Trial ⚷165.

Where evidence is fairly susceptible of two constructions, or several inferences, on motion for nonsuit, court must take view most favorable to plaintiffs.

3. Trial ⚷160.

Statute does not authorize court of its own motion to order nonsuit at conclusion of plaintiff's testimony (Code Civ. Proc. § 581).

4. Stipulations ⚷14(1).

Where it was stipulated that defendants indorsed note, it must be inferred that note was signed by makers at same time (Code Civ. Proc. § 1963, subd. 22).

Code Civ. Proc. § 1963, subd. 22, provides that there is a disputable presumption that an indorsement of a negotiable promissory note or bill of exchange was made at the time and place of making the note or bill.

5. **Alteration of instruments 🔑10.**

Where indorser, on default, paid note, and his indorsement was struck out, prior indorsers and makers, when sued, could not claim alteration.

6. **Bills and notes 🔑527(1).**

As regards discharge of indorsers, evidence *held* not to show renewal of note sued on.

Appeal from Superior Court, Los Angeles County; Charles D. Wallace, Judge.

Action by T. M. Gullick against the Interstate Drilling Company, and others. From a judgment of nonsuit, plaintiff appeals.

Reversed.

Henry M. Lee, of Los Angeles, for appellant.

Pacht, Pelton & Warne, of Los Angeles, for respondents Interstate Drilling Co. and H. Director.

Perry F. Backus, of Los Angeles, for respondent A. Zimmerman.

IRA F. THOMPSON, J.

[1] This appeal purports to be one from a judgment of nonsuit. Whether it is will depend upon the conclusion reached upon the contention of the respondents that the appeal should be dismissed. Heretofore a motion was made by them for a dismissal of the appeal, and was by this court denied. Gullick v. Interstate Drilling Co., 100 Cal. App. 243, 279 P. 828. Since that time they have made a motion for diminution of the record, which was granted, and the record is now supplemented by a copy of the minutes of the court for October 15, 1928, the material part of which reads as follows: "Motion of all defendants, by attorney Isaac Pacht for nonsuit is by the Court granted." It is to be noted that the judgment was signed four days later, or on October 19. The notice of appeal, which refers only to the judgment of October 19, was filed November 7, 1928, well within the time, even though it started to run on October 15. In view of the fact that the appeal was well within the sixty-day period, and also that the respondents could not possibly have had any doubt concerning the intention of the appellant to have reviewed the action of the court in granting a nonsuit, the dismissal of the present appeal would be the result of an insistence upon a pure technicality without either rhyme or reason. It would amount to reliance upon the shadow and not the substance. The law, however, does not require us to so act. It is to be observed that in Bengel v. Traeger, 100 Cal. App. 526, 280 P. 538, the sixty-day period had not only run when counted from the entry of the order of nonsuit on October 30, 1928, but also when reckoned from the entry of the so-called formal judgment on January 3, before the notice of appeal was filed on March 26, 1929. So, too, in Burks v. Bronson, 58 Cal. App. 143, 207 P. 1018, the second judgment was entered a month after the order of nonsuit was "entered on the minutes and noted in the register of actions by the clerk." In Estate of Yale, 208 Cal. 102, 280 P. 358, 359, the Supreme Court said: "Without in any manner attempting to minimize the force of the authorities cited and relied on by the respondents in support of their motion, it is our conclusion, founded on a reading of the several minute orders and of that portion of the formal judgment hereinabove quoted, that the minute orders were intended by the trial court, and must have been understood by the parties, to be and to serve merely as memoranda affording data from which a proper final judgment might thereafter be drafted disposing of the entire cause. In such a case an appeal is held to lie from the formal judgment. Ferris v. Baker, 127 Cal. 520, 523, 524, 59 P. 937; Larson v. Larson, 15 Cal. App. 531, 536, 115 P. 340." In the case of Ferris v. Baker, just cited, it is said: "The order in this case was a mere narration by the clerk as follows: 'Defendants move the court for nonsuit on the grounds stated. Said motion is argued, and thereupon granted.' The order did not show what were the grounds of the motion. It did not purport to be a dismissal of the action, nor a judgment of any kind, and was in fact but a memorandum affording data from which a judgment or proper order might be drafted, similar to the minute made when final judgment is announced, directing that it pass for one party or the other." The identical observations may with all propriety be made concerning the minute entry here in question. In Larson v. Larson, supra, we also find appropriate language as follows: "We are inclined to think, however, that the first order was merely 'a memorandum affording data from which a judgment * * * might be drafted,' and that, therefore, the order of September 22d was the proper one from which to take the appeal. The Supreme Court so held in a similar case. Ferris v. Baker, 127 Cal. 520, 59 P. 937. The appeal was in time, even if the order of nonsuit was entered as claimed by respondent. The error complained of, even if it existed, could not possibly have misled any one, for the notice of appeal identified the order appealed from with reasonable certainty. That is all that is required. Section 941b, Code Civ. Proc. Such errors have al-

ways been disregarded. See Weyl v. Sonoma Valley Ry. Co., 69 Cal. 202, 10 P. 510; Anderson v. Goff, 72 Cal. 65, 1 Am. St. Rep. 34, 13 P. 73; Paul v. Cragnaz, 25 Nev. 293, 59 P. 857, 60 P. 983, 47 L. R. A. 540; British Bark Latona v. McAllep, 3 Wash. T. 332, 19 P. 131." Our conclusion is that an appeal has been duly taken.

We therefore turn to the question whether the nonsuit was properly granted. The action was upon a promissory note. The testimony adduced to support the plaintiff's cause of action shows in effect that the plaintiff had, through his nephew C. M. Gullick, loaned to the respondent Interstate Drilling Company upwards of $16,000; that the note sued upon for $5,162 was delivered to him by his nephew signed Interstate Drilling Co. H. Director Pres. C. M. Gullick Sec. S. Malis, and indorsed on the back by C. M. Gullick, H. Director, and A. Zimmerman; that appellant took the note to his bank, where he discounted it, indorsing it and guaranteeing payment; that, when the note fell due, it was not paid by the payor and indorsers, and he was obliged to pay it; that, after the bank was paid, a pen was drawn through his name, where it appeared as an indorser; that he could not give the exact amounts going to make up the note of $5,162 because his nephew, C. M. Gullick, kept the books for him. The note was delivered to him by his nephew, the defendant C. M. Gullick, who was not called as a witness. The face of the note waived "diligence, demand, presentment, protest and notice of protest." The signatures of the indorsers were admitted by stipulation.

The motion for a nonsuit was made on behalf of the defendant H. Director by counsel, who also represented the defendant Interstate Drilling Company, and was accompanied by the statement by that counsel that the defendant Zimmerman "joins in or is joining in" the motion. No response was forthcoming from counsel who represented the last-named defendant. After argument, the court announced that the motion was granted, but the judgment recites that the motion was made and granted as to defendants Director, Zimmerman, and Interstate Drilling Company, and awards costs, not only to them, but also to the remaining defendants, C. M. Gullick and S. Malis. The grounds of the motion of the defendant Director as stated by his counsel were: That the note sued upon was "not the note of the Interstate Drilling Company"; that no authority for its execution had "been established"; that the indorsers had been discharged from liability by reason of "a material alteration of the instrument," and by a renewal thereof without their knowledge or consent.

[2-4] The plaintiff was seventy-nine years of age, and at times somewhat confused in his testimony, but, when we apply the rule which should be made use of upon a motion for a nonsuit, it becomes apparent that the judgment should be reversed. The rule alluded to is that "where evidence is fairly susceptible of two constructions, or if one of several inferences may reasonably be made, the court must take the view most favorable to the plaintiffs." Berger v. Lane, 190 Cal. 443, 213 P. 45, 49. So far as the defendants Interstate Drilling Company, C. M. Gullick, and S. Malis are concerned, it is obvious that the judgment is erroneous, for the reason that no motion for a nonsuit was made by either of them. Section 581, Code of Civil Procedure, does not authorize the court of its own motion to order a nonsuit at the conclusion of the plaintiff's testimony. It must be on motion of the defendant. We have serious doubts also as to whether we may consider that a motion was made by the defendant Zimmerman, but, for reasons about to be stated, the question becomes immaterial. By section 1963, subd. 22, it is provided that it shall be presumed until controverted "that an indorsement of a negotiable promissory note or bill of exchange was made at the time and place of making the note or bill." It having been stipulated that the defendants Zimmerman and Director indorsed the note, it must be inferred that the note was signed by the makers at the same time. In this connection it is to be noted that the defendant H. Director purported to sign the note as president of the defendant corporation, and that the secretary was C. M. Gullick, who delivered the note to plaintiff. It is hardly conceivable that the defendant H. Director would have indorsed a note purporting to be signed by him as president of the corporation, unless he had in fact executed it.

[5, 6] There is no merit in the point that there was an alteration of the note. The testimony indicates that a pen was drawn through the signature of plaintiff after he had paid the bank. In other words, his indorsement thereof was withdrawn. This cannot be claimed to be an alteration of the note. Nor was there any evidence of a renewal of the note. The testimony which appellants say is capable of this construction is that which relates to the payment of the bank which at the instance of the plaintiff discounted the note.

Judgment of nonsuit reversed.

We concur: WORKS, P. J.; CRAIG, J.

BARR LUMBER CO. et al. v. PERKINS et al.*

Civ. 4231.

District Court of Appeal, Third District, California.

Jan. 19, 1931.

Rehearing Granted Feb. 18, 1931.

1. Mechanics' liens 🔑78.

Lessor's notice of nonliability for improvement *held* defective in not containing name of lessee (Code Civ. Proc. § 1192, as amended by St. 1925, p. 304).

2. Mechanics' liens 🔑5.

Statutes creating mechanic's liens are liberally construed.

3. Mechanics' liens 🔑78.

Statute whereby owner of property on which improvement is made may relieve himself from liability for mechanic's lien must be strictly construed (Code Civ. Proc. § 1192, as amended by St. 1925, p. 304).

4. Mechanics' liens 🔑24.

Oil derrick constituted "other structure or other work of improvement" within Mechanics' Lien Law; hence one furnishing materials entering into oil derrick obtained lien (Code Civ. Proc. § 1183).

> Code Civ. Proc. § 1183, gives lien to one furnishing materials to be used or consumed in construction of building, wharf, bridge, ditch, flume, aqueduct, well, tunnel, fence, machinery, railroad, wagon road, or "other structure, or other work of improvement."
>
> [Ed. Note.—For other definitions of "Other," see Words and Phrases.]

5. Mechanics' liens 🔑92.

That digging of oil well was abandoned after furnishing and consuming of materials in erection of oil derrick did not affect materialman's right to lien (Code Civ. Proc. § 1183).

6. Mechanics' liens 🔑198.

Lease provision authorizing lessee's removal of structure which otherwise, when erected, would constitute part of real estate, did not bar materialman's right to lien effective against lessor failing to give proper notice of nonliability (Code Civ. Proc. § 1183, and § 1192 as amended by St. 1925, p. 304).

Appeal from Superior Court, Los Angeles County; William Hazlett, Judge.

Action by the Barr Lumber Company and another against Roy W. Perkins, Lawrence G. Brubaker, and others. Judgment for plaintiffs, and the last-named defendant appeals.

Affirmed.

Ray W. Bruce, of Los Angeles, for appellant.

Frank G. Swain, of Whittier, for respondents.

PLUMMER, J.

This is an appeal from a judgment directing foreclosure of a mechanic's lien.

The record shows that on or about the 16th day of August, 1924, the appellant leased two lots of land to one R. T. Colter, giving him the exclusive right to explore, mine, excavate, and obtain oil, asphaltum, petroleum, natural gas, and any other hydrocarbon substances contained in said premises. The lease was to continue for a period of twenty years. On or about January 27, 1925, R. T. Colter assigned said lease to Roy W. Perkins. On February 3, 1925, the erection of an oil derrick was begun on lot No. 23, adjoining lot No. 22, the one involved in this action. As the judgment for the foreclosure of a lien does not involve lot 23, no further attention need be given as to what actions were taken in relation thereto. Thereafter, and on or about the 10th day of September, 1925, Roy W. Perkins commenced the erection of an oil derrick on lot No. 22 in block 19, of Athens, as per map recorded in book 8, page 146, of maps, in the office of the county recorder of Los Angeles county. Within ten days thereafter, and on the 16th day of September, 1925, the appellant posted a notice of nonliability, and on the same day filed a verified copy thereof in the office of the county recorder of Los Angeles county. For the erection of said derrick the plaintiffs in this action furnished lumber and materials which actually went into the erection and became a component part of the derrick erected upon said lot No. 22.

[1-3] Upon this appeal only two questions are presented: First, the sufficiency of the notice of nonliability; second, whether the erection of an oil derrick upon the premises constitutes a lienable improvement. A third question is presented to the effect that both lots included in the lease to which we have referred should have been included in the lien filed by the respondents. The record, however, shows that the lots are separate tracts, and this statement is a complete answer to the appellant's contention. No question is made as to the amount of the judgment or as to the sufficiency, in form and substance, of the notice of lien filed by the respondents. The trial court held the notice of nonliability insufficient, and also held that the erection of an oil derrick for the purposes of exploring the premises for oil, constituted a lienable improvement within the lien laws of the state. The notice of nonlia-

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*For opinion modifying judgment, see 297 P. 922. Hearing granted 6 P.2d 948.

bility posted and filed for record by the appellant is in the following words and figures:

"Notice of Non-Liability

"Under Section 1192, Code of Civil Procedure.

"To All Whom it May Concern, and particularly to all persons who may furnish labor or material, or both, for or upon all or any part of that real property situate in the City of Los Angeles, County of Los Angeles, State of California, described as follows: Lots Twenty-two (22) and Twenty-three (23) in Block Nineteen (19) of Athens, as per map recorded in Book 8, page 146 of Maps, in the office of the County Recorder of said County, or for the improvement upon said land or any part or parcel thereof, or for the construction, alteration or repair of any work or improvement thereon;

"Notice is hereby given by the undersigned, that he is the owner of said described land and being the land upon which this notice is posted; that he will not be responsible for any labor or material delivered upon said premises or used in the construction, alteration or repair of any work or improvement now being, or which may be hereafter constructed, made or done upon said land or any part thereof. Dated September 16, 1925.

"Lawrence G. Brubaker,
"By [Signed] Ray W. Bruce, His Attorney."

Section 1192, Code of Civil Procedure, providing for the filing of a notice of nonliability, sets forth when such notice shall be filed, by whom it shall be filed, and also specifies what such notice shall contain, to wit: "Said notice shall contain a description of the property affected thereby sufficient for identification, with the name, and the nature of the title or interest of the person giving the same, name of purchaser under contract, if any, or lessee if known; said copy so recorded may be verified by anyone having a knowledge of the facts, on behalf of the owner or person for whose protection the notice is given." The notice posted and filed for record in this case did not give the name of the lessee, nor does it state that the name of the lessee was unknown. The record before us shows that the owner of the premises had executed a lease thereof, and therefore must be held to have known the name of the person to whom he leased the premises. The record shows that the lessee of the owner assigned his interest in the lease, but it does not appear that the owner ever consented thereto, nor does it appear that the owner did not know of the assignment. This, however, does not change the effect of the requirement of the statute that if the owner has leased the premises, the name of the person to whom he has leased must be given in the notice. Prior to 1925, section 1192, Code of Civil Procedure, did not require that the notice should include the name of the person to whom the premises had been leased, if leased. In 1925 (Stats. 1925, p. 304), the section of the Code which we are considering was amended so as to require the including of the name of the lessee, if known, and also the name of anyone holding a contract of purchase. From this the only conclusion deducible is that the Legislature considered the inclusion of such facts within the notice to be material, to the intent and purpose that anyone furnishing material to the occupant of the premises might ascertain what, if any, title he possessed, and be furnished the means for obtaining information in relation thereto. We do not need to cite authorities to the effect that the courts adopt the rule of a liberal construction relative to mechanic's liens, and therefore must follow a strict construction of any act or provision by which the owner of property upon which improvements are made, may relieve himself from, or escape liability. We may, however, cite one case which supports the conclusion of the trial court in this cause.

In Pasqualetti v. Hilson, 43 Cal. App. 718, 185 P. 693, the sufficiency of the notice of nonliability was before the court. The notice contained all the provisions then required to be stated in the notice by section 1192, Code of Civil Procedure, but was acknowledged instead of verified, and was recorded in that form. The court held that the failure to verify the notice and to file a verified notice of record rendered the notice insufficient. In that case, as contradistinguished to the present, the body of the notice contained all the data required to be set forth by the provisions of the Code.

The appellant calls our attention to the case of Allen v. Wilson, 178 Cal. 674, 174 P. 661, 663, where it was held that a claim of lien which did not state the name of the owner of the premises upon which the lien was claimed, did not affect the validity of the lien. The court there said: "The plaintiff is only required to state names mentioned (owner etc.), if known. If the names are not known, the claim filed is sufficient if it is silent on the subject. (Citing cases.) The name of the owner, or reputed owner, is not presumably within the knowledge of the claimant." (Citing cases.) Here, where the owner of the premises is the defendant, and the owner is the one who has given the notice of nonliability, there can be no presumption of lack of knowledge of the name of the person to whom he has leased the premises. The record shows that the owner, to wit, the appellant, at the time he filed the notice of nonliability, possessed a knowledge of the facts which should have been set forth therein. The strictness required in complying with the Code provisions as to the notice of nonliability is further illustrated in the case of Leoni v. Quinn, 189 Cal. 622, 209 P. 551, where it was held that actual notice was insufficient, and that the notice of nonliability must be given in full compliance with the requirements of the section.

[4] Does the erection of an oil derrick afford the basis for a lien to one furnishing material entering into such structure? Section 1183, Code of Civil Procedure, gives a lien to one "furnishing materials to be used or consumed in or furnishing appliances, teams and power contributing to the construction, alteration, addition to or repair, either in whole or in part, of any building, wharf, bridge, ditch, flume, aqueduct, well, tunnel, fence, machinery, railroad, wagon road or other structure, or other work of improvement." Is an oil derrick reasonably included within any of the terms set forth in this section of the Codes? This requires an interpretation of what is meant by the words "other structure or other work of improvement."

In the case of Helm v. Chapman, 66 Cal. 291, 5 P. 352, the question arose as to whether a lien existed for work performed and materials furnished in sinking a shaft upon a mining claim. The court there said: "The section of the Code [section 1185 of the Code of Civil Procedure] treats of the 'building, improvement, or structure' as separate and distinct from the land upon which it is erected or constructed. We think, without doing violence to the received meaning of language, a mine or pit sunk within a mining claim may be called a structure. Section 1183 does not, it is true, provide for a lien upon mines, but upon 'mining claims.' The lien, if it exists at all, extends to the whole claim. Strictly speaking, of course, a 'mining claim' cannot be constructed, altered, or repaired. The intention of the law-makers seems to have been to give a lien upon the whole claim, for labor performed on, and for materials furnished for and used in, any structure, or on or in the alteration or repair of any structure on or in the mining claim." The court held the plaintiff entitled to a lien.

In the case of Western Electric Co., Inc., v. Colley, 79 Cal. App. 770, 251 P. 331, 333, this court, in consideration of the word "structure," used the following language: "We think the Legislature, in the use of the term 'other structure,' must have had in mind the comprehensive language of the Constitution where use is made of the word 'property,' and that a liberal and fair interpretation would lead to the conclusion that the Legislature so intended, and not that the term 'other structure' is limited in its meaning to an object, which is in kind similar either to a house, a wharf, a bridge, or a wagon road, but includes all objects built upon the soil, and, in some instances, extending beneath the surface of the soil, which partake of the nature of permanency, that is, a structure is an object which is built upon the soil and is not necessarily a house, or similar to a house, a bridge, or similar to a bridge, but is property, under the constitutional definition, having the nature of permanency and put in place to accomplish some definite purpose." The question before the court in that case was whether a lien existed upon a power line, and it was there held that a power line, including the poles supporting it, constituted a structure.

In 18 Ruling Case Law, 892, we find the following in relation to the interpretation given by different courts to the words "other improvement or structure": "Where the statute provides for a lien upon any building, erection, etc., or 'other' improvement or structure, the term 'other' improvement or structure is interpreted by some courts in accordance with the familiar doctrine ejusdem generis. That is, the term in question is regarded as including only such erections or constructions as are similar to the improvements or structures named. * * * In some of the statutes the improvements specifically mentioned are numerous and the term 'other' has been construed to give the acts a very wide application. So, in such a connection, the phrase has been applied to a completed oil well with all its appliances, and to a mine or mining claim. The right to a lien for the work of digging or drilling a well has sometimes been denied under a statute giving a lien for 'other improvements', but other courts, giving the statute a liberal construction, have considered the phrase as clearly sufficient to give the right to a lien for such work."

In Sunburst Oil & Refg. Co. v. Callender, 84 Mont. 178, 274 P. 834, 837, under a statute somewhat similar to our own, the Supreme Court of Montana held that a lien existed for materials furnished and work done upon an oil well. In so ruling the court used the following language: "Undoubtedly, having drilled well No. 4 and furnished all fixtures and equipment necessary to complete the well and equip it for operation, and not having been paid for his labor and material, defendant had a lien upon the property on which he did the work and placed the improvements," etc.

In Parke & Lacy Co. v. Inter Nos Oil & Devp. Co., 147 Cal. 490, 82 P. 51, 52, the Supreme Court had before it the question of a lien for work done upon a well, where the testimony was not clear as to the kind of well, and used the following language: "The allegations of the complaint bring the case within this provision" (referring to a provision in section 1183, Code Civ. Proc.) "and we are not called upon to decide whether this provision or the one referring to mining claims would be applicable to an oil well, it not appearing that this was an oil well. There is, however, much force in the argument that any and all wells, for whatever purpose constructed, fall within the provision already quoted, and that when the word 'well' was inserted therein by amendment in 1899 (St. 1899, p. 33, c. 35), and in section 1185, Code Civ. Proc., at the same time (St. 1899, p. 24, c. 23), it was contemplated thereby to include oil wells." See, also, notes to Peaceable Creek Coal Co. v. Jackson, Ann. Cas. 1912B, p. 11, where the word "structure" is defined as follows: "The term 'structure' when applied to a material thing made by human labor, whether considered etymologically or with reference to common usage, or with regard to the words by which it is immediately preceded in the statute, means something composed of parts or portions which have been put together by human exertion. * * * Not only was the oil well * * * a structure in the literal sense, but when it is regarded in connection with the structures specifically named in the statute, it must, we think, be considered as within the legislative intent in the use of the statutory phrase 'other structure.'"

In 40 C. J. p. 65, we find the further definition of the word "structure": "The meaning of the word 'structure' as used in a statute authorizing a lien for labor performed or materials furnished in connection with the creation, improvement, or repair of a structure, is to be ascertained by referring to the meaning of the words associated with it, and where all the associated terms designate classes of property attached or appurtenant to, or a part of, the land, the word 'structure' is to be likewise restricted, notwithstanding the fact that it is susceptible to other definitions. The word 'other structure,' following an enumeration of particular things, comprehends all the properties specifically enumerated, and any similar thing constructed, should the enumeration prove incomplete, but it does not embrace matters not resembling, related to, or belonging in, the same class with the structures or improvements specifically enumerated." Following these definitions, even though we were to adopt the strictest interpretation, we think that an oil derrick erected upon premises for the purposes of boring a well, comes within the definition of the terms "other structure or other work or improvement," as found in section 1183, Code of Civil Procedure. A reference to the language of the section preceding the word "well" enforces this conclusion. We find therein these words: "Materials to be used or consumed in or furnishing appliances, or * * * contributing to the construction, alteration, addition to or repair, either in whole or in part, of any building, wharf, bridge, ditch, flume, aqueduct, well," etc. Here, it is specifically provided that a lien is given for any materials or appliances used or consumed in the construction of a well. No well could be dug without the construction of a derrick, or, as it is sometimes called in relation to oil wells, "oil rig," and therefore the materials which enter in, and are consumed in the construction of the oil rig or derrick, erected for the purposes of digging a well, furnish a basis for a mechanic's lien.

[5] It will be noticed also that the language of the statute includes materials furnished to be used or consumed, and not materials that have been used or consumed. The record shows in this case that after the materials were consumed in the building of the derrick, the well was not in fact dug. The fact that the actual digging of the oil well referred to in this case was abandoned after the furnishing of materials and the consuming thereof in the erection of the derrick, does not affect the right of the plaintiff in this action to a lien for materials furnished. Under the various sections of the Code of Civil Procedure the abandonment of work or the abandonment of the improvement by the contractor or owner does not destroy the right to a lien for work already done, or materials furnished, although it does in some particulars affect the procedure.

[6] Nor do we find any merit in the contention that the provisions in a lease which authorize the removal of an improvement or structure which otherwise, when erected or created, would constitute a part of the real estate, bar the right to a lien. Those provisions are personal only to the owner and the lessee.

The judgment is affirmed.

All concur.

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111 Cal. App. 151

CALIFORNIA STANDARD FINANCE CORPORATION v. RIVERSIDE FINANCE CO. et al.

Civ. 160.

District Court of Appeal, Fourth District, California.

Jan. 16, 1931.

1. Sales ⚷459.

Title to automobiles to which finance corporation took title from distributor, and which it conditionally sold to dealer, was vested in finance corporation.

2. Sales ⚷472(3).

Automobile dealer being in default under conditional sale contract with finance corporation, latter must prevail in claim and delivery against dealer's customer, absent estoppel.

3. Estoppel ⚷119.

Whether conditional seller is estopped to claim title against third person is fact question.

4. Estoppel 🔑75.

Conditional seller of automobile, placing car in hands of dealer, is estopped to claim title against bona fide buyer for value (Civ. Code, § 1142).

> This is so, in view of the rule that, if personal property is delivered under conditional sale contract to buyer who is engaged in business of selling property of same kind, and, with knowledge of seller, is placed on display for sale with such other property, holder of reserved title is estopped to assert it against bona fide buyer for value from dealer.

5. Sales 🔑475.

Assignee of conditional sale contract from automobile dealer, who was also holding under conditional sale contract, acquired dealer's rights, and, upon default of dealer's customer, has right to repossess car and terminate contract, thereby succeeding to customer's rights.

6. Sales 🔑475.

Assignee of conditional sale contract from automobile dealer succeeded to customers' rights, though they consented to repossession.

7. Appeal and error 🔑931(1).

In examining sufficiency of evidence, evidence supporting finding, with reasonable inferences, must be accepted as true.

8. Appeal and error 🔑931(1).

Every substantial conflict in testimony must be resolved in favor of finding.

9. Estoppel 🔑116.

Burden rests upon party asserting estoppel to prove its elements.

10. Estoppel 🔑75.

Mere possession of automobile by dealer is insufficient to establish estoppel in favor of dealer's customer against dealer's conditional seller.

11. Estoppel 🔑75.

Finance corporation, holding reserved title to automobile delivered to dealer in and displayed for sale with property of same kind, with finance corporation's knowledge, *held* estopped to assert title against dealer's bona fide subvendee for value under conditional sale contract.

12. Estoppel 🔑118.

Evidence *held* to show automobile dealer's salesman, buying automobile from dealer, was put upon inquiry; hence, could not assert estoppel against conditional seller to dealer.

13. Automobiles 🔑32.

Driving automobile from distributing agency to dealer's business place, with dealer's license number, *held* not to require registration by finance corporation, holder of legal title; hence, corporation was not estopped to assert title against third person because of failure to register (St. 1923, p. 522, § 36(a), as amended by St. 1927, p. 1423, § 8; St. 1923, p. 524, § 45, as amended by St. 1925, p. 402, § 7; St. 1923, p. 517, § 45½(b), as added by St. 1927, p. 1424, § 10; St. 1923, p. 526, § 46, as amended by St. 1927, p. 1424, § 11).

14. Estoppel 🔑110.

In claim and delivery, complaint being in usual form and answer denying plaintiff's and alleging defendant's ownership and right to possession, facts constituting equitable estoppel need not be pleaded.

Appeal from Superior Court, Riverside County; George R. Freeman, Judge.

Action by the California Standard Finance Corporation against the Riverside Finance Company and others. From an adverse judgment, plaintiff appeals.

Affirmed in part, and reversed in part.

Rollinson, McGann, Becker & Nelson, of Los Angeles (Charles W. Rollinson and Don S. Irwin, both of Los Angeles, of counsel), for appellant.

Leonard J. Difani, of Riverside, for respondents.

WARMER, Justice pro tem.

The facts out of which this action arose are briefly as follows: W. H. Jenner and Ethel L. Sampson, sued herein as Mrs. Edyth Sampson, were doing business under the fictitious name of Paige Sales & Service Company in Riverside, Cal., hereinafter called the dealer. The dealer made an arrangement with the appellant whereby appellant was to finance certain automobiles for the dealer. Under this plan, the appellant was to take the title to the automobiles financed by them from the distributors in Los Angeles, then sell said automobiles to the dealer on conditional sale contracts, hereinafter called flooring contracts. The automobiles were then to be driven by the dealer to Riverside, where the dealer had his place of business. The dealer secured possession of the two automobiles here in question, a Paige sedan, motor No. 171428, and a Paige sedan, motor No. 171994, hereinafter referred to as the Sturgis car and the McKay car, respectively.

The Sturgis car was delivered to the dealer on November 22, 1927, and the McKay car on February 21, 1928. Each of said cars was covered by one of said flooring contracts.

The dealer sold the Sturgis car to Dorothy Sturgis under a conditional sale contract February 25, 1928, and the McKay car to Jack P. McKay on February 27, 1928. On or about February 27, 1928, the dealer assigned these contracts to Riverside Finance Company, hereinafter referred to as respondent. The initial payments on the flooring contracts were made. No other or further payment was made by the dealer or by any one in his behalf. The initial payment on the Sturgis contract was made in cash. McKay was a salesman for the dealer, and the initial payment on the McKay car was made by a credit adjustment. No other or further payments were made on the conditional sale contracts to the dealer by either Sturgis or McKay or anyone else in their behalf.

On March 8, 1928, both of these automobiles were repossessed by respondent, although no further payments under the contracts were due until March 25 and March 27, respectively. The facts surrounding the repossession of the cars are that on or about March 8, 1928, an attachment was levied on the place of business of the dealer, and both Sturgis and McKay notified the respondent herein that they would be unable to make the payments provided for in the contract, and that respondent had better take the cars; which was done by respondent. At the time of the execution of the Sturgis and McKay contracts, the dealer was in default under the flooring contracts which were still held by appellant. Soon thereafter, the appellant instituted this action in claim and delivery, and while the cars were in the possession of the respondent. A further detail of facts will appear in the course of the opinion.

[1, 2] The court's findings are in detail, but in effect find that the appellant is estopped to assert its title as against the respondent herein; that the respondent is the owner of the automobiles in question. It is now conceded by the parties that judgment is based upon an estoppel in pais arising out of an indicia of ownership with which the dealer was clothed by the appellant and by which the respondent was misled and induced to purchase the said automobiles. The title to the automobiles here in question was vested in the appellant. Pacific Finance Corp. v. Hendley (Cal. App.) 284 P. 736. The title being vested in the appellant and the dealer being in default under the terms of the conditional sale contract by which he secured the right of possession, the appellant must prevail, unless it is estopped to assert such right because of certain acts or omissions on its part. In the case of Pacific Finance Corp. v. Hendley, supra, 284 P. 736, 737, at page 737, the court said: "It is well settled in this state that the owner of personal property may make a conditional sale of the same and deliver possession thereof, reserving the title thereto until payment of the agreed price, which title will be superior to that of a subsequent purchaser or mortgagee without notice of the reservation. Oakland Bank of Savings v. California P. B. Co., 183 Cal. 295, 297, 191 P. 524. It is equally well settled that, if personal property is delivered, under a conditional sale contract, to a buyer who is engaged in the business of selling property of the same kind, and, with the knowledge of the seller, is placed on display for sale with such other property, the holder of the reserved title is estopped to assert it against a bona fide subvendee for value. Civ. Code, § 1142; Democrat-Herald Public Co. v. Pettit, 94 Cal. App. 724, 271 P. 910; General Secur. Corp. v. Reo Motor Car Co., 91 Cal. App. 16, 266 P. 576; State Finance Co. v. Isaacson, 86 Cal. App. 113, 260 P. 580; Rapp v. Fred W. Hauger Motors Co., 77 Cal. App. 417, 246 P. 1067; Trust Co. v. Acceptance Co., 70 Cal. App. 41, 232 P. 489; Carter v. Rowley, 59 Cal. App. 486, 211 P. 267. In such a case the rights of the innocent subvendee 'do not depend upon the actual title or authority of the party with whom he deals directly, but are derived from the act of the real owner, which precludes him from disputing, as against the innocent party, the existence of the title or power which, through negligence or mistaken confidence, he has caused or allowed to be vested in the party making the sale.' "

[3] The existence of estoppel is a question of fact. Parke v. Franciscus, 194 Cal. at page 297, 228 P. 435; Di Nola v. Allison, 143 Cal. 106, 76 P. 976, 65 L. R. A. 419, 101 Am. St. Rep. 84. In Carter v. Rowley, 59 Cal. App. 486, at page 490, 211 P. 267, 269, the court said: "Mere possession, it is true, even by one who happens to be a dealer in the same class of goods, is not sufficient evidence of ownership or of authority to sell to protect one who purchases from the possessor. Covill v. Hill, 4 Denio (N. Y.) 323; Linnen v. Cruger, 40 Barb. (N. Y.) 633; Wilson v. Nason, 17 N. Y. Super. Ct. 155; Case v. Jennings, 17 Tex. 661. See, also, Pacific Acceptance Corp. v. Bank of Italy, 59 Cal. App. page 76, 209 P. 1024, and Levi v. Booth [58 Md. 305, 42 Am. Rep. 332], supra. But where, in addition to possession by the vendor, the owner has given such evidence of authority to sell as usually accompanies such authority according to the custom of trade or the general understanding of business men, then, as was stated by Mr. Justice Field in an early California case, Wright v. Solomon, 19 Cal. 76, 79 Am. Dec. 196, the vendor's possession under such circumstances is evidence, not that he is the owner, but that he has received authority from the owner to sell."

[4-6] Inasmuch as the holder of the reserved title is estopped to assert it against a bona fide vendee for value, it becomes necessary to determine, in the case at bar, whether

or not the respondent is a bona fide purchaser for value, which gives rise to the inquiry—What are the rights of the purchaser of a conditional sale contract, or contracts, from a dealer whose only right to the property is the right of purchase under a conditional sale contract? The rights of such a purchaser (respondent herein) are measured by the contract which is presented. Rogers Lamb Co. v. Coast Secur. Co., 58 Cal. App. 744, 209 P. 246. By the assignment of the conditional sale contracts by the dealer to the respondent, it acquired all of the rights in the property possessed by the dealer, and, upon default under the terms of the contract, would have the right to repossess the Sturgis and McKay cars and terminate the contract, thereby succeeding to all of the rights of McKay and Sturgis in and to the property described in the contracts. The vendees McKay and Sturgis voluntarily consented to the repossession of the automobiles by the respondent and to the termination of all their rights under the said contracts. We can see no reason why the respondent would not thereby succeed to all of the rights of the vendees therein, to the same extent and for all purposes that it would have succeeded had the repossession been accomplished by some process of law. It therefore becomes pertinent and necessary to determine what were the rights of Sturgis and what were the rights of McKay under the conditional sale contract. In other words, were the conditions under which each of them purchased the automobiles from the dealer such as to work an estoppel as against the dealer's vendor under the conditional sale contract? If so, then the appellant is estopped to assert his reserved title as against the respondent, said respondent's rights being measured by the terms of the contract he presented.

Mr. Coffman, a department manager for the appellant herein, who conducted negotiations on behalf of appellant with the dealer, testified in part as follows:

"(Question by Mr. Difani): I will ask you if, in your experience as an automobile man, and one who has had a great deal of experience—how long have you been with the company? A. With the company about a little over two and a half years.

"Q. During that time, I will ask you, in your experience, if you don't know whether it is a fact that dealers, as such, use their cars as demonstrators? * * *

"(Mr. Difani): Just a moment; he has stated that he did not know until he was informed by Mr. Jenner late in March, that Mr. Jenner was using his cars off the floor as demonstrators, and I am asking him a general question—whether or not he knew that dealers, such as the Paige Sales & Service, used their cars as demonstrators. * * *

"A. No, I don't know of any finance company that will allow a dealer to use floor cars as demonstrators; we have demonstrator contracts that can be entered into by companies, by permission. * * *

"(Question by Court): Was that done in this case? A. Yes, we had demonstrator contracts with Mr. Jenner, but not on these two cars.

"The Court: That is what I mean—in this case. A. No. * * *

"Q. (Mr. Difani): Now, did you know, Mr. Coffman, when Mr. Jenner, for the Paige Sales & Service Company, purchased these cars, he was purchasing them from you for resale to the public?

"Mr. Irwin: We object to that, immaterial.

"The Court: Overruled.

"A. Yes.

"Q. You knew that he was taking those cars from Los Angeles, from the storeroom or factory or branch, whatever it might be, the Paige Company of California, and driving those cars down here to Riverside? A. Yes, sir.

"Q. Did you ever come down here and make any investigation to find out whether or not they were sitting on his floor, or being driven around?

"Mr. Irwin: We object to that, incompetent, irrelevant, immaterial. * * *

"The Court: Overruled. * * *

"A. No, sir.

"Q. (Mr. Difani): As far as you knew, then, after Mr. Jenner got these cars from the Paige people in Los Angeles and drove them up from there, your interest in them ceased as far as the use of those cars was concerned, if Jenner kept his contract payments up? A. No, sir."

Mrs. Ethel Sampson, one of the members of the copartnership of the Paige Sales & Service Company, testified that in January she knew that the cars were being financed by some one and thought they were all financed by appellant herein, but she knew the cars were being driven by Mr. Jenner or some representative of the Paige Sales & Service Company from the Paige branch in Los Angeles to their place of business in Riverside; that the cars were being operated by those in the employ of the Paige Sales & Service Company, salesmen and herself. She went to the appellant's office in Los Angeles and asked for the manager. A gentleman who resembled Mr. Coffman appeared and she told him who she was—that she was connected with Mr. Jenner in the Graham-Paige agency in Riverside—and the gentleman informed her that he was the one who handled that line of business and would talk to her. She asked a number of questions and he refused to answer. She told him the cars were being continuously driven and was informed by him that they were doing business with Mr. Jenner and that she was interfering.

[7, 8] "In examining the sufficiency of the evidence to support a questioned finding, an appellate court must accept as true all evidence tending to establish the correctness of the finding as made, taking into account, as well, all inferences which might reasonably have been thought by the trial court to lead to the same conclusion. Every substantial conflict in the testimony * * * is to be resolved in favor of the finding." Bancroft-Whitney Co. v. McHugh, 166 Cal. 140, 134 P. 1157, 1158.

[9-11] It appears, without conflict, that, under the arrangement between the appellant and dealer herein, the distributing agency for the Graham-Paige automobiles were paid for the cars by the appellant for and on behalf of the dealer; that at the time said payment was made the appellant herein took title to the said automobiles and sold them to the dealer on a conditional sale contract, reserving title thereto in the appellant; that Mr. Coffman, department manager of appellant, knew that the cars were driven from the agency in Los Angeles, where they had been purchased, to Riverside; that the dealer maintained a regularly established place of business for the sale of new cars in the city of Riverside; that said Coffman knew that said cars were purchased for resale by the dealer. The conditional sale contract under which the dealer secured possession of the cars from the appellant herein provided, among other things, that: "The purchaser agrees not to sell, attempt to sell, lease, mortgage, hypothecate or otherwise dispose of said personal property or take the same out of the State of California, during the life of this contract, and the purchaser further agrees not to assign this contract, or any of his rights hereunder, and any assignment of this contract or any of the purchaser's rights hereunder, without the consent of the seller, by the purchaser, or by execution or other legal process, or otherwise, or the transfer thereof by process of law, or otherwise, shall at the option of the seller, terminate all rights hereunder to purchase said personal property. The purchaser agrees not to use or permit said personal property to be used for hire."

It is admitted that the dealer sold the two cars here in question on conditional sale contract to Sturgis and McKay; that Miss Sturgis was a resident of the city of San Bernardino and there is no evidence as to whether or not she ever saw the car purchased by her at the dealer's place of business or knew anything about the dealer's business, or whether the automobiles were driven or not. However, it does appear that a salesman of the dealer took her to the office of the dealer and she executed the contract at the dealer's place of business. In General Securities Corp. v. Reo Motor Car Co., 91 Cal. App. 16, at page 19, 266 P. 576, 577, the court said: "'Where the owner of the property clothes another with the apparent title to or power of disposition over it, and an innocent third party has thereby been induced to deal with the apparent owner in reference thereto,' the true owner in such case is estopped from afterward asserting his title. Chase v. Whitmore, 68 Cal. 545, 9 P. 942." See, also, Western States Acceptance Corp. v. Bank of Italy (Cal. App.) 285 P. 340.

The burden rests upon a party asserting an estoppel to prove all of the elements constituting it. 10 Cal. Jur. 656. Manifestly, Miss Sturgis could not be induced to deal with the dealer as an apparent owner by any fact or circumstances not within her knowledge or information, mere possession of an automobile by a dealer being insufficient to establish an estoppel against his vendor in favor of a purchaser. Carter v. Rowley, supra. Does the fact that Miss Sturgis was taken to the dealer's place of business by a salesman of the dealer and there executed a conditional sale contract for the purchase of the automobile, coupled with the fact of the possession of the automobile by the dealer, constitute facts sufficient to work an estoppel in her favor as against the appellant herein?

Western States Acceptance Corp. v. Bank of Italy et al., supra, is a case where the acceptance corporation paid for an automobile for the dealer, and, as a part of the same transaction, the dealer executed a trust receipt in favor of the acceptance corporation, agreeing to hold the automobile in trust as the property of the acceptance corporation. The dealer agreed not to sell, incumber, or otherwise dispose of same except upon written consent of the acceptance corporation. The dealer sold the automobile to another dealer for cash. The purchasing dealer had no actual notice of ownership, or of possession, or any interest in the same by the acceptance corporation. The purchasing dealer sold the automobile on a conditional sale contract to one Mrs. Kennon, and then sold the contract to the Bank of Italy. The purchasing dealer caused the automobile to be registered with the motor vehicle division, and a white certificate was issued to Mrs. Kennon as registered owner and a pink certificate to the Bank of Italy as legal owner. The acceptance corporation, upon learning these facts, brought suit in replevin. On page 341 of 285 P., the court said: "There can be no question that the evidence clearly establishes an estoppel. * * * The duty rests upon one financing a retail dealer to see to it that cars upon which he has a lien or other interest are not left under the domain or control of such sale dealers on his salesroom floor, to be offered to the public. Secret arrangements which place it in the power of a dealer to deceive unsuspecting purchasers should be, and they are, condemned. General Securities Corp. v. Reo Motor Co., supra. Whether, therefore, plaintiff had or had not any interest in the car is unimportant, for if it had, it negligently permitted Ballard, a known automobile dealer in this make of car, to appear as apparent owner with the right of selling the same, and it should therefore be estopped from asserting its alleged title as against respondents, who are innocent purchasers without notice. Where one of two innocent purchasers must suffer through the act or negligence of a third person, the loss should fall upon the one who by his conduct created the circumstances which enabled the third party to perpetrate the wrong or cause the loss."

In the case at bar, as in the Western States Acceptance Corp. v. Bank of Italy et al., supra, the appellant did nothing to protect innocent purchasers, and, under the circumstances disclosed herein, it is estopped to assert its title against the respondent herein.

[12] Mr. McKay, the purchaser under conditional sale contract of the McKay car, was a salesman or sales manager for the dealer. He knew that some of the cars purchased from the Graham-Paige agency were purchased under flooring contracts executed by the dealer in favor of the appellant herein. To quote his testimony:

"Q. (Mr. Difani) Until that day (referring to the day that the respondent herein took possession of the McKay car) you knew, did you not, Mr. McKay, that this car was floored there by the California Standard Finance Company? A. No;—Well, I had an idea it was, yes.

"Q. (Mr. Difani) Well, do you know? The question is—do you know, Mr. McKay? A. Not positively; no.

"Q. (Mr. Rollinson) You knew, did you not, Mr. McKay, that the California Standard Finance Company had been flooring other cars? A. Had floored some, I don't know that they floored them all.

"Q. (Mr. Difani) Now, Mr. McKay, you said that you didn't recall using the car after you purchased it? A. Um-huh.

"Q. Can you state how that happened? A. Well, we didn't have many on the floor to show, we only had the two new cars.

"Q. Then, as a salesman, was there an agreement between you and Mr. Jenner that the car would be left on the floor, after you purchased it, for display purposes? A. No, that was more or less all of my own idea, no part of the sales—

"Q. You used your car later on to take somebody else? A. Yes."

It appears from the above-quoted testimony that McKay was in possession of enough information to have placed him upon inquiry as to the exact condition of the title to said car. If that be true, then he could not assert an estoppel as against the vendor of the dealer herein. Rogers Lamb Co. v. Coast Securities Co., 58 Cal. App. 744, 209 P. 246; General Securities Corp. v. Reo Motor Car Co., supra. Therefore, the appellant is not estopped from asserting its title as to the McKay car.

[13] The respondent further urges that, because of the fact that appellant did not register said automobile with the state motor vehicle division, it failed in a duty imposed by law, and hence is estopped to assert its title to said automobiles as against respondent. It is admitted that there was no registration made of either of the cars with the state motor vehicle division until the dealer caused the same to be registered, and a white certificate was issued to Miss Sturgis and to Mr. McKay, as registered owners of the automobiles respectively, and to the respondent as the legal owner of each of said automobiles. It appears that the Graham-Paige agency in Los Angeles was the distributor of Paige automobiles in the district in which the dealer was doing business. It further appears that the appellant herein did not sell the said automobiles for the purpose of being operated upon the public highways of this state. In fact, by the contract of the appellant herein with the dealer it appears that such was not to be done. We quote from the contract: "The purchaser hereby agrees not to drive or cause to be driven, or otherwise operate, the motor vehicle herein described without the written consent of the seller."

Section 36 of the Motor Vehicle Act, subdivision a, defines what vehicles are to be registered under the Motor Vehicle Act, and reads as follows: "Every owner of a motor vehicle * * * which shall be operated upon the public highways of this state shall for each such vehicle owned, except as herein otherwise provided, apply to the division for the registration thereof." (Amended by Stats. 1927, p. 1423 § 8.)

It appears from the said section that no registration of new automobiles is required under the terms of said act except those which are to be operated upon the public highways of this state. Section 45 of said act (amended by St. 1925, p. 402, § 7), subdivision a, provides, upon the transfer of title or interest of a legal owner, certain records must be made and sent to the state motor vehicle division. Subdivision b requires that the transferee shall forward both the certificate of ownership, so indorsed, and the certificate of registration to the division. Subdivision c provides that subdivision b of this section requiring a transferee to forward the certificate of ownership, after indorsement, and the certificate of registration to the division shall not apply to the transferee of a vehicle not intending to and who does not drive such vehicle or permit such vehicle to be driven upon the public highway, etc. Subdivision e of said section provides that until said division shall issue said new certificate of registration and certificate of ownership, as hereinbefore provided in subdivision d, delivery of such vehicle shall be deemed not to have been made, and title thereto shall be deemed not to have passed, and said intended transfer shall be deemed to be incomplete and not to be valid or effective for any purpose. Section 45½ of said act (added by St. 1927, p. 1424, § 10), subdivision b, provides for the giving of notice of sale and transfer as follows: "Every dealer, upon transferring a motor vehicle * * * whether by sale, lease or otherwise, to any person other than a dealer, shall immediately give written notice of such transfer to the department," etc.

Section 46 of said act permits the manufacturer or dealer in motor vehicles, having an established place of business in this state, owning any such new vehicles and operating them upon the public highways exclusively for the purpose of testing, demonstrating, or selling the same, in lieu of registering each such vehicle, may secure from the state department what is commonly known as driver's symbols or dealer's numbers. It further provides, in subdivision d thereof, that it shall be permissible for such manufacturer or dealer to operate any such vehicle without number plates attached thereto from any vessel, railroad depot or warehouse over the public highways, to the salesrooms or other place of business of such manufacturer or dealer, or to a warehouse or other place of storage under a written permit authorizing such operation first obtained from the police authorities.

It therefore appears that the only automobiles required to be registered under the California Motor Vehicle Act (amended by Stats. 1927, p. 1424, § 11) are the vehicles to be used upon the public highway. The distributing agency in Los Angeles, therefore, was not required by said act to register new automobiles in their possession not to be used upon the public highway. Appellant herein, when securing the title to said automobiles, did not procure them to be operated upon the public highway by appellant, and the dealer, by its contract with the appellant herein, expressly agreed not to operate said automobiles upon the public highway. It therefore appears that no registration of said automobiles was required by the said Motor Vehicle Act unless the fact that the appellant acquiesced in the dealer driving the said automobiles from the distributing agency in Los Angeles to his place of business in Riverside, California, with the dealer's license number displayed thereon, was such a use of said automobiles upon the public highway as to require a registration thereof. This we do not believe was such a use as to require registration of said automobiles under the Motor Vehicle Act. It will be observed that the apparent intent of the Legislature was to permit the moving of motor vehicles from one dealer's place to another and from warehouse to storage without the necessity of registration of the car so moved. Section 46, supra. The appellant therefore owed no legal duty to the respondent or any one else to cause the registration of said automobiles with the state motor vehicle division and is therefore not estopped because of failure to register said automobiles to assert its title.

[14] The appellant further urges that the pleadings are insufficient to present an issue in estoppel. The respondent in answer thereto insists that, under the circumstances presented here, it is not necessary to plead an estoppel and relies upon the rule announced in the case of Kenny v. Christianson, 200 Cal. page 419, 253 P. 715, 50 A. L. R. 1297. The rule is there declared on page 424 of 200 Cal., 253 P. 715, 717: "In making this contention plaintiff relies upon the familiar rule that the defense of an equitable estoppel is one which must be pleaded. This rule, however, has only application to cases wherein the plaintiff bases his sole reliance for his recovery in said action upon a claim of title which he is estopped to urge. Where, however, a plaintiff, as in this case, bases her alleged right to recovery in the first instance upon the original claim of ownership of the property in question and upon her contention that the person through whom the defendant acquired title to said property had no authority from her to dispose of the same, the defendant is not required in his pleadings to anticipate such other contentions as the plaintiff may seek to rely upon when her main reliance for her right of recovery has failed her, and which do not appear upon the face of her complaint. In such cases the defendant may await the assertion by the plaintiff in her proof of such additional foundation for her right of recovery and may then oppose the same with his evidence of an equitable estoppel."

In that case the complaint was in the usual form employed in actions for claim and delivery. The answer denied, for want of information and belief, that plaintiff was the owner or entitled to the possession of said personal property, and denied that he had ever taken wrongful possession of same, or that his detention thereof was unlawful; but, on the contrary, alleged that from a time prior to the commencement of the action and ever since said time he had been and continued to be the owner of and entitled to the possession thereof. The court made its findings in part showing equitable estoppel, and entered judgment in favor of the defendant.

An examination of the complaint in the action at bar shows that the complaint is one in the usual form employed in actions of claim and delivery; that the answer denied that the plaintiff was the owner entitled to the possession of the said personal property, and alleged that the defendant was the owner of said personal property entitled to possession thereof. We conclude that under such circumstances the facts constituting the equitable estoppel need not be pleaded. Kenny v. Christianson, supra.

For the foregoing reasons the judgment is affirmed as to the Sturgis car, being Paige sedan, motor No. 171428, and is reversed as to the McKay car, being Paige sedan, motor No. 171994.

We concur: MARKS, Acting P. J.; BARNARD, J.

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111 Cal. App. 382

GOODYEAR TIRE & RUBBER CO. v. HANBY, Judge, et al.

Civ. 7674.

District Court of Appeal, Second District, Division 2, California.
Jan. 27, 1931.

1. Prohibition ⚷17.

Where defendant's demurrer on ground of lack of jurisdiction was overruled, no further objection was necessary before applying for writ of prohibition.

2. Pleading ⚷418(1).

Filing of answer, after defendant's demurrer on ground of lack of jurisdiction was overruled, did not waive contention raised by demurrer.

3. Prohibition ⚷3(2).

Appeal after trial on merits *held* not such speedy or adequate remedy as would preclude writ of prohibition, where trial court had no jurisdiction of subject-matter.

4. Prohibition ⚷10(1).

Superior court *held* without jurisdiction over compensation claimant's suit for damages and for specific performance of Accident Commission's award, justifying issuance of writ of prohibition.

5. Prohibition ⚷10(1).

Writ of prohibition *held* proper remedy, where trial court was without jurisdiction of subject-matter.

Petition by the Goodyear Tire & Rubber Company for a writ of prohibition, to be directed to J. Walter Hanby, Judge, and the Superior Court in and for the County of Los Angeles, to restrain certain proceedings in a suit brought by James Steiner against petitioner.

Peremptory writ granted.

A. G. Ritter, of Los Angeles, for petitioner.

Norbert Savay, of Los Angeles, for respondents.

WORKS, P. J.

James Steiner commenced an action in respondent court against petitioner in this proceeding. Later he filed an amended complaint therein. This pleading was in two counts.

It was alleged in the first count, in effect and among other things, that Steiner was injured on the head by a falling steel bar while in the course of an employment under petitioner, and that the injury arose out of the employment, that the injury consisted of two depressed fractures of the skull, that on a certain date the Industrial Accident Commission gave Steiner an award against petitioner because of his injury, directing that petitioner "furnish to applicant forthwith a decompression operation together with the medical and hospital treatment reasonably necessary to cure and relieve appellant from the effects of his injury," that petitioner did furnish a decompression operation but for only one of the depressed fractures, that, therefore, petitioner did not comply with the award, although Steiner demanded from petitioner a further operation for the second depressed fracture, that as a direct consequence of the failure and refusal to furnish the second operation Steiner suffered "damage to his brain, has been injured in his health and constitution and made sick generally in [and(?)] his mental and intellectual faculties have been impaired, has suffered and continues to suffer great and agonizing pain in his head," thereby rendering him unable to pursue any occupation, all to his damage in the sum of $50,000, and that no remedy is open to him except by suit in respondent court to compel specific performance of the award and to recover the damages alleged.

The second count repeated, by reference, all the allegations of the first count, and averred in addition that ten days before the decompression operation was performed Steiner and petitioner entered into an agreement which was "as follows: That defendant shall choose and employ a surgeon to perform said decompression operation on plaintiff's head; that in consideration of plaintiff's consenting to said selection by defendant of the surgeon to perform such operation, the defendant agreed to furnish plaintiff with an operation or operations that may be necessary for the removal of all the depressed fractures on plaintiff's head, and to treat the plaintiff until reasonably cured of said injury"; that the operation was performed as alleged in the first count, that demand was thereafter made upon petitioner "to comply fully with the terms of the agreement heretofore stated, and to furnish an operation for the remaining depressed fracture," etc., that petitioner refused and still refuses to comply with the demand, "in consequence whereof plaintiff has endured and still endures great physical and mental suffering," etc., to his damage in the sum of $50,000.

At the conclusion of the amended complaint Steiner demanded judgment for specific performance of the award, for specific performance of the agreement between the parties, for damages as alleged, for costs, and for all other proper relief.

Petitioner demurred to each count of the amended complaint on the ground, among others, that it "affirmatively shows that this court has no jurisdiction of the subject-matter of said action and that the sole jurisdiction in connection with the matters therein alleged is vested in the Industrial Accident Commission of the State of California." The demurrer was overruled, and petitioner was allowed ten days within which to answer. In due time an answer was filed. Petitioner then, under appropriate allegations, asked this court to prohibit further proceedings in the action, and an alternative writ of prohibition issued.

The questions presented in the proceeding are so simple that we shall answer them with dispatch. At the conclusion of respondents' brief the points made by them are summarized in seven brief statements. In each of the ensuing seven paragraphs we shall state one of these points, immediately following the statement with our views upon it.

[1] "Petitioner failed to make objection to the ruling of the subordinate court before applying for prohibition." The position of petitioner was fully made known to the court by the demurrer. The court sufficiently indicated its intentions by overruling the demurrer and allowing petitioner time to answer. No more was necessary.

[2] "Petitioner acquiesced in the decision of the respondent, Judge Hanby, by filing his [its] answer." The filing of the answer was no waiver of the point made in the demurrer that the court had no jurisdiction of the subject-matter of the action.

[3] "In the case under consideration an appeal would have afforded petitioner a plain, speedy and adequate remedy at law." An appeal could not have been prosecuted until after a trial of the issues of fact presented by the amended complaint and the answer. The appeal would have been neither speedy nor adequate. To remit petitioner to its right of appeal would cause the expense and the delay incident to the trial and review of an action over which respondent court had not the shadow of jurisdiction. The expense and delay entailed upon petitioner, and the activities of the courts in the attempted exercise of a wholly unwarranted jurisdiction, should be halted at once.

"It does not seem conceivable that any injury (and still less that any irreparable injury) could result to the petitioner if he [it] exercised his [its] right of appeal from the lower court—whereas, it is perfectly clear that in the event of prohibition the plaintiff might suffer an irreparable injury." A portion of this statement has been answered in the next preceding paragraph. For the remainder, it is perfectly clear that Steiner could and will suffer no injury from the peremptory writ of prohibition which we propose to issue, halting, as it will, the trial, and rendering impossible the appeal, of an action over which respondent court has no jurisdiction whatever. On the contrary, if petitioner were remitted to its right of appeal, Steiner, together with petitioner, would be injured by the expenditure of time and money incident to the trial and appeal of a wholly fruitless action.

[4] "All authorities agree that prohibition should never issue except in clear cases of judicial usurpation, or clear violation by the court of mandatory provisions of law." This is a clear case for the issuance of the writ of prohibition.

[5] "Errors of law of a subordinate tribunal cannot be corrected by prohibition." This is a general proposition which we do not endeavor to meet in terms. Certainly where, as here, a trial court threatens to continue in the attempted exercise of a jurisdiction which is absolutely nonexistent, the wheels of its unwarranted progress may be stopped by prohibition.

"The record conclusively shows that the case at bar"— counsel must mean the action heretofore pending in respondent court—"is clearly within the jurisdiction of the superior court." The record conclusively shows the contrary.

A peremptory writ of prohibition will issue as prayed.

We concur: CRAIG, J.; IRA F. THOMPSON, J.

111 Cal. App. 377

SIEROTY v. CITY OF HUNTINGTON PARK et al.

Civ. 7673.

District Court of Appeal, Second District, Division 2, California.

Jan. 27, 1931.

Rehearing Denied Feb. 25, 1931. Hearing Denied by Supreme Court March 26, 1931.

1. Municipal corporations 🔑626.

Ordinance relating to distribution of handbills or other printed or written advertising matter throughout city *held* not invalid as discriminatory in matter of classification.

> Ordinance made it unlawful for any one to distribute or cause to be distributed in city any handbill or other printed or written advertising matter by placing same in any automobile, yard, porch, or mail box in city, not in possession or under control of party so distributing same. Under its terms, ordinance was inapplicable to any newspaper or other publication printing news of a general nature, or keeping advertising space therein open to the public for publication therein of general advertising matter.

2. Evidence 🔑14.

It is matter of common knowledge that individual, on finding mail box stuffed with advertising matter, will cast offending publication to wind promptly.

3. Municipal corporations 🔑622.

Ordinance relating to distribution of handbills or other printed or written advertising matter *held* not invalid as being prohibitive.

4. Municipal corporations 🔑611.

Ordinance relating to distribution of handbills or other printed or written advertising matter *held* valid under police power of city.

5. Constitutional law 🔑70(3).

Manner and extent of regulation under police power of city is matter for legislative determination.

6. Municipal corporations 🔑63(1).

Court cannot interfere with regulation of city pursuant to police power unless manner and extent of such regulation is arbitrary or unreasonable.

Appeal from Superior Court, Los Angeles County; Walter S. Gates, Judge.

Action by A. Sieroty against the City of Huntington Park, a municipal corporation, and others. Judgment for defendants, and plaintiff appeals.

Affirmed.

Benjamin & Benjamin and Aaron Elmore, all of Los Angeles, for appellant.

Arch G. McLay, of Huntington Park, for respondents.

ARCHBALD, Justice pro tem.

This is an appeal upon the judgment roll from a judgment against plaintiff in the superior court after defendants' demurrer to the complaint was sustained.

Plaintiff filed his complaint to enjoin respondent city of Huntington Park, its mayor, chief of police, trustees, and councilmen from arresting or otherwise interfering with plaintiff in the distribution of an advertising publication in said city. The complaint sets out two counts, and appellant, for the purposes of this appeal, concedes the correctness of the ruling of the trial court as to the first. The second alleges, in substance, that the plaintiff at all times mentioned was the owner and publisher of an advertising publication known as "Better Home Furnishing Facts," which was distributed by plaintiff to the "homes and residences" throughout Los Angeles county and particularly in said city of Huntington Park; that plaintiff's business of distributing such publication developed into a profitable one; that said publication and the matter contained therein "are not indecent or offensive in any respect" and are identical in "form and content to a large degree with advertising matter published in a large number of newspapers distributed throughout said county and said City of Huntington Park." The complaint further alleges that on or about January 21, 1929, said city enacted an ordinance providing as follows: "Section 1. It shall be unlawful for any person, firm or corporation to distribute or cause to be distributed in the City of Huntington Park any hand bill or other printed or written advertising matter by placing or causing the same to be placed in any automobile, or in any yard, or on any porch, or in any mailbox in said city, not in the possession or under the control of the party so distributing the same. Section 2. The provision of this ordinance shall not be deemed to apply to any newspaper or other publication printing news of a general nature, or keeping advertising space therein open to the public for the publication therein of general advertising matter." The ordinance ten provides that any one violating the provisions thereof shall be guilty of a misdemeanor and upon conviction shall be fined in a sum not exceeding $300 or imprisoned in the city or county jail for a period not exceeding three months, or both.

No question is raised as to the authority of the council to pass such an ordinance if it be free from the alleged defects.

Appellant contends that the court erred in sustaining the demurrer and entering judgment thereafter, because the ordinance is unconstitutional and void by reason of (a) its discriminating classifications and (b) because it is prohibitory. Counsel for appellant concede that there exist causes for exempting newspapers from the effect of such an ordinance, but say that in the "novel classification" excepting "other publications printing news of a general nature or keeping advertising space therein open to the public for the publication therein of general advertising matter" lies the vice of this particular enactment. The ordinance is directed against handbills and advertising matter of a particular or special nature and put out by one advertiser. Counsel argue that "if one person buys all the space in such a publication its distribution is prohibited; whereas if more than one person advertises (assuming the publication is open to the public in the latter instance), then its distribution is not prohibited," and that availability to the public of space is not a reasonable or constitutional basis for classification, as there is no inherent difference between the distribution of free publications where the content is paid for by one person and those in which the content is paid for by many persons.

[1] Section 2 of the ordinance excepts from its application newspapers, which counsel admit is a reasonable exception, and also (1), other publications "printing news of a general nature" or (2) "keeping advertising space therein open to the public for the publication therein of general advertising matter." The purpose of the ordinance is undoubtedly to prevent the littering of the streets with quantities of waste paper, which might not only occasion fire, but choke up and obstruct gutters and drains, all to the great detriment of the general welfare. It permits the distribution of advertising publications also "printing news of a general nature," and there would seem to be a very reasonable basis for such an exception, for it is reasonable to suppose that such a publication would be taken from the automobile, yard, porch, or mail box, where it was deposited in the course of distribution, into the house, by reason of the content of such a publication being of a more general interest than one consisting purely of advertising matter, and consequently that it would not be left to the caprice of the winds to litter the streets and walks. The same is true of a publication in which advertisers generally are permitted to hold out to the public the varied and general lines of merchandise they are selling. Some of the people whose private property is made the involuntary receptacle for such a publication would be interested in the attractive bargains shown in one line of merchandise and some in another, with the result that it is fair to assume that the number of copies of such a publication that would find their way into the streets would be very inconsiderable as compared to a publication advertising a more limited number of lines sold by one advertiser. And it is a matter of common knowledge that most people have a preference for trading with certain business houses and are constantly on the lookout for bargains advertised by those particular establishments, so the diversity of advertisers alone would reasonably serve to tend to prevent the very thing the ordinance is enacted to prevent. The classification made would seem to be based on reason and to be not arbitrary, and, if the ordinance discriminates against appellant's business as compared with other advertisers of the same line of merchandise, it is by reason of the nature of his publication. Such discrimination appearing to us to be based on distinctions that we cannot say are unreasonable or arbitrary, it is within the jurisdiction of the council to make. Quong Wing v. Kirkendall, 223 U. S. 59, 32 S. Ct. 192, 56 L. Ed. 350.

[2] It might be urged that, if such a publication were deposited in a mail box, it would be beyond the reach of the wind and beyond the jurisdiction of the council to legislate against, as the act of so depositing the publication could not affect the public welfare even though it might raise the ire of the owner of the mail box. We think it also a matter of common knowledge that, when an individual finds his mail box stuffed with something in which he has no interest and which the receptacle was not made to receive, his frame of mind is such that the offending publication is usually given to the wind very promptly, resulting in the probability of its reaching a destination in the street or alley or on the sidewalk; so we cannot say that the council has gone beyond its jurisdiction in prohibiting the deposit in mail boxes of a publication that is so likely to be detrimental to the public by reason of its content.

[3] Counsel for appellant also contend that the ordinance is prohibitive. It is directed against the deposit of the proscribed publication in four places only: In an automobile, in any yard, on any porch, or in any mail box in such city not in the possession or under the control of the party distributing the same. The council has selected the four places where deposit of a publication in which the householder is not interested would most likely result in the very thing the ordinance is directed against. There is nothing to prevent distribution to the householder at the door if he is interested in the publication, or

to individuals, and appellant could probably obtain the consent of interested householders to deposit the publication on their porches or in their mail boxes, or could change the form of his publication so as to bring it within the excepted classes. We therefore cannot see that distribution is prohibited.

[4-6] In our opinion the ordinance in question is a valid exercise of the police power of the city. It is not prohibitive, but regulates matters over which the council had jurisdiction; and, as the manner and extent of such regulation is for legislative determination and appears not to have been exercised in an arbitrary or unreasonable manner, we cannot interfere. In re Anderson, 69 Neb. 686, 96 N. W. 149, 5 Ann. Cas. 421.

Judgment affirmed.

We concur: WORKS, P. J.; CRAIG, J.

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111 Cal. App. 310

DARROW v. ROBERT A. KLEIN & CO., Inc., et al.

Civ. 7715.

District Court of Appeal, First District, Division 2, California.

Jan. 26, 1931.

Rehearing Denied Feb. 25, 1931. Hearing Denied by Supreme Court March 26, 1931.

1. Conspiracy 🔑15.

Where conspiracy, as to defraud, is charged in civil case, gist of action is not conspiracy, but civil wrong resulting in damage.

2. Fraud 🔑7.

Constructive fraud usually arises from breach of duty, where relationship of trust and confidence exists (Civ. Code, § 1573).

Civ. Code, § 1573, defines constructive fraud as breach of duty which, without actually fraudulent intent, gains advantage for one by misleading another to his prejudice.

3. Brokers 🔑38(4).

Evidence showed that relationship of trust and confidence existed between vendor and broker, who was secretly acting as purchaser's agent, and who violated promises to vendor (Civ. Code, § 1573).

4. Principal and agent 🔑48.

Relationship of agent to principal is of fiduciary nature, analogous to relationship between trustee and beneficiary (Civ. Code, §§ 2228, 2234, 2322).

In view of Civ. Code, § 2322, forbidding agent to do any act which trustee may not do, principal agent relationship is governed by section 2234, providing that violation of duty by trustee is fraud on beneficiary, and also by section 2228, prohibiting trustee from obtaining any advantage by slightest misrepresentation or concealment, or from secretly taking part in transaction in which trustee has interest adverse to that of beneficiary.

5. Principal and agent 🔑48.

Agent must act with highest good faith, and may not obtain advantage over principal in any transaction by virtue of agency (Civ. Code, §§ 2228, 2234, 2322).

6. Brokers 🔑32.

Failure of brokers to make disclosures to vendor, or to reveal they were acting as purchaser's agents, *held* breach of duty, justifying vendor's recovery for constructive fraud (Civ. Code, §§ 1573, 2228, 2234, 2322).

Evidence showed that brokers, agreeing to purchase real estate from vendor, disclosed that they were making profit of $1,000 on resale to certain purchaser, but did not disclose that they were receiving $500 as commission or secret profit from purchaser, nor that, contrary to brokers' promises to vendor, purchaser was not making cash payment or procuring bond to insure completion of building which purchaser proposed to construct, and that failure to furnish such bond would make worthless the second deed of trust which vendor agreed to accept.

Appeal from Superior Court, Los Angeles County; J. Walter Hanby, Judge.

Action by Marie E. Darrow against Robert A. Klein & Co., Inc., and another. Judgment for plaintiff, and defendants appeal.

Affirmed.

Henry Haves and Haves & Engelhardt, all of Los Angeles, for appellants.

Lucius F. Chase, Lucius K. Chase, and Stanley N. Barnes, all of Los Angeles, for respondent.

SPENCE, J.

Plaintiff brought this action for damages based upon the alleged fraud of the defendants in a real estate transaction. The case was tried by the court sitting without a jury, and, from a judgment in favor of plaintiff in the sum of $4,215, defendants appeal.

Plaintiff was the owner of a contract for the purchase of a certain lot of land. There was a balance due upon the contract of approximately $1,185. The lot was admittedly of the value of $5.500. Defendant Robert A. Klein & Co. was a corporation engaged in the transaction of the business of a real estate broker, while defendant Fred W. Klein was an officer and acted for and on behalf of the corporation. The corporation appears to have been a family affair, defendant Fred W. Klein testifying that it consisted of his brother Robert A. Klein and himself. The defendant corporation had previously acted as agent for plaintiff in other real estate transactions and plaintiff had sought their advice on several occasions. Plaintiff had previously listed the lot in question with them for sale. About February 22, 1926, she sought their advice with respect to a proposed offer of $5,500 for the property. She talked with defendant Fred W. Klein. He informed her that he believed his brother, Robert A. Klein, would purchase the property upon terms similar to those offered. Plaintiff called at their office on February 22, 1926, and after a discussion accepted a deposit of $50 on the purchase price of $5.500 and signed a deposit agreement dictated by defendant Fred W. Klein. This deposit agreement read as follows: "In consideration of fifty dollars for which I hereby acknowledge receipt, I hereby agree to sell to Robert A. Klein & Co. or nominee lot No. 686 Tract No. 6143 for $5,500 upon the following terms and conditions, Fifteen Hundred Dollars cash including the amount receipted for. The balance of $4.000, I am to take back in the form of a trust deed payable $50 per month or more including interest at 8%. I am to allow Robert A. Klein & Co. or nominee to place a first trust deed on the above mentioned property upon which they agree to erect a four family flat of 5 rooms each. First Trust deed is not to exceed $15,000. I also agree that this lot is to be free and clear of all incumbrances. Robert A. Klein & Co. are to retain $275 out of the $1,500 down payment as their commission for services rendered."

Plaintiff was informed during the discussion that the defendant corporation had resold the lot for $6,500 to a Mr. Wallin and that the company would thereby make a profit of $1,000. To this plaintiff apparently assented. Plaintiff was further told that Wallin was to pay $2,500 down and was to put a building loan on the property in the sum of $15,000 for the purpose of erecting a building thereon and that the balance of $4,000 due to plaintiff was to be represented by a second deed of trust. There was further discussion regarding the protection which plaintiff would have in the transaction. She was assured that it would be perfectly safe, that Mr. Wallin was reliable, and that a bond would be furnished to insure the completion of the building referred to. In reliance upon these assurances, plaintiff entered into the transaction and the following day went to the Inglewood Savings Bank and signed escrow instructions dictated by defendant Fred W. Klein. These escrow instructions provided for a deed from plaintiff to Wallin and the payment by him of $2,450, being the balance of the down payment, and the execution of a $4,000 second deed of trust subject to a first deed of trust of $15,000. No mention of a bond was made in the instructions. Apparently no escrow instructions were given by Wallin. He testified that Mr. Klein acted as his agent in the transaction, which fact was unknown to plaintiff. Neither the sum of $2,450 nor any other sum was ever put up by Wallin, but he proceeded to negotiate a loan on the property in the sum of $15,000 from Golden Gate Securities Company. Upon the execution by Wallin of the instruments required, the Golden Gate Securities Company deposited $3.600 with the escrow holder as an advance on the building loan. Of this money so advanced on the building loan, approximately $1,185 was paid out by the escrow holder in obtaining the deed from plaintiff's vendor and the balance was paid over to and divided between Wallin and defendant Robert A. Klein & Co., the defendant company receiving a total of $1,775 therefrom. Defendants claimed that this sum represented the $275 commission from plaintiff, the $1,000 profit, and an additional $500 due from Wallin. Defendants did not disclose to plaintiff the fact that they were receiving this $500 from Wallin, defendant Robert A. Klein testifying that he did not believe it was necessary. Aside from receiving the second deed of trust in the sum of $4,000, the plaintiff received nothing in the transaction except the $50 deposit and one $50 monthly payment upon the second deed of trust which was advanced by the defendant company with the explanation that Wallin was up against it. Almost immediately thereafter Wallin became bankrupt. No house was built upon the property and the holder of the first deed of trust proceeded to foreclose. It developed that the only bond that existed was an indemnity bond obtained by the Golden Gate Securities Company to indemnify it against loss, which bond did not inure to the benefit of plaintiff. Wallin being bankrupt, and the second deed of trust being worthless, the damages awarded plaintiff were based upon the value of her interest, less the sum of $100 which she had received.

[1] Plaintiff's complaint appears to have been drawn upon the theory of a conspiracy to defraud charging that such conspiracy existed between defendants and Wallin. The complaint was of considerable length. It charged that all of the alleged fraudulent acts set forth were done in pursuance of such conspiracy and recited in detail the entire transaction and facts surrounding it. Respondent on this appeal refers to the action as one for damages for fraud, and we will so treat it,

for, where a conspiracy is charged in a civil case, the gist of the action is not the conspiracy but the civil wrong resulting in damage. Mox, Incorporated, v. Woods, 202 Cal. 675, 262 P. 302; Bowman v. Wohlke, 166 Cal. 121, 135 P. 37, Ann. Cas. 1915B, 1011; Dowdell v. Carpy, 129 Cal. 168, 61 P. 948.

It is contended by appellants that the evidence does not support the findings, and the findings do not support the judgment. Summarizing appellants' position, it consists of the claim that no actual fraud on the part of appellants was shown. We deem it unnecessary to determine whether the evidence was sufficient to support all of the numerous findings made or whether the evidence and findings make out a case of actual fraud on the part of the appellants. If the evidence and findings are sufficient to make out a case of constructive fraud on the part of appellants, we are satisfied that the judgment should be affirmed.

[2, 3] Constructive fraud most frequently arises from a breach of duty where a relationship of trust and confidence exists. It consists of "any breach of duty which, without an actually fraudulent intent, gains an advantage to the person in fault, * * * by misleading another to his prejudice. * * *" Civ. Code, § 1573. A relationship of trust and confidence existed in the present case by reason of the prior dealings of the parties and the terms of a deposit agreement providing for an agent's commission, and the findings that respondent reposed special confidence and trust in her agent are amply sustained by the evidence.

[4, 5] The duties and obligations of an agent are many. The relationship of an agent to his principal is of a fiduciary nature similar in many respects to the relationship between a trustee and his beneficiary. The relationship not only imposes upon the agent the duty of acting with the highest good faith, but likewise precludes him from obtaining an advantage over the principal in any transaction had by virtue of the agency. Langford v. Thomas, 200 Cal. 192, 252 P. 602; Calmon v. Sarraille, 142 Cal. 638, 76 P. 486. A violation of duty on the part of a trustee is treated as a fraud upon the beneficiary (Civ. Code, § 2234), and a violation of duty on the part of an agent should be treated in the same manner (Civ. Code, § 2322; Sterling v. Smith, 97 Cal. 343, 32 P. 320). Under said section 2322, an agent may not do any act which a trustee is forbidden to do. That section, by reference to the sections relating to trustees, prohibits an agent from obtaining any advantage by the slightest misrepresentation or concealment of any kind (Civ. Code, § 2228), and prohibits an agent or those acting for him from taking part in any transaction concerning the agency in which the agent has an interest present or contingent, adverse to that of the principal, unless the principal with a full knowledge of the motives of the agent and all the facts which might affect the principal's decision permits the agent to do so (Civ. Code, § 2230).

[6] Measured by the foregoing rules, it is apparent that appellants are chargeable with a breach of duty to respondent. They failed to disclose, first, that they were acting as agents for Wallin; second, that no cash down payment was being made, but that Wallin was financing his down payment on the lot out of money advanced on the building loan; and, third, that out of money advanced on the building loan appellants were receiving, not only the commission of $275 and the profit of $1,000, but also an additional sum of $500 either as a secret profit from Wallin or as money owing from Wallin on some other transaction. The disclosure by appellants of the fact that they were participating in the transaction to the extent of a profit of $1,000 did not relieve them of their duties and obligations generally in their capacity as agents of respondent. In fact, their right to take part in the transaction to that extent depended upon their compliance with their duties as agents to fully disclose their motives and all the facts which might affect respondent's decision in assenting to such participation. Without disclosing their motives and all the facts, they obtained respondent's assent to the $1,000 profit and took part in the transaction, not only to the extent disclosed, but also to obtain the additional sum of $500. They withdrew all of the sums which they received, totaling $1,775, from the building loan money intended for the erection of a building for the protection of respondent's second deed of trust. Disregarding their duty to act with the highest good faith in respondent's interests, they acted throughout the transaction primarily, if not solely, in their own interests and to their own advantage, with the resultant loss to respondent.

Further, it has been frequently held that, where a relationship of trust and confidence exists, constructive fraud may be predicated upon a breach of duty consisting of a failure to perform a promise made. 12 Cal. Jur., p. 735, § 20, and cases cited. At the time respondent agreed to enter into the transaction appellant Fred W. Klein, both orally and in the deposit agreement dictated by him on behalf of the appellant company, promised that a building of a certain type would be erected on the premises. By his own testimony he further assured respondent that there would be a bond which would insure the completion of such a building. Relying upon these promises, respondent parted with her interest in the property. These promises were ignored by appellants and never performed.

That respondent was misled to her prejudice by the promises and concealments of appellants there can be no doubt. The nonperformance of these promises, together with the concealments practiced, constituted breaches of duty whereby appellants gained for themselves an advantage to the prejudice of respondent. We are satisfied that, aside from any question of the sufficiency of the evidence to establish conspiracy or actual fraud, the evidence established a case of constructive fraud sufficient to support all the material findings and the judgment.

The judgment is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

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111 Cal. App. 287

WARDEN et al. v. BARNES et al.

Civ. 4237.

District Court of Appeal, Third District, California.

Jan. 22, 1931.

1. Municipal corporations 🔑527.

Statutory amendment regarding costs, on foreclosure sale for failure to pay installments on street improvement bond, did not apply to bond issued before amendment (St. 1893, p. 36, § 5, subd. c., as amended by St. 1921, p. 558).

> The statute in effect when bond was issued, St. 1893, p. 36, § 5, subd. c., as amended, provided that city treasurer must collect, in addition to amount due on bond, cost of publication of notice, and 50 cents for certificate of sale, and the amendment, St. 1921, p. 558, provides for charge of $1 for certificate of sale.

2. Municipal corporations 🔑582.

Deed under improvement bond foreclosure sale *held* invalid, where there was error in statement regarding amount due in certificate (St. 1893, p. 36, § 5, subd. c., as amended).

> There was an error in the statement as to the amount due because of an excessive cost charge, and record also showed an error of 87 cents in amount necessary to redeem.

3. Municipal corporations 🔑527.

Statute relating to defects and irregularities does not apply to proceedings to foreclose bond (St. 1885, p. 147).

4. Municipal corporations 🔑527.

Statute relating to defects and irregularities or informalities and omissions refers to informal proceedings which may be corrected by city council (St. 1885, p. 147).

5. Judgment 🔑356.

Order vacating judgment, findings of fact, and conclusions of law on ground same were signed and filed by inadvertence, and granting certain defendants leave to substitute modified judgment, findings of fact, and conclusions of law, *held* invalid (Code Civ. Proc. §§ 663, 663a).

6. Municipal corporations 🔑579.

Where proceedings to foreclose improvement bond were invalid, judgment quieting title as against foreclosure purchaser's title without requiring payment of amount due *held* improper.

7. Equity 🔑66.

In equity action, title cannot be quieted in favor of party, extinguishing valid lien without requiring successful party to do equity.

8. Municipal corporations 🔑583.

Where proceedings to foreclose improvement bond only were invalid, property was subject to lien of bond.

Appeal from Superior Court, Los Angeles County; T. H. Selvage, Judge.

Action by Grace P. Warden and others against Walter J. Barnes and others. From a judgment for defendants, plaintiff named appeals.

Affirmed in part, and in part reversed and remanded.

J. Everett Brown, of Los Angeles, for appellant.

Woodruff, Musick, Pinney & Hartke and Charles Cassat Davis, all of Los Angeles, for respondents.

PLUMMER, J.

This action was begun by the plaintiffs to quiet title to lot 115, Mortimer's East Hollywood View tract, as per map recorded in book 8, page 27, records of Los Angeles county. The defendants had judgment, and the plaintiff Grace P. Warden appeals.

The defendants Barnes interposed denials to the respective allegations of the plaintiffs' complaint, and in their answer, by way of further defense, alleged their ownership of the premises involved, and prayed for affirmative relief, to wit, that their title be quieted against all the demands of the plaintiffs.

The defendants Brooks denied the allegations of the plaintiffs' complaint and, among other things, set up the existence of a mortgage on the premises involved in the sum of $6,000, and prayed that the plaintiffs take nothing as against them.

The record shows that the cause of action was based upon a failure to pay installments of principal in the sum of $6.08 due on a street improvement bond. The plaintiffs introduced a deed to the premises involved, executed by the city treasurer of the city of Los Angeles to Grace P. Warden, and then rested. The defendants then introduced in the first place sufficient evidence to warrant a judgment finding the defendants Barnes to be the owners of the premises involved, and then introduced the certificate of sale upon which the deed, executed in favor of the plaintiff Grace P. Warden, was based.

The record further shows that the bond for the street improvement was issued in accordance with the act of June 14, 1913 (St. 1913, p. 845 et seq.). This act prescribes the method of foreclosure of the sale of property and the items which may be included as costs. The bond in question was No. 132. The insufficiency of this certificate will be considered later on.

Appellant bases her argument in favor of reversal upon the alleged error of the trial court in admitting testimony relative to the name of the owner of the lot against which the bond was outstanding as a lien. Whether the contention of the appellant is correct or incorrect, or whether the name of the owner of the lot should be given in proceedings leading up to a sale of the lot, for failure to pay either principal or interest upon a bond issued for street improvements, need not be determined in this action, as the certificate to which we have referred shows that the plaintiff has no title to the premises. A reference to the certificate shows the following items making up the amount of $22.69 alleged to be due, to wit:

Amount of unpaid principal of bond	$ 6.08
Amount of interest on bond	.61
Costs	15.00
Certificate of sale	1.00
Total	$22.69

[1] Section 5 of the act of 1893 (St. 1893, p. 36) as amended in 1913 (St. 1913, p. 849) reads as follows: "Subdivision c. The city treasurer must collect, in addition to the amount due on such bond, the cost of publication of such notice, and fifty cents for the certificate of sale, as hereinafter provided." This section was amended in 1921 providing for a charge of $1 for the certificate of sale. However, the act of 1921 (St. 1921, p. 558) is inapplicable to the case at bar.

In Chapman v. Jocelyn, 182 Cal. 294, 187 P. 962, 963, the Supreme Court of this state definitely settles this question in the following language: "The case must be determined upon the provisions of the bond act as it existed in 1912 when the bond was issued. The act then in force was enacted in 1899. Stats. 1899, p. 40. The amendments of the act in 1913 made some material changes in the requirements concerning a sale. Stats. 1913, p. 849. (c) A street assessment is a contract, and the provisions of the statute in force at the time prescribing the manner of its enforcement are a part of such contract. Creighton v. Pragg, 21 Cal. 115; Houston v. McKenna, 22 Cal. 552. (4) The bond issued upon such assessment, by reason of the failure of the owner to pay the same within the 30 days allowed to the contractor for the work to collect the same, must therefore also constitute a contract. In effect, the bond creates a power of sale whereby the contractor may enforce the lien of the assessment against the property described in the bond. (5) The city treasurer is thereby made a special agent of the parties concerned, with authority to execute the power according to its terms, as found in the statute under which the bond is issued. The Constitution forbids the passage of a law impairing the obligation of a contract. Article 1, § 16. (6) It follows that a law enacted after such contract is made, and which materially alters the remedy of the bondholder to enforce his lien by means of a sale, or the rights of the owner under the law existing at the time the bond was issued, cannot apply to previous contracts, and can have only a prospective effect. Houston v. McKenna, supra. The case in this aspect is not distinguishable from Welsh v. Cross, 146 Cal. 621, 106 Am. St. Rep. 63, 2 Ann. Cas. 796, 81 P. 229, wherein it was held that a law extending the time for redemption from a foreclosure sale impaired the obligation of a mortgage executed before its enactment."

[2] The case of Chapman v. Jocelyn is also decisive of another point involved in this action, to wit, the failure to correctly state the amount due in the certificate. On page 300 of 182 Cal., 187 P. 962, the figures are all set forth showing a discrepancy in the statement of the amount due in the sum of $1.95. In the case at bar, as shown by the certificate, there was an error in the statement as to the amount due by reason of an excessive cost charge, and the record further shows an error of 87c in the amount necessary to redeem.

In addition to the case of Chapman v. Jocelyn, supra, showing the materiality of these discrepancies, we may cite the cases of Simmons v. McCarthy, 118 Cal. 622, 50 P. 761, and Landregan v. Peppin, 86 Cal. 126, 24 P. 859. Other cases might be cited, but these are sufficient to show the invalidity of the deed under which the plaintiff Grace P. Warden claims title.

[3, 4] The appellant, in answer to these discrepancies, calls our attention to section

53 of the Vrooman Act (St. 1885, p. 147), relative to defects and irregularities or informalities and omissions, contending that this section refers to foreclosure proceedings of a bond given for an assessment. This contention, however, is untenable. The section refers to such informal proceedings as may be corrected by the city council, and has no relevancy whatever to proceedings to foreclose a bond. The city council has jurisdiction only of the improvement in making the assessment, but has nothing to do with foreclosure proceedings.

[5] The record further discloses that after the making of findings, drawing conclusions and the entry of judgment herein, upon motion of the respondents the court made the following order:

"Amended Order

"The oral motion to vacate and set aside the judgment, findings of fact and conclusions of law herein, on the ground that the same were signed and filed by inadvertence and mistake, and to substitute modified judgment, findings of fact and conclusions of law therefor, being presented to the above-entitled court sitting in Department 4 thereof, Judge Thomas H. Selvage presiding, on the 23rd day of December, 1927, by Woodruff, Musick, Pinney & Hartke, by Harold H. Streight, for defendants Walter J. Barnes and Alice Barnes, there being no appearance on behalf of plaintiffs and other defendants;

"It Is Hereby Ordered that said judgment, findings of fact and conclusions of law be vacated and set aside, and that said defendants Walter J. Barnes and Alice Barnes be, and they hereby are granted leave to file herein judgment, findings of fact and conclusions of law with judgment modified to make said judgment conditional upon the payment to plaintiffs Grace P. Warden and C. P. Warden of a sum of money equal to the full amount of taxes, penalties and costs paid out by said plaintiffs;

"Further, It Is Ordered, that the foregoing order is made on condition that the same be of no effect if a notice of said motion by the moving defendants to plaintiffs is necessary to a proper hearing of said motion. Should notice be necessary and the said order be of no effect, this court will then consider that said motion of defendants has been put before this court to be heard after proper notice to said plaintiffs.

"T. H. Selvage, Judge."

This order is not supported by sections 663 and 663a of the Code of Civil Procedure, specifying when orders may be made setting aside judgments.

[6-8] The case of Stanton v. Superior Court, 202 Cal. 478, 261 P. 1001, settles the question here involved, and shows the invalidity of the order herein set forth. The judgment, however, must be reversed and sent back for the following reasons: The respondents Barnes asked for and obtained affirmative relief as against the plaintiff Grace P. Warden, and judgment was entered in favor of the defendants Barnes quieting their title as against all claims of the plaintiff. To this relief respondents Barnes are not entitled. The statutes of 1893, page 36, so far as the bond involved herein is concerned, reads as follows: "Said assessment shall be a first lien upon the property affected thereby, until the bond issued for the payment thereof, and the accrued interest thereon, shall be fully paid." While the foreclosure sale and deed based upon the proceedings therein had availed the plaintiff nothing, the lien of the bond was not extinguished. This being an action in equity, title cannot be quieted in favor of a party, extinguishing a valid lien upon real property, without requiring the person in whose favor the judgment is entered, to do equity. The foreclosure proceedings in this case only being held invalid, the property is still subject to the lien of the bond and the trial court should have entered judgment in favor of the respondents Barnes, quieting their title thereto, upon payment of the amount due the plaintiff Grace P. Warden, as the owner of the bond, including such costs as she was entitled to collect. This question is settled, we think, by the following cases: Sawyer v. Berkeley Securities Co., 99 Cal. App. 545, 279 P. 217, and the authorities there cited; Green v. Palmer, 68 Cal. App. 393, 229 P. 876.

The judgment in all particulars save as hereinafter stated, in favor of the respondents, is affirmed. The judgment in so far as it quiets the title of the respondents Barnes against all claims of Grace P. Warden, based upon the lien of the bond involved in this action, is reversed, and the cause remanded to the trial court to proceed and ascertain the amount due on said bond, together with such interest and costs as may properly be added thereto and charged against the respondents Barnes, and enter judgment accordingly.

It is further ordered that all of the parties herein bear their own costs.

All concur.

111 Cal. App. 359

MOSS v. STUBBS et al.*

PRATT v. SAME.

Civ. 7381.

District Court of Appeal, First District,
Division 1, California.
Jan. 27, 1931.

Rehearing Denied Feb. 26, 1931. Hearing Denied by Supreme Court March 26, 1931.

1. New trial 🔑6.

Matter of granting or refusal to grant motion for new trial was largely within discretion of trial court.

2. New trial 🔑159.

Trial court on motion for new trial must weigh and consider evidence of both parties and determine just conclusions to be drawn therefrom.

3. New trial 🔑72.

Trial court, if satisfied that findings of jury are contrary to weight of evidence, may grant new trial.

4. New trial 🔑159.

Probative force or evidentiary value of testimony is within determination of trial court in proceeding on motion for new trial.

5. New trial 🔑70.

Order granting new trial cannot be sustained, where there is no substantial conflict in testimony and evidence will be insufficient as matter of law to support verdict.

6. Automobiles 🔑244(7).

Evidence respecting truck driver's negligence *held* insufficient as matter of law to warrant recovery for injury to child.

7. Automobiles 🔑245(40).

Truck driver *held* not negligent as matter of law by reason of violation of statute respecting speed at time of injuring boy (St. 1923, p. 562, § 139 and p. 553, § 113(b)(2–4), as amended by St. 1927, p. 1436, § 30).

8. Automobiles 🔑162(2).

Failure of truck driver to sound horn before striking boy running across street from behind street car *held* not negligence (St. 1923, p. 562, § 139).

> Truck at time of accident was being driven along a one-way street within block in middle of afternoon, without pedestrians or vehicular traffic in sight, except approaching street car, and with no danger whatever apparent, so that it could not be fairly maintained that under such circumstances a duty was imposed upon driver of truck as reasonably prudent person to sound his horn.

9. Automobiles 🔑162(1).

Failure of truck driver to travel along right-hand side of one-way street was not negligence as respected injury to boy struck by truck.

> Truck driver at time of accident was about to pass between approaching street car and parked automobile, making it necessary for him to follow a course down the center of the street.

10. Trial 🔑241.

Reading to jury section of act having no bearing on facts of particular case is improper.

11. Appeal and error 🔑701(1).

Party, to avail of point that instruction is erroneous, must bring before court sufficient evidence to show that on proper instruction there might have been favorable finding.

Appeals from Superior Court, Alameda County; E. C. Robinson, Judge.

Separate actions by Fredonia J. Moss and by David S. Pratt, a minor, suing by Fredonia J. Moss, his guardian ad litem, against A. D. Stubbs and another. Judgments for defendants, and, from subsequent orders granting plaintiffs' motions for new trials, defendants appeal.

Reversed.

Thomas J. Straub, J. C. Wood, and Alden Ames, all of San Francisco, for appellants.

Everette C. McKeage, of San Francisco, for respondents.

PER CURIAM.

The plaintiff David S. Pratt, 9 years of age, through his guardian ad litem, brought an action for damages on account of personal injuries he sustained as a result of being struck by a Ford truck owned by the defendant Pacific Gas & Electric Company and driven by the defendant A. D. Stubbs; and his mother, Fredonia J. Moss, brought a similar action against the same parties to recover the amount of damages she claimed to have suffered as a result of the accident, including loss of services. The actions were consolidated and tried before a jury. Motions for nonsuit and directed verdicts were made by defendants, and denied; and the jury returned separate verdicts in favor of defendants. Following the entry of judgments thereon, plaintiffs presented motions for new trial, which the court granted; and, from the orders made in that behalf, defendants have taken these appeals.

The orders are identical in form, and read in part as follows: "First: That plaintiff's

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*For opinion denying rehearing, see 296 P. 86.

instruction No. 13 was withdrawn by counsel with the understanding that the court would read from the California Vehicle Act the sections regarding the blowing of horn, referred to in said instruction which through some inadvertence the court did not do, but did read other sections of the California Vehicle Act embraced in said instructions. Second: That it is the belief of the court that the plaintiff has not had a fair trial. Third: That the court is of the opinion that the verdict of the jury is contrary to the weight of the evidence. It is therefore ordered that the motion for new trial in each case be granted, on the ground of errors of law occurring at the trial and insufficiency of the evidence to warrant the verdict."

[1-5] The well-settled rule is that the matter of granting or refusal to grant a motion for a new trial is largely within the discretion of the trial court (Work v. Whittington, 61 Cal. App. 302, 214 P. 474); that in passing upon such motion the trial court is not bound by the rule of conflicting evidence as is the appellate tribunal (Huckaby v. Northam, 68 Cal. App. 83, 228 P. 717; Smith v. Royer, 181 Cal. 165, 183 P. 660); but must weigh and consider the evidence for both parties and determine for itself the just conclusion to be drawn from it (Green v. Soule, 145 Cal. 96, 78 P. 337; Rudin v. Luman, 53 Cal. App. 212, 199 P. 874); and, if it is satisfied that the finding of the jury is contrary to the weight of the evidence, it may grant a new trial (Gordon v. Roberts, 162 Cal. 506, 123 P. 288). Even where the evidence is not conflicting and all the proof seems to be favorable to one or the other of the parties litigant, the question of the probative force or the evidentiary value of the testimony is nevertheless within the determination of the trial court in a proceeding on motion for a new trial. Otten v. Spreckels, 24 Cal. App. 251, 141 P. 224; Roberts v. Southern Pacific Co., 54 Cal. App. 315, 201 P. 958. But it is equally well settled that, where there is no substantial conflict in the testimony on material issues, and the evidence as a whole would be insufficient as a matter of law to support a verdict in favor of the moving party, an order granting a new trial cannot be sustained. Springer v. Pacific Fruit Exchange, 92 Cal. App. 732, 268 P. 951; Wendling Lumber Co. v. Glenwood Lumber Co., 153 Cal. 411, 95 P. 1029; Empire Investment Co. v. Mort, 169 Cal. 732, 147 P. 960; Harvey v. Machtig, 73 Cal. App. 667, 239 P. 78, 82. As will hereinafter appear, there is no substantial conflict in the evidence as to any of the essential facts relating to the manner in which the accident happened; and the determinative question presented with reference to the evidence is therefore whether as a whole it would be sufficient as a matter of law to support verdicts in favor of plaintiffs, in the event that such verdicts had been found.

[6] The accident happened on the lower or westerly one-way traffic lane of Arlington avenue, some distance south of the intersecting line of San Fernando avenue, in the city of Berkeley, about 3 o'clock in the afternoon. Arlington avenue is constructed along the side of a hill for a considerable distance, and in the vicinity of the accident is divided by a parkway into two one-way paved traffic lanes. The lower or westerly lane accommodates the south-bound traffic, and the grade thereof, which descends slightly toward the south, is about ten feet lower than the roadbed of the upper or easterly lane, which takes care of the north-bound traffic. Both lanes are constructed on a curve. The width of the lower lane between curbs is 27 feet, and it is intersected by San Fernando avenue, which extends into but not beyond the upper lane. The parkway is 16 feet wide, and is planted to trees and shrubs, but, as indicated, it is intersected by San Fernando avenue so as to make the latter accessible to the traffic using the upper lane. Along the inside of the lower or westerly lane is laid the single track of a street car company, over which it operates its north and south bound cars. The outer or westerly rail is laid about 8 feet distant from the easterly bank, but just how close to the bank the inner rail is laid does not appear. Stubbs was traveling along the center of the lower traffic lane in a southerly direction, and was about to pass between a street car approaching in the opposite direction on his left and a parked automobile on his right, when the boy, who had just descended the hill to the street and paused at the edge of the bank to let the street car pass, suddenly ran out from behind the street car into the pathway of the on-coming truck, intending to cross the street, and was struck by the front wheel of the truck. He was knocked unconscious, and, besides being bruised about the head and face, suffered a fracture of both bones of the leg below the knee. On account of the presence of the street car, the boy and Stubbs were unable to see each other until the boy emerged from behind the street car, at which time they were within a few feet of each other. Stubbs brought his truck to a stop within a few feet beyond the point of the impact, picked up the boy, and, leaving his truck there in the street, accompanied the boy to the hospital, in an automobile belonging to another man.

The foregoing facts showing the manner in which the accident happened were established by the testimony of five witnesses, two of whom were the boy and Stubbs; the others being a man named Martin and two women, Mrs. Young and Mrs. Porter, all of whom happened to be driving along the upper or easterly lane of Arlington avenue. The boy testified that on the afternoon in question he left the private school he was attending, located up the hill above Arlington avenue, descended the steps down the hillside, crossed the upper lane of Arlington avenue, ran across the parkway, and "sort of skidded" down the bank to the curb of the lower lane, which is adjacent to the bank; that he reached the curb just as a north-bound street car was passing. Continuing, he testified as follows:

"Q. And after the car had passed, did you attempt to cross the street? A. Yes.

"Q. Were you running across the street? A. I looked first and then I ran, but because the car was there I couldn't see Mr. Stubbs coming down with his truck."

And on cross-examination, he testified:

"Q. When you left this point P-2 [the easterly curb of the lower lane] you went right across. Did you run or did you walk? A. I looked and then I ran.

"Q. So you ran right across? A. Yes.

"Q. Really in front of the automobile didn't you? A. Yes."

He further testified that he first observed the truck as he emerged from behind the street car, at which time the truck was about 6 feet away from him, but that he continued on his course across the street, and was hit.

The material portions of Martin's testimony were as follows:

"Well, when the boy ran down through this parkway space he had to slide and brace himself and wait for the car to pass. Just as this took place, I saw the Ford coming, when the boy ran down and waited for the street car, and the moment it passed him he started across the street. In darting across, which was faster than the eye almost, I saw the left wheel in the front strike the boy, roll him up, and he came out under the rear of the Ford. * * *

"Q. What the jury wants to know is what you saw? A. Well, the street car was coming parallel with me, naturally I could look down on the roof of it as there is an elevation of six feet or better. You can see practically over the roof of the car. I saw the Ford truck belonging to the Gas Company coming down. The boy could not see it. I could see it. And in looking over and seeing what was going to take place I stopped my car, because I saw exactly the position of the parties and the cars. And when the boy came around the end of the street car he was right within a few feet of the front of the Ford car.

"Q. He was exactly in front of the Ford car a few feet? A. No, I don't call it that. The boy was running and he could cover the distance between the rear of the street car and where the Ford hit him, and was so quick that it was just a flash. Therefore, it is hard for me to determine the distance between the end of the street car and the Ford car, it was so very minute."

Mrs. Young and Mrs. Porter were riding in the latter's automobile; and Mrs. Young's description of the accident was as follows:

"He [the boy] came right across a moment and waited for the car to pull down and switch here. Then he ran out from behind the car and the Ford car was coming along down in here, along the lower Arlington, when he ran out from behind the street car into the path of this Ford car.

"Q. When he ran out from behind the street car how far, as nearly as you can recollect, was the Ford car away from that particular point. A. Well, I would not say as to feet, because I was in the car. But it was right close. I could see when he darted behind the car that he was going to be hit. I could see there wasn't any way that the driver had that he could possibly avoid hitting him. * * * It all happened so quickly that by the time the child ran from behind the car he was right in front of his car. I couldn't say in feet because it all happened in a flash. I could see he was going to be hit and in the excitement and all you could not stop to figure feet. I know he just ran right in front of the car.

"Q. But the distance was very close? A. Very close. He was very close to the car, ran right into it."

Mrs. Porter testified: "Well, I didn't see a great deal of it, because I was driving; but as I came around the turn I saw the little boy run across the street. And he crossed the drive, and I didn't see anything else until I saw him fall in back of the truck."

Stubbs' testimony was to the effect that, as he was traveling southerly along the lower lane, he saw the approach of the street car more than 200 feet distant from him; that he was following a course down the center of the lane in order to pass between the car and an automobile parked along the right-hand curb; that, just as the front end of his truck reached a point opposite the rear end of the street car, he saw the boy for the first time emerging from behind the car; that the boy was then only 3 feet distant from the left front end of the truck, running across the street directly in the pathway of the truck, and that he was struck by the left front wheel.

The foregoing is, in substance, all of the evidence relating to the manner in which the accident happened, and in our opinion it would have been wholly insufficient as a matter of law to support verdicts in favor of plaintiffs, if such verdicts had been rendered, for the reason that, regardless of all question of contributory negligence, it utterly fails to establish any negligent act or omission on the part of the driver of the truck or any facts from which an inference of negligence could be fairly and reasonably drawn. As will be observed, the proof is not confined to the testimony of any particular witness. All five agree as to the essential facts; and, consequently, even though the testimony of Martin and Stubbs be disregarded entirely, as plaintiffs claim it should be, the testimony given by the remaining witnesses, including that of the boy himself, fails to establish any facts upon which a finding of negligence could be reasonably founded.

Stubbs testified that the accident happened about 200 feet south of the southerly intersecting line of San Fernando avenue, and the plaintiffs claim that on this point he was contradicted by the testimony of Mrs. Young. The record shows that on cross-examination she was asked by counsel for plaintiffs how far it was from the point where the boy was standing when the street car passed to the southerly intersecting line of San Fernando avenue, that is, the north end of the parkway, and she replied:

"Well, I don't know, because I never paid much attention to the park there, but I should imagine around 50 feet. I should think it was about that far, but I had never paid much attention.

"Q. So you would say then that the boy was struck about 50 feet or so south of this line? A. Yes."

Even assuming that the answer given was sufficiently definite to raise a substantial conflict on the point, it would seem to be entirely immaterial, so far as the cause of the accident was concerned, whether it happened 50 feet or more south of the intersecting line of San Fernando avenue.

[7] Section 113 of the California Vehicle Act (as amended by St. 1927, p. 1436, § 30) provides, among other things, that it shall be unlawful for the driver of a vehicle to drive the same at a speed greater than 15 miles an hour; subdivision (b) (2) in traversing an intersection of highways when the driver's view thereof is obstructed in such a way that during the last 100 feet of his approach to such intersection he does not have a clear and uninterrupted view of such intersection and of the traffic entering such intersection for a distance of 200 feet from such intersection; or subdivision (b) (3), in traversing or going around curves or corners of a highway when the driver's view is obstructed within a distance of 200 feet along such highway in the direction in which he is proceeding; or subdivision (b) (4), when passing a school while persons are entering or leaving the grounds of such school. And plaintiffs contend that there is evidence to show that Stubbs violated said provisions and consequently was guilty of negligence as a matter of law. We are unable to agree to such contention. Stubbs testified that he crossed the intersection at a speed not greater than 15 miles an hour, and then increased his speed slightly so that, when he first saw the boy running out from behind the car, he was traveling 18 or twenty miles an hour; and the only other testimony as to speed was that given by Mrs. Young and Martin, which, so far as it goes, supports the statement of Stubbs. In this regard Mrs. Young testified that Stubbs was traveling "approximately around 15 miles an hour"; and Martin testified that when he first saw the truck, which was then south of the intersecting line, he "would say" that it was traveling between 18 and 20 miles an hour; but that he could not "truthfully say," because he was "not a very good judge of anything like that." Nor does the fact that Stubbs was traveling 18 to 20 miles an hour south of the intersection establish a violation of either of the other two provisions of said section 113, for the reason that the physical conditions therein described were not shown to exist at the place of the accident. True, testimony was given to the effect that there was "a radius on the street of about 126 degrees," and that, standing at a point 50 feet north of the northerly intersecting line of San Fernando avenue, it was impossible to obtain an unobstructed view 200 feet ahead; but no testimony whatever was introduced to show that from the southerly intersecting line of said avenue, from which point Stubbs stated he increased his speed to 18 or 20 miles an hour, the view ahead is obstructed within a distance of 200 feet. And, as to the second point, the evidence shows without dispute that the grounds of the private school are not adjacent to the street on which the accident occurred.

[8] Stubbs admitted that he did not sound his horn on approaching the scene of the accident, and it is claimed therefore that he violated the provisions of section 139 of said act (St. 1923, p. 562). But, as will be observed from the heading given said section, "Mountain Driving," as well as from the terms of the section itself, its provisions apply to the operation of vehicles "through defiles and canyons or over mountain highways," which is not this case. It may be conceded, of course, that, wheresoever a person may be driving, circumstances might arise which would require the driver, as a reasonably prudent person, to sound warning of his approach, but no such circumstances existed here. The truck was being driven along a one-way city street, within the block, in the middle of the afternoon, where there was no pedestrian or vehicular traffic in sight except the street car. There was no danger whatever apparent, and therefore, under such circumstances, it cannot be fairly maintained that a duty was imposed upon the driver of the truck as a reasonably prudent person to sound his horn.

[9] Plaintiffs argue also that, if Stubbs had been driving in a careful manner he doubtless would have seen the boy descending the steps; but the evidence shows that the steps were

visible only from certain points along the lower lane, and no proof was introduced to show that the boy was descending the steps at the particular time the steps could have been seen from the lower lane. Moreover, it would be unreasonable to assume that a prudent and careful driver would have been looking along the side of the hill and away from the highway when he was about to pass between an approaching street car and a parked automobile in a narrow street. Plaintiffs make the further point that Stubbs was guilty of negligence in not traveling along the right-hand side of the street; but it must be remembered that this was a one-way traffic lane, and that he was about to pass between the street car and the parked automobile, which made it necessary, as he stated, for him to follow a course down the center of the street.

[10] The state of the evidence in the present case is entirely different from the one presented in Conner v. Henderson (Cal. App.) 291 P. 641, 642, cited by plaintiffs, for the reason that there the evidence as to the manner in which the accident happened was sharply conflicting. In this regard the court said: "The case presents a clear conflict in the evidence. Viewed from the standpoint of plaintiff's witnesses, the negligence of defendants was unquestioned. Viewed from the standpoint of defendants' witnesses, the plaintiff by her actions in suddenly darting from behind the truck directly into the path of the on-coming machine rendered the accident unavoidable and gave defendants no opportunity to avert the injury." The case of Off v. Crump, 40 Cal. App. 173, 180 P. 360, is cited by plaintiffs as supporting their contention that Stubbs was negligent in failing to see the boy until he was within 3 feet of him. But, unlike the facts of that case, the evidence here shows without dispute that the boy was completely hidden behind the street car until the truck was within a few feet from him. And the fact that the court inadvertently omitted to read section 139 of the California Vehicle Act to the jury did not furnish grounds for granting a new trial, for, as already pointed out, the provisions of said section were not applicable here; and it has been repeatedly held that it is improper to read to a jury a section of said act having no bearing upon the facts of the particular case. O'Meara v. Swortfiguer, 191 Cal. 12, 214 P. 975; Dewhirst v. Leopold, 194 Cal. 424, 229 P. 30; Lower v. Hughes, 80 Cal. App. 444, 251 P. 952. The case of Rush v. Lagomarsino, 196 Cal. 308, 237 P. 1066, cited by plaintiffs, is not in point for the reason that it involved the provisions of an earlier vehicle act which were different from those contained in section 139 as it stood at the time this accident happened.

[11] Plaintiffs further contend that the trial court erred during the course of the trial in commenting on the evidence in the presence of the jury, while plaintiffs' counsel was arguing the motion for a nonsuit; also in giving and refusing to give certain instructions. But, in view of the inevitable conclusion that the evidence would be legally insufficient to support verdicts in favor of plaintiffs, it is useless to inquire into or determine these latter points, because, even though the remarks complained of had not been made, and the jury had been instructed as plaintiffs claim it should have been instructed, and verdicts had been rendered in their favor, the evidence would still be insufficient as a matter of law to sustain such verdicts. In other words, the question of the legal sufficiency of the evidence cannot be affected in any manner by the trial court's comments on the evidence or its instructions as to matters of law. As held in Hamlin v. Pacific Electric Ry. Co., 150 Cal. 776, 89 P. 1109, 1112, cited approvingly in Mintzer v. City of Richmond, 27 Cal. App. 566, 150 P. 799, to avail himself of the point that an instruction is erroneous, a party must bring before the court sufficient evidence to show that upon a proper instruction there might have been a finding in his favor; and, if he does less than this, he presents for consideration a mere question of abstract error. In other words, to quote the language of the court, as applied to the facts of that case: "He was therefore not harmed by the action of the court in submitting this question to the jury on erroneous instructions, since there was no evidence which would have sustained a finding in his favor under the view of the law most advantageous to him."

As said by the court in Harvey v. Machtig, supra, in directing a reversal: "We are not unmindful of the reluctance with which appellate courts reverse orders granting or refusing new trials, nor of the rule that a trial court in passing upon such a motion is not bound by the findings of the jury if there is sufficient evidence to sustain a contrary finding. Huckaby v. Northam, 68 Cal. App. 83, 228 P. 717. Where, as here, however, there is no evidence upon which a contrary finding could be founded, the order granting a new trial cannot be sustained upon appeal."

The orders appealed from are reversed.

111 Cal. App. 250

PEOPLE v. KNOTH.

Cr. 111.

District Court of Appeal, Fourth District, California.
Jan. 20, 1931.

1. Criminal law 🔑511(3).

Testimony of accomplice may be corroborated by circumstantial evidence.

2. Criminal law 🔑511(3).

Accused's conduct may be examined for circumstances corroborating accomplice, and if from all circumstances guilt may be fairly inferred, corroboration is sufficient.

3. Criminal law 🔑511(1).

In prosecution for burglary, accomplice's testimony *held* sufficiently corroborated to justify conviction.

4. Witnesses 🔑337(5).

Asking defendant, on cross-examination, whether he had been convicted of felony, *held* proper for purpose of impeachment (Code Civ. Proc. § 2051).

5. Criminal law 🔑829(10).

Failure to instruct state's witness was accomplice as matter of law *held* not prejudicial, in view of full instructions on law of accomplices.

6. Criminal law 🔑829(1).

Refusing proposed instructions *held* not error, where fully covered by instructions given.

Appeal from Superior Court, Tulare County; Frank Lamberson, Judge.

Charles Knoth was convicted of burglary in the second degree, and he appeals.

Affirmed.

J. M. Lopes, of Tulare, for appellant.

U. S. Webb., Atty. Gen., and John D. Richer, Deputy Atty. Gen., for the People.

MARKS, J.

By an information filed by the district attorney of Tulare county, appellant was charged with the crime of burglary together with one prior conviction of a felony. He entered a plea of not guilty to the charge of burglary and of a plea of guilty to the prior conviction. The jury returned a verdict of guilty of burglary in the second degree, and appellant prosecuted this appeal.

An unoccupied house belonging to J. O. Guill was located west of the town of Goshen in the county of Tulare. In it was a quantity of household furniture. E. C. Featherstone was caretaker of the property and John V. Deniz was employed to pump water for the cattle on the place. All the doors and windows of the house were closed and the exterior doors boarded up on the evening of April 11, 1930. On that date Deniz was at the Guill house and had pumped the water for the cattle. After finishing his task, and as he crossed the road in front of the house on his way home, he noticed an automobile approaching, without its headlights illuminated. It was stopped by the gate to the Guill house. Two men alighted from it and proceeded to the rear of the house. He heard noises at the back door, then saw one of the men return to the automobile, take something from it, and return to the rear of the house. He then secured his own automobile and, picking up Featherstone and a boy named Wallace Schulz, brought them back to the Guill premises. Deniz then went to call the officers. Featherstone and Schulz saw O. J. Ward come around the house from the rear and approach his parked automobile carrying a bottle or pan of water. Ward told them he was filling the radiator of his car. About the same time Featherstone noticed a man running through a field and away from the house. Schulz followed the fleeing man, but as he was unable to overtake him, fired some shots at him. Ward called to the man, saying, "Come on in Charlie." The fleeing man made good his escape.

An examination showed that the boards over the rear door of the Guill house had been torn loose, the door opened, and some household effects and a patent toilet removed from the house and placed on the ground outside the door. An iron pinchbar was found near the door.

During the month of August, 1930, appellant was arrested by the sheriff of Tulare county, in the city of Hanford. After he was confined in the Tulare county jail, he made a voluntary statement to a deputy district attorney which was taken down in shorthand by a reporter. In this statement appellant said that he paid Ward $2 to drive him from Visalia out in the country so that he might dispose of five gallons of wine which he had in his possession; that after he had disposed of the wine, Ward stated to him that he wanted to look at a house which he intended to rent and drove to the Guill place; that Ward alighted from the car and went to the rear of the house, appellant remaining seated in the automobile; that after Ward had been gone several minutes, appellant proceeded to the rear of the house and found Ward tearing boards from the door; that appellant told Ward not to do this, but that Ward made entry into the house and carried household goods and a patent toilet from the house to

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

the yard; that about this time appellant heard an automobile drive up and stop in front of the house; that appellant told Ward they had better go and then ran across the fields as fast as he could and escaped; that he went to the state of Montana, where he remained for some time.

Ward appeared as a witness for the people. He testified that he had known appellant for several months before the burglary and met him on the evening of April 11, 1930, and they formed the plan of driving out to the Guill house to get some household goods to enable appellant to set up housekeeping. Appellant procured the pinchbar with which the boards were pried off the rear door of the house. The two drove to the Guill place and made entry; that they carried the household goods and patent toilet outside the door and were interrupted by an automobile driving up and stopping in front of the house; that Ward went to his automobile with a bottle of water and appellant ran away as described by the other witnesses.

[1-3] Appellant contends that the evidence of the accomplice Ward is not sufficiently corroborated to justify a conviction. With this we cannot agree. The law is well settled that the testimony of an accomplice may be corroborated by circumstantial evidence. The conduct of the accused may be examined for corroborating circumstances, and if from all the circumstances of the case the guilt of the accused may be fairly inferred, the corroboration is sufficient. People v. Yeager, 194 Cal. 452, 229 P. 40; People v. Nikolich, 93 Cal. App. 356, 269 P. 721; People v. Rodgers, 94 Cal. App. 150, 270 P. 712.

[4] Appellant offered himself as a witness in his own behalf. Upon cross-examination and over his objection, he admitted that he had been convicted of a felony. He assigns this ruling as error, but as the question was asked on cross-examination for the purpose of impeachment there is no merit in this contention. Section 2051, Code Civ. Proc.; People v. Rodgers, supra.

Appellant makes complaint of other rulings of the trial court upon objections to questions propounded to various witnesses. There is no merit in any of them, and no good purpose can be served by a detailed discussion of them here.

[5] Appellant contends that the evidence showed that Ward was an accomplice and that the court should have instructed the jury to this effect. There can be no question from the evidence but that Ward was an accomplice in the commission of the crime. The failure to give such an instruction, under the circumstances of this case, was held not prejudicial to the rights of the defendant in the case of People v. Ferlin, 203 Cal. 587, 265 P. 230, 236, in which the court said:

"Complaint is made by the defendant that the lower court erred in refusing to charge the jury, as matter of law, that the witness Hill was an accomplice. It is urged that this question, in view of the evidence in the case, was not a proper one to be submitted to the jury for determination. We are of the opinion that the defendant's contention is meritorious. * * * It was the duty of the trial court, therefore, to instruct the jury, as matter of law, that Hill was an accomplice of the defendant. [Citing cases.] However, this error cannot be said to have prejudicially affected the defendant. In People v. McDermott, 75 Cal. App. 718, 243 P. 485, it is declared that: 'The jury should have been instructed that Sova must be regarded as an accomplice. That question should not have been left to it to determine. However, it must be presumed that the jurors observed and applied the instructions given them. In other instructions the definition of an accomplice was correctly stated, as also was the rule that the defendant may not be convicted on the uncorroborated testimony of an accomplice, and that the corroborating evidence is not sufficient if it merely shows the commission of the crime and the circumstances thereof; and further, that such corroborating evidence must tend to connect the defendant with the commission of the crime. Hence it is inconceivable that the erroneous instruction given in any way prejudiced any right of the appellant.'"

[6] Appellant complains of other instructions given by the trial court, and of the refusal to give instructions proposed by him. We have examined all of these instructions and find no error in them. The instructions given fully cover the instructions proposed by the appellant which were refused and there was no error in the trial court's rejecting them.

Judgment affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

111 Cal. App. 456

BROWN et al. v. BARNETT.

Civ. 6187.

District Court of Appeal, Second District, Division 1, California.

Jan. 30, 1931.

1. Trial ⚷251(2).

Trial of action for money received as action for accounting between partners *held* erroneous as outside issues presented by pleadings.

Complaint alleged that defendant received a named sum to and for the use of plaintiffs, and that he had refused payment after demand therefor, while answer denied that defendant at time stated or any time received sum alleged or any sum to or for the use of plaintiffs, and admitted the demand and refusal of payment.

2. Partnership ⚷108.

One partner cannot sue another upon demand arising out of partnership transactions, in absence of settlement of accounts.

Appeal from Superior Court, Los Angeles County; Walter Guerin, Judge.

Action by Walter Brown and another against Thomas D. Barnett. Judgment for plaintiffs, and defendant appeals.

Reversed.

Victor Ford Collins, of Los Angeles, for appellant.

Arthur William Green, of Los Angeles, for respondents.

CONREY, P. J.

By the complaint the plaintiffs alleged that on January 12, 1925, defendant received the sum of $1,256.50 to and for the use of plaintiffs. The complaint further alleged demand for payment, refusal of payment, and nonpayment. The answer of defendant denied that at the time stated or at any time he received said alleged sum, or any sum, to or for the use of plaintiffs, and admitted the demand and refusal of payment.

The findings of fact are that all the allegations of the complaint are true and that all of the allegations of the answer are untrue. There is a further finding as follows: "That a partnership existed between the above named parties, plaintiffs and defendant, and that each was entitled to an undivided one-third interest in and to the earnings of the business, known as Thomas D. Barnett Company, as conducted at and during the times mentioned in plaintiffs' complaint and that in accordance with said partnership conditions and agreements, there is now due from defendant to plaintiffs the sum of One Thousand ($1,000.00) Dollars."

The record shows that the plaintiffs were permitted to try the case as if the complaint had alleged a partnership between the plaintiffs and the defendant and a series of partnership transactions ending with a dissolution of the partnership; and as if it had been further alleged that after dissolution of the partnership the affairs thereof were in such condition as to require an accounting by the court. To all of this offered evidence relating to a partnership and to partnership transactions the defendant objected upon the ground that the evidence was not within the issues of the case, and that under the allegations of the complaint the plaintiffs did not have a right to thus present an issue of partnership and accounting. Judgment was entered in favor of the plaintiffs for the sum of $1,000. From this judgment the defendant appeals.

[1, 2] There are numerous assignments of error, most of which we need not discuss. We are satisfied that the court erred in trying this action as an action for an accounting between partners when, as it plainly appears, the pleadings tendered no issue of that kind. "It is well settled in this state, as elsewhere, that one partner cannot sue another upon a demand arising out of the partnership transactions, in the absence of a settlement of the accounts." Bull v. Coe, 77 Cal. 54, 18 P. 808, 810, 11 Am. St. Rep. 235; Jepsen v. Beck, 78 Cal. 540, 21 P. 184. See, also, 21 A. L. R., pages 34 et seq.; 58 A. L. R., pages 623 et seq.

At the trial of this action it was admitted that the accounts of the partnership remained open. The plaintiff White said: "There has not been any settlement since dissolution of partnership. Mr. Barnett refused to settle with us. * * *" The plaintiff Brown, as witness, testified to estimates, according to which the plaintiffs "figured up" the amount which, as he said, constituted an unpaid balance of $1,250.50 "coming to White and myself." It is thus admitted that at the time of commencement of this action, and at all times thereafter, there was no settlement of these accounts.

"It may not at this day be necessary, in order to maintain an action at law against a copartner, or one who had been such, to show an express promise to pay a sum of money already ascertained as the balance due, but it is necessary that the balance itself must be one which has been ascertained by the act of both parties—in other words, agreed to as constituting a balance due." Ross v. Cornell, 45 Cal. 133.

The judgment is reversed.

We concur: HOUSER, J.; YORK, J.

111 Cal. App. 423

MAUZY et al. v. MILLAR.

Civ. 6332.

District Court of Appeal, Second District, Division 1, California.

Jan. 28, 1931.

Principal and agent ⚷173(2).

In action on note given as consideration for modification of escrow agreement, letters to escrow holder showing ratification of agent's modification *held* admissible.

> Escrow agreement in connection with sale of certain realty was executed by agent for some of owners. Subsequently, escrow agreement was modified by such agent so as to grant purchaser extension of time, in consideration of which purchaser gave note of third party.

Appeal from Superior Court, Los Angeles County; Harry R. Archbald, Judge.

Action by Eddy H. Mauzy and others against J. D. Millar. Judgment for plaintiffs, and defendant appeals.

Affirmed.

L. B. Stanton, of Los Angeles, for appellant.

Holland & Holland, of Los Angeles, for respondents.

HOLLZER, Justice pro tem.

This is an action upon a note in the sum of $1,600, executed by defendant to the order of one E. H. Mauzy, one of the plaintiffs, and who assigned same to the parties bringing this suit.

The circumstances under which the note was given were, briefly, as follows:

In September, 1925, E. H. Mauzy, one of the plaintiffs, and one Darnell, as agent for the remaining plaintiffs, entered into an escrow agreement with one R. F. Crittenden, whereby the Title Insurance & Trust Company was authorized to act as escrow holder in connection with the sale of certain real estate by plaintiffs to said Crittenden, at the price of $325,000.

Shortly thereafter, a deed, duly executed and acknowledged by all of the plaintiffs, conveying said property to said Crittenden, was deposited in said escrow by said Darnell.

Apparently being unable to complete the purchase of the property within the time provided by the escrow, said Crittenden on January 21, 1926, paid to the plaintiffs the sum of $4,000 on account of said purchase, and at the same time said escrow agreement was modified so as to grant to Crittenden an extension of time to March 20, 1926, within which the balance of the purchase price might be paid, and also so as to grant to him the right to three additional extensions thereafter of thirty days each, upon the payment each month in advance of $1,600; it being agreed, however, that no part of such monthly payments should apply on the purchase price. Said escrow agreement, as thus modified, was originally signed by the plaintiff E. H. Mauzy, and the said Darnell, as agent for the remaining plaintiffs; but the latter shortly thereafter ratified such modification in writing. On or about February 17, 1926, Crittenden assigned to the defendant an undivided three-fourths interest in said property.

Being unable to pay the balance of the purchase price by March 20th, Crittenden, induced the defendant to execute and deliver the note in question, in consideration of which he secured an additional extension of thirty days.

The purchase not being completed by April 20, 1926, a further extension was granted to May 5, 1926. No further payment having been made, said E. H. Mauzy and Darnell, the latter acting as agent for the remaining plaintiffs, on July 7, 1926, gave notice to the escrow agent that the agreement would be canceled on July 20, 1926, on which last-mentioned date the plaintiffs terminated the deal.

The lower court rendered judgment in favor of plaintiffs. Defendant has appealed and, in support thereof, has advanced the following points:

That the defendant was never a party to the contract for the sale of the property in question.

That the note executed by the defendant was offered as a guarantee for the payment of Crittenden's debt, but such offer was rejected.

That the parties to the original contract of sale, without the consent of the defendant, altered the original obligation, and thereby discharged him.

That the original parties to the said contract voluntarily released the principal charged upon said obligation and rescinded the transaction, and thereby released and effected a cancellation of the note.

That said note was tendered as a guaranty of the payment of a penalty in case the original obligor under the contract of sale should fail to carry out his engagements.

That no damage has been suffered.

In addition, appellant cites several instances—six in number—wherein it is claimed the trial court erred in overruling objections to the admission of evidence. For example, defendant objected to the introduction of letters, signed by those plaintiffs for whom Darnell acted as agent. Said letters had been addressed and delivered to the escrow holder, and recited that the signers thereof ratified the act of said agent in modifying the agreement, whereby the extension of January 21, 1926, was granted.

Another objection was to the introduction of letters of similar import, written by the same parties in April, 1926, ratifying the extension which Darnell had granted under date of April 20. Still another objection was to the introduction of the deed deposited in escrow, and which upon its face purported to be a conveyance by plaintiffs transferring the property in question to said Crittenden.

We have considered each of the points raised by appellant and find no merit in any of them.

The judgment is therefore affirmed.

We concur: CONREY, P. J.; YORK, J.

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111 Cal. App. 426

PAIR et al. v. HAMMOND LUMBER CO. et al.

Civ. 6494.

District Court of Appeal, Second District, Division 2, California.
Jan. 28, 1931.

Automobiles ⚷245(91).

Evidence in action for death of motorist who attempted to pass vehicle and collided with approaching motortruck justified submission of case on last clear chance doctrine.

Appeal from Superior Court, Los Angeles County; Walton J. Wood, Judge.

Action by J. F. Pair and others against the Hammond Lumber Company and others. Judgment for plaintiffs, and defendants appeal.

Affirmed.

George L. Greer, of Los Angeles, for appellants.

Troy Pace, of Los Angeles, for respondents.

IRA F. THOMPSON, J.

This action was brought by the surviving husband and three minor children of Mrs. Elizabeth Pair, for damages for her wrongful death resulting from an automobile collision.

On the 10th day of April, 1928, the deceased was driving a Nash automobile south on Alameda boulevard near Bennett street, in the city of Compton; she was accompanied by Cornelia Huffman, whose husband was the owner of the machine. Immediately preceding them on the highway, and going in the same direction, was an empty truck with a trailer attached, owned by the B. & O. Truck Company; a truck and trailer, both loaded with lumber and owned by the defendant Hammond Lumber Company, was proceeding north on Alameda boulevard at the same time. Mrs. Pair attempted to pass the B. & O. truck, and just as she was in a position where she could start to turn back onto the right side of the boulevard in front of the B. & O. truck, the automobile she was operating was struck by the lumber truck going north, the left front wheel of the Nash automobile having caught on the left front wheel of the lumber truck, causing the Nash automobile to swing around at right angles to the side of the lumber truck. Instantly the B. & O. truck struck the Nash from the side and carried it forward about forty or more feet. Mrs. Huffman and the deceased were both thrown from the automobile and severely injured; they were taken to a hospital, where Mrs. Pair died in the afternoon of the same day. There was conflicting testimony as to the speed of the three vehicles; however, an eyewitness testified that none of them was exceeding twenty miles an hour. There was no dispute of this last statement.

The driver of the lumber truck testified that he was watching the Nash automobile from the time it swung out from behind the B. & O. truck; that it was 100 feet or more away from him when it started to turn out to pass the B. & O. truck; that he saw it weaving back and forth in its course; that, when he saw the Nash come out from behind the truck, in his opinion "she did not give herself ample room to pass between the two trucks" and that "he thought she was taking a chance"; that his right front wheels were about eighteen inches inside the pavement and his rear wheels about twelve; that there was nothing which would have prevented him from pulling off the pavement to the right of the road. A map introduced in evidence showed that there was a shoulder of dirt road on his right approximately five and a half feet wide. He further testified that he would not have upset his load if he had turned to the right on the dirt portion of the highway; that he put on his brakes when he saw the Nash automobile weaving, but another witness testified: "The truck traveling north, I don't believe turned either way out of its course; I didn't see him apply the brakes, but I know the truck was slowed down, turned off the highway after hitting the car, so he must have at least applied his foot brakes right after the time; I don't say he put them on before the crash, but I don't believe it was possible." There was testimony that the lumber truck was swerving also. A witness named Welch was asked the following questions:

"Q. You saw this big heavy lumber loaded truck coming north and the back of the trailer swinging backwards and forwards? A. Yes.

"Q. Then you saw a commotion of some kind like there had been an accident and heard the crash? A. Yes."

A nonsuit was ordered in favor of the defendant the B. & O. Truck Company, but the jury returned a verdict in favor of the plaintiffs and against the Hammond Lumber Company. This appeal is from the judgment rendered pursuant to the verdict.

The sole question for our determination is whether the facts are sufficient to warrant the jury in returning a verdict upon the doctrine of the last clear chance. The court's instruction correctly defined the law thereof, and the appellant makes and could make no objection thereto other than to say that the evidence did not warrant the submission of the case to the jury upon that theory.

Undoubtedly, as was admitted in the trial court, the deceased was guilty of negligence when she attempted to pass the B. & O. truck without sufficient time to give her clearance, but, after putting herself in that position, was it possible for her to escape by the use of ordinary care, and did the driver of appellant's truck realize her dangerous situation and her inability to escape therefrom, and did he have a clear chance to avoid the collision by the exercise of ordinary care, and did he fail in this regard? Upon the answers to these questions hinges the outcome of this appeal. Darling v. Pacific Electric Ry. Co., 197 Cal. 702, 242 P. 703. From our recital of the testimony it cannot be doubted that appellant's driver realized the dangerous situation in which Mrs. Pair had placed herself and the difficulty, if not impossibility, she faced of extricating herself therefrom; nor can we escape the conclusion that the jury was entitled to say that he could have avoided the accident by the exercise of ordinary care (the act of turning slightly to the right), but that he made no attempt to alter his course. That leaves but the single question of whether the deceased could have extricated herself from her predicament by the use of ordinary care. There should be added to the facts the statement that other automobiles were following the B. & O. truck, so that her escape in that direction was very doubtful. The testimony of Mrs. Huffman is capable of the construction that Mrs. Pair had no chance to turn back into her regular line of traffic until just at the moment of impact. She testified, "It seems like just as we were clearing that one" (truck and trailer) "going south, why, then, we were struck by the one going north," and again, "As near as I can tell, and as near as it seemed to me that we had just passed, we had passed the truck going south, and had just started to turn back into our own." Also she said, "The last I can remember clearly was that we were just clearing the truck nicely, and the other truck was coming faster than I expected it was coming, and I felt that Mrs. Pair felt the same way, and just why or how it was that truck struck us, I don't know," and lastly, "The last I do remember was when she was just at this point, seemed to me she was just at the point where she could slip in and clear in front of the truck we were passing, and that was the truck I had my eyes on."

Judgment affirmed.

We concur: WORKS, P. J.; CRAIG, J.

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111 Cal. App. 241

PECOR v. NORTON-LILLY CO.

Civ. 6435.

District Court of Appeal, Second District, Division 1, California.

Jan. 20, 1931.

1. Master and servant ⚿351.

Where employer carried liability insurance, but employer and insurer refused to pay compensation for injuries, employee could not bring action at law (St. 1917, p. 857, § 29(a) and (b), as amended).

> St. 1917, p. 857, § 29(b), as amended, provides that, "if any employer shall fail so to secure payment of compensation, any injured employee or his dependents may proceed against employer by filing application for compensation with commission," and, in addition, may bring action at law against employer for damages.

2. Master and servant ⚿394.

When specified conditions exist, remedy provided by Workmen's Compensation Act is exclusive of all other statutory or common-law remedies (St. 1917, p. 857, § 29(a) and (b), as amended).

Appeal from Superior Court, Los Angeles County; Marshall F. McComb, Judge.

Action by Edward Pecor against the Norton-Lilly Company. From a judgment dismissing the action, plaintiff appeals.

Affirmed.

J. S. LePage, of Long Beach, for appellant.

J. L. Kearney, of Los Angeles, for respondent.

⚿For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

CONREY, P. J.

Judgment was entered dismissing the action after and pursuant to an order sustaining demurrer to complaint. From the complaint it appears that the plaintiff received certain injuries while engaged in work for the defendant. The facts alleged are sufficient to show that the injury arose out of and in the course of the employment, although there is no direct allegation to show this fact; and there is no attempt to state a cause of action based upon negligence of any kind.

[1, 2] By section 29(a) of the Workmen's Compensation, Insurance and Safety Act of 1917 (St. 1917 p. 857), as amended and in force at the time of the accident referred to in the complaint, it was required that every employer (with exceptions not material here) shall secure the payment of compensation either by insuring against liability with an insurance carrier duly authorized therefor or by securing from the commission a certificate of consent to self-insure. In subdivision (b) of said section 29 it is provided: "If any employer shall fail so to secure the payment of compensation, any injured employee or his dependents may proceed against such employer by filing an application for compensation with the commission, and, in addition thereto, such injured employee or his dependents may bring an action at law against such employer for damages, the same as if this act did not apply. * * *"

The complaint does not allege that the defendant did not at the time of the accident carry insurance against liability. On the contrary, the complaint admits that there was such insurance. The allegation is that "the defendant and its insurance company for such cases has failed and refused to pay him any compensation under and by virtue of the Workmen's Compensation, Insurance and Safety Act of 1917 and the amendments thereto of 1919 of the state of California for and because of such injuries and damages, though plaintiff has demanded the same." It is the contention of appellant that this failure to pay constitutes a failure "to secure the payment of compensation," as required by said section 29, and that this gives him a right to bring his action at law in the superior court instead of making application for compensation by a proceeding before the Industrial Accident Commission. We are of the opinion that this contention of appellant is without merit, and that he has not alleged facts sufficient to show failure "so to secure the payment of compensation," within the meaning of that clause as found in said section 29(b).

"The California Workmen's Compensation Act provides the only means by which an injured employee can recover compensation from his employer for injuries received in the course of and arising out of his employment, and it abrogates the common-law liability of the master for such injuries in the cases to which it is applicable. * * * When the specified conditions exist, the remedy provided by the act is exclusive of all other statutory or common law remedies." Alaska Packers' Ass'n v. Industrial Accident Commission, 200 Cal. 579, 583, 253 P. 926, 928.

The judgment is affirmed.

We concur: HOUSER, J.; YORK, J.

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111 Cal. App. 258

CALIFORNIA SECURITIES CO. v. STATE.

QUAKER OATS CO. v. SAME.

Civ. 7464.

District Court of Appeal, First District, Division 2, California.

Jan. 21, 1931.

Rehearing Denied Feb. 21, 1931. Hearing Denied by Supreme Court March 19, 1931.

1. States ⚷191(2).

In determining whether actions against secretary of state were in effect against state, substance of complaints is primarily to be considered.

2. States ⚷191(2).

Actions by corporations against secretary of state to recover taxes, paid under protest pursuant to unconstitutional law, *held*, in effect, actions against state (St. 1893, p. 57; St. 1917, p. 371, as amended).

> Complaints, in substance, alleged that secretary of state, as such, demanded payment pursuant to California Corporation License Tax Act (St. 1917, p. 371, as amended) on penalty of having corporations' right to transact business within state forfeited; that, to avoid such forfeitures, moneys were paid under protest to secretary of state, who paid them to state treasurer; that act is void; that demand for refund was made and refused; and that moneys were due and owing to complainants. Moreover, it appeared that Attorney General, when appearing in cases, was not misled as to his defense, for he pleaded by way of answer that actions were barred by provisions of St. 1893, p. 57, which provides for maintenance of actions against state itself.

3. States ⚷203.

In actions by corporations against secretary of state to recover taxes paid under unconstitutional law, circumstances required affirmance of orders substituting state as party;

plaintiffs having been led into such form of action by appellate court decisions.

> To rule otherwise would place state in decidedly inequitable position of admittedly collecting moneys under void statute, but denying relief, notwithstanding parties entitled thereto had pursued as nearly as possible, in view of appellate court decisions at time of filing actions, remedial procedure provided for in such cases, although subsequently Supreme Court *held* that such actions would lie only against state itself.

4. States ⚷205.

Attorney General having voluntarily appeared and submitted to jurisdiction in actions against state, alleged noncompliance with statute was immaterial (St. 1893, p. 57).

5. States ⚷205.

Actions against state having been brought within statutory period, time of Attorney General's appearance was immaterial.

Appeals from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Actions by the California Securities Company and by the Quaker Oats Company against Frank C. Jordan, individually and as Secretary of State. The court ordered that the State be substituted in place of defendant, and, from judgments rendered against it, the State appeals.

Affirmed.

U. S. Webb, Atty. Gen. and Alberta Belford, Deputy Atty. Gen., for the State.

John A. Sinclair, of San Francisco, for respondents.

LUCAS, Justice pro tem.

These actions were brought by plaintiffs, respondents herein, to recover certain corporation license taxes paid by them under protest to Frank C. Jordan as secretary of state, who was sued both individually and in his official capacity. The taxes were levied, assessed, and collected under the provisions of the California Corporation License Tax Act (St. 1917, p. 371, as amended), which act had, prior to the institution of these actions, been declared unconstitutional by the Supreme Court. Both complaints herein were filed on December 31, 1927. Prior to this time, and in December, 1917, the District Court of Appeal for the First Appellate District, in the case of McClellan v. State of California, 35 Cal. App. 605, 170 P. 662, held that an action brought directly against the state for the recovery of moneys paid under the provisions of said act would not lie, because the state could not be sued without its consent. This decision declared that the act of February 28, 1893 (Stats. 1893, p. 57), did not authorize such a suit. Subsequently, however, and on February 26, 1929, the Supreme Court, in the case of Welsbach Co. v. State of California, Frank C. Jordan as Secretary of State and Charles G. Johnson as Treasurer of said State, 206 Cal. 556, 275 P. 436, held that an action to recover taxes collected under an unconstitutional statute was authorized by the said statute of 1893, and would lie against the state itself, but not against the secretary of state or the state treasurer, or either of them, in their official capacity.

On April 1, 1929, the Attorney General of the state of California filed answers to the complaints herein, denying the alleged involuntary character of the tax payments, and alleging that the actions were barred by the terms of said statute of 1893 and by section 339 of the Code of Civil Procedure.

Apparently with the Welsbach decision in mind, respondents on July 12, 1929, secured orders from the trial court reciting that the actions were in effect actions against the state of California; that the said state of California was the real party defendant; that the actions were being defended by the duly authorized attorney for the state of California, and ordering that the state of California be substituted in the place and stead of the defendants Frank C. Jordan and Frank C. Jordan as secretary of state in the same manner and to the same effect as if the state of California had been named as a party defendant in the original complaints filed herein.

Thereafter, and on July 18, 1929, the Attorney General filed on behalf of the state of California new answers denying certain allegations of said complaints, and again affirmatively alleging that the actions were barred by the terms of the said statute of 1893 and by the provisions of section 339 of the Code of Civil Procedure.

The cases were tried and judgments rendered against the state of California for the amounts sued for.

The state of California now appeals, alleging as grounds of appeal: (1) That the original actions brought against the secretary of state were not in fact actions against the state of California; (2) that the order substituting the state of California in the place of the said secretary of state was void; (3) that, assuming the actions against the secretary of state to be in fact actions against the state of California, the state was not properly in court because of noncompliance by respondents with the terms of the statute of 1893; and (4) that, assuming the appearances by the Attorney General constituted waivers of the terms of the statute of 1893, the actions were barred by the statute of limitations because the appearances were made more than two years after the causes of action accrued.

We cannot agree with any of these contentions.

[1, 2] Primarily, the substance of the complaints is to be considered. An examination thereof reveals the fact that they contain every allegation necessary to constitute causes of action against the state.

Briefly, the allegations are that the secretary of state as such demanded of respondents the payment of moneys under and pursuant to the so-called California Corporation License Tax Act on penalty of having their right to transact business within the state forfeited if they failed so to do; that, in order to avoid such forfeitures, the moneys were paid under protest to the secretary of state, who in turn paid them forthwith to the state treasurer; that the act under which the moneys were collected is void; that demand for a refund was made and refused; and that the moneys were due and owing to respondents.

Furthermore, it appears that the Attorney General, when he appeared in the cases, was in no wise misled as to his defense, for he pleaded by way of answer, and before the substitution of parties was made, that the actions were barred by the provisions of the said act of 1893, which specifically provides for the maintenance of actions against the state itself, and makes available to the state a plea that actions brought under the terms of said act must be brought within a period of two years after the causes of action accrue.

In the case of Smith v. Reeves, 178 U. S. 436, 20 S. Ct. 919, 920, 44 L. Ed. 1140—an action brought against the defendant as treasurer of the state of California for the return of taxes illegally collected—Mr. Justice Harlan said: "Is this suit to be regarded as one against the state of California? The adjudged cases permit only one answer to this question. Although the state, as such, is not made a party defendant, the suit is against one of its officers as treasurer; the relief sought is a judgment against that officer in his official capacity; and that judgment would compel him to pay out of the public funds in the treasury of the state a certain sum of money. * * * The action is not one to recover specific moneys in the hands of the state treasurer, nor to compel him to perform a plain ministerial duty. It is to enforce the liability of the state to pay a certain amount of money on account of the payment of taxes alleged to have been wrongfully exacted by the state from the plaintiffs. Nor is it a suit to enjoin the defendant from doing some positive or affirmative act to the injury of the plaintiffs in their persons or property, but one in effect to compel the state, through its officer, to perform its promise to return to taxpayers such amount as may be adjudged to have been taken from them under an illegal assessment."

In commenting upon this case, appellant contends that it was a suit against the state, not because it was a suit against a state officer, but because the treasurer was authorized by the law under which the suit was brought to appear and defend such action. We find, however, nothing in the decision of the court to warrant such conclusion.

[3] On the question of the orders of substitution being void, several cases are cited which either authorize the making of such orders or approve the filing of an amended complaint properly naming the real party defendant, even after the statute of limitations has run. Thompson v. Southern Pacific Co., 180 Cal. 730, 183 P. 153; Walsh v. Decoto, 49 Cal. App. 737, 194 P. 298, 300; Craig v. San Fernando Furniture Co., 89 Cal. App. at 172, 264 P. 784.

In the Walsh Case the court concluded its opinion with these words: "There is abundance of authority that the court may so act on its own motion in furtherance of justice." Furtherance of justice in the instant case demands that the action of the trial court in making the orders of substitution be affirmed. To rule otherwise would place the state in the decidedly inequitable position of admittedly collecting moneys under a void statute but denying relief, although the parties entitled thereto had pursued as nearly as possible, in view of upper court decisions, the remedial procedure provided for in such cases.

[4] As to evidence of the alleged noncompliance with the terms of the act of 1893, by way of filing an undertaking and serving summons, the record before this court is entirely silent, the transcript consisting merely of the complaints, answers, orders of substitution, findings, and judgments. These matters, however, are immaterial if our first conclusion herein is correct, namely, that the actions were in effect actions against the state itself, for the Attorney General voluntarily appeared and submitted to the jurisdiction of the court.

[5] Likewise, if our first conclusion is correct, the final point raised on appeal is without merit—that is, that the appearances having been made more than two years after the original actions were filed, such actions are barred by the statute of limitations. If the actions were, as held herein, actions against the state itself, they were not barred by the statute of limitations, because they were brought within two years from the date the causes of action accrued. The time of appearance is not material.

The judgments appealed from are affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

111 Cal. App. 165

CARR v. KINGSBURY, Chief of Division of State Lands.

Civ. 186.

District Court of Appeal, Fourth District, California.

Jan. 16, 1931.

Rehearing Denied Feb. 11, 1931. Hearing Denied by Supreme Court March 16, 1931.

1. Navigable waters ⇨36(3).

"Tide lands" are those over which neap or ordinary tide regularly ebbs and flows.

[Ed. Note.—For other definitions of "Tide Lands," see Words and Phrases.]

2. Mines and minerals ⇨5.

"Submerged lands," within Leasing Act before 1929 amendment, means that part of ocean bed not uncovered by tides (St. 1921, p. 404).

3. Mines and minerals ⇨5.

"Overflowed lands," in connection with ocean, are that portion of shore line and sand bars not uncovered by ordinary tides, but appearing above water during semi-monthly spring tides, or during high spring tides happening during equinoxes (St. 1921, p. 404).

[Ed. Note.—For other definitions of "Overflowed Lands," see Words and Phrases.]

4. Constitutional law ⇨50.

Legislature, having primary function to declare public policy, may do so within limitations and principles recognized by Constitution and laws.

5. Statutes ⇨206.

Courts will construe statute so as to give it full effect as far as possible, so that it may stand in entirety.

6. Constitutional law ⇨48.
Statutes ⇨174, 175.

If language will reasonably permit, statutes will be construed so as to render them valid and operative (Civ. Code, § 3541).

7. Mines and minerals ⇨5.
Statutes ⇨181(1).

Court must, if possible without doing violence to clear language, give effect to intention of Legislature and all provisions of Leasing Act regarding minerals in state lands (St. 1921, p. 404, as amended).

8. Mines and minerals ⇨5.

Leasing Act, relating to minerals on state lands and prospecting therefor, *held* intended to apply to all cities alike (St. 1921, p. 404, as amended).

9. Mines and minerals ⇨5.

"Tide lands" and "submerged lands" in Leasing Act referred to all such lands, whether inside or outside exterior boundaries of city (St. 1921, p. 404, as amended).

10. Mines and minerals ⇨6.

Tide and submerged lands within exterior boundaries of city *held* within prohibition against granting of prospecting permit for gas or oil on such lands "fronting on" city (St. 1921, p. 405, § 4).

> Prohibition against granting such prospecting permits on tide or submerged lands "fronting on incorporated city" includes such lands, though within city whose boundaries, as in present case, extend over ocean bed up to three-mile limit, in view of public policy to reserve municipal beaches for enjoyment and recreation of people; the quoted phrase referring to tide and submerged lands touching balance of city, whether within or without its boundaries; "front" having been defined as the beginning, land which faces or abuts on a piece of water; and "fronting" being variously defined as opposing face to face, opposing directly, adjoining; abutting on, touching.
>
> [Ed. Note.—For other definitions of "Fronting and Abutting," see Words and Phrases.]

11. Statutes ⇨110½(1).

Proviso in Leasing Act, prohibiting granting of prospecting permits for minerals on tide or submerged lands fronting on cities, *held* not unconstitutional as not embraced within title (St. 1921, p. 405, § 4).

> Title of St. 1921, p. 404, is "An act to reserve all minerals in state lands; * * * to provide for the granting of permits and leases to prospect for and take any such minerals; to provide for the rents and royalties to be paid, and granting certain preference rights. * * *"

12. Statutes ⇨68.

Act is "general" if applying to cities, counties, or persons within well-defined class.

[Ed. Note.—For other definitions of "General Law," see Words and Phrases.]

13. Statutes ⇨93(4).

Proviso in Leasing Act, prohibiting granting of prospecting permit for minerals on tide and submerged lands fronting on cities, *held* not unconstitutional as discriminatory (St. 1921, p. 405, § 4).

> Proviso is not unconstitutional, since it applies to all cities fronting on tide, overflowed or submerged lands, whether such lands be in ocean, lakes, or rivers;

fact that but few of such cities now have proven oil fields within or near their exterior boundaries not being controlling.

Appeal from Superior Court, Orange County; G. K. Scovel, Judge.

Application for peremptory writ of mandate by Arthur Carr against W. S. Kingsbury, as Chief of the Division of State Lands, Department of Finance. From a judgment denying the writ, petitioner appeals.

Affirmed.

Head, Wellington & Jacobs, of Santa Ana, and I. B. Dockweiler, John Dockweiler, Roy Maggart, George B. Bush, and Philip Farman, all of Los Angeles, for appellant.

L. W. Blodget, City Atty., of Huntington Beach, amicus curiæ for appellant.

U. S. Webb, Atty. Gen., and H. H. Linney, and John W. Maltman, Deputy Attys. Gen., for respondent.

William A. Barnhill, Hubert T. Morrow, James S. Bennett, Frank G. Finlayson, and Finlayson, Bennett & Morrow, all of Los Angeles, amici curiæ for respondent.

MARKS, J.

Appellant filed this petition in the court below seeking a peremptory writ of mandate to compel respondent to issue a permit or lease to prospect for oil and gas under the provisions of an act of the Legislature approved May 25, 1921 (St. 1921, p. 404), on certain tide, overflowed, or submerged lands in the city of Huntington Beach, Cal. For brevity we will hereafter refer to this act as the Leasing Act. In each of the briefs originally filed all of the respective counsel agreed that the sole question to be determined upon this appeal was whether or not respondent was justified in refusing to issue the permit under that provision of section 4 of the Leasing Act which is as follows: "Provided further, however, that in no case shall permits or leases be granted covering tide, overflowed or submerged lands fronting on an incorporated city, or for a distance of one mile on either side thereof." It was also agreed that appellant had taken all of the steps necessary leading up to the granting of the permit or lease. At the argument, and now in supplemental briefs filed, it is urged that the provision of the Leasing Act which we have quoted is unconstitutional.

The city of Huntington Beach is a municipal corporation of the sixth class in Orange county, Cal. Its westerly boundary line is three miles out in the ocean from the coast line and corresponds with the westerly boundary line of the state of California. Const. of California, art. 21. The property upon which appellant seeks a lease is rectangular in shape, having a width of thirteen hundred and twenty feet and a length of thirty-three hundred feet. It extends from the line of mean high tide along the coast line, southwesterly for its length into the ocean. Its northwesterly line is approximately sixty-eight hundred and eight feet southeasterly from the northwestern city limits. A municipal pleasure pier of the city of Huntington Beach is constructed oceanward from the land at a point approximately thirty-eight hundred and ninety feet southeasterly from the southeasterly line of the location claimed by appellant. The business and residential portion of the city extends shoreward from the pier and centers on Main street, which ends at the foot of the pier. The land to the shoreward of appellant's location is occupied exclusively by oil wells and oil well rigs, machinery, and equipment. It was formerly fairly well covered with dwellings which were removed to make way for drilling operations. The dwellings now commence above the shore line a short distance southwesterly from the Carr location.

The proviso of the Leasing Act which we must construe divides itself into two portions, the first of which provides in effect that no permits or leases shall be granted by the state covering tidelands, overflowed lands, or submerged lands fronting on an incorporated city; and, the second, that no permits or leases shall be granted covering such lands for a distance of one mile on either side of such city. The second portion of the proviso has been construed in the case of Joyner v. Kingsbury, 97 Cal. App. 17, 275 P. 255. We will, therefore, not consider it here except in so far as may be necessary to determine the public policy of this state as declared by the Legislature in the Leasing Act and acts amendatory thereof.

[1-3] Tidelands are generally defined as those over which the neap or ordinary tide regularly ebbs and flows. Submerged land, as the term was used in the Leasing Act before the amendment thereof in 1929 (St. 1929, p. 944), and as applied to this case, must be held to mean that part of the ocean bed not uncovered by the tides. Overflowed lands, if there can be any such in connection with the ocean, must be said to be that portion of the shore line and sand bars which are not uncovered by the neap or ordinary tides, but which appear above the water during the spring tides, which occur twice each month, or during the high spring tides which happen during the equinoxes. Whether or not any of the property involved here properly can be denominated as overflowed lands seems unimportant in this case, and we will assume that it was composed of tidelands, and submerged lands only.

[4] Primarily it is the duty and function of the Legislature to declare the public policy of the state, and it may do so within the limita-

tions provided by the Constitution, and the principles underlying and recognized by the Constitution and laws. Lux v. Haggin, 69 Cal. 255, 4 P. 919, 10 P. 674; Southern Pacific Co. v. Stibbens, 103 Cal. App. 664, 285 P. 374; Maryland Casualty Co. v. Fidelity & Casualty Co., 71 Cal. App. 492, 236 P. 210. Therefore we must look to the provisions of the Leasing Act itself to determine the public policy of the state in regard to the drilling of oil wells along the beach fronting the shore line of an incorporated city.

In a great majority of municipalities having an ocean frontage the line of mean high tide forms their ocean boundaries. It was stated in the argument of this case that the city of Huntington Beach is the only municipality in California with boundaries extending over the bed of the ocean. While this statement was not denied we have not verified it. If it be true, the case before us presents the only instance in California in which a similar question could be presented.

In 1921 the Legislature passed the Leasing Act which we are considering. By its terms all minerals in the public domain were reserved to the state. It contained the proviso which we have quoted, and because of the tidewater boundary line of the great majority of our coastal cities this proviso discloses the trend of the legislative mind towards the reservation of municipal beaches free from mining operation for the enjoyment and recreation of the people of the state. In 1923 (St. 1923, p. 593) the act was amended by the Legislature which attempted to give the surveyor general a discretion in granting permits or leases which would have further restricted drilling operations on the coastal tide and submerged lands. A portion of this amendment was declared unconstitutional in the case of Boone v. Kingsbury, 206 Cal. 148, 273 P. 797, because its provisions were not contained in the title of the act or of the amendatory act. Its passage, however, shows an intention on the part of the Legislature to place additional restrictions upon drilling for oil on tide or submerged lands. In 1929 the Legislature again amended the Leasing Act and added three new sections to it which prohibited the receiving of any application for a permit or lease after September 1, 1929, and the issuing of any such permit or lease after such date, except that "nothing contained in this section shall be deemed or construed with reference to the holder of a valid, uncanceled and unforfeited prospecting permit granted upon an application filed in full accordance and compliance with the provisions of this act on or prior to January 17, 1929." St. 1929, p. 945. These enactments show the legislative mind progressed from the intention to limit the drilling of oil wells on tide and submerged lands fronting on coastal cities in 1921 to the determination to declare a public policy which would prevent the removal of all hydrocarbons from such lands along the entire coast of the state when the right so to do had not already accrued.

[5-10] The word "front" is defined in Webster's International Dictionary as "The beginning, * * * land which faces or abuts on a piece of water." The same authority defines "fronting": "To oppose face to face, to oppose directly." "Fronting" is defined as "adjoining, touching. Phrases: fronting, adjoining or abutting on." 27 Corp. Jur. 910. Property described in a mortgage as having a certain front to a river has been held to have a riparian estate bordering upon the river. La Branch's Heirs v. Montegut, 47 La. Ann. 674, 17 So. 247. The words "fronting" and "adjoining" have been held synonymous. Meier v. City of St. Louis, 180 Mo. 391, 79 S. W. 955. The phrase referring to lots "fronting upon a street" means the lots touching the boundary line of the street. Flynn v. Chiappari, 191 Cal. 139, 215 P. 682.

Applying these definitions to the phrase under consideration where the Legislature referred to the "tide, overflowed or submerged lands fronting on an incorporated city," we conclude that it meant to refer to the line where these lands touch the uplands of the city. We find the uplands of the city touched first by the tidelands. The tidelands are defined on the upland side by the line of the neap or ordinary high tides, and on the ocean side by the line of the same low tides. Omitting from consideration, as unnecessary, overflowed lands, we have next adjoining the tidelands oceanward the submerged lands that are not uncovered by the tides. The westward boundary of the uplands of the city is the line of neap or ordinary high tides, and the shoreward boundary of the submerged land is the line of the same low tides. We therefore have the tidelands "fronting on" (touching) the incorporated city at the line of the neap or ordinary high tides, and the submerged lands "fronting on" (touching) the incorporated city at the line of the neap or ordinary low tides. We believe that any other construction placed upon this language would do violence to the intention of the Legislature as expressed in the Leasing Act and would be contrary to the public policy which it announced in its legislative enactments. It must be borne in mind that the Legislature did not provide that the permits or leases should be granted covering tide or submerged lands fronting on the exterior boundaries of an incorporated city. To adopt the construction of the act urged by appellant we would have to read these words into it. He contends that the permits may be granted on tide, overflowed, or submerged lands within the city limits and not in an area one mile wide and three miles long outside of such limits. The effect in this case of such an interpretation of the Leasing Act would be to prohibit the leasing of the tide, overflowed, or submerged lands one mile in width lying along and adjoining and outside of the northerly and southerly city limits of Huntington Beach, and permit the leasing of such lands on both sides thereof. We do not believe that such a construction is warranted by the language of the Leasing Act, nor is it in accord with the intent and purpose of the Legislature in passing it.

If the theory of appellant were adopted, there would be no tidelands in Huntington Beach to which the terms of the Leasing Act would be applicable, as the city limits extend three miles into the ocean. Tidelands are made such by the water of the ocean flowing over them. Submerged lands are made such by the water standing over them. Their lines of meeting with the shore make their points of contact with the city. Under the theory of appellant the use of the term "tidelands" would be meaningless, useless, and without application in this case.

"It is the well-settled rule of law in this state that the courts will construe a statute so as to give it full force and effect as far as is possible so that it may stand in its entirety. Kydd v. San Francisco, 37 Cal. App. 598, 174 P. 88; Hunt v. Manning, 24 Cal. App. 44, 140 P. 39. If the language will reasonably permit, a construction will be given statutes which will sustain and render them valid and operative rather than defeat them. Section 3541, Civ. Code; Glassell Development Co. v. Citizens' Nat. Bank, 191 Cal. 375, 28 A. L. R. 1427, 216 P. 1012; Cuthbert v. Woodman, 185 Cal. 43, 195 P. 673." Chilson v. Jerome, 102 Cal. App. 635, 283 P. 862, 864. It happens that the tidelands are within the exterior boundaries of the city of Huntington Beach, but the fact remains that they are there. It is our duty to give effect to all the provisions of the Leasing Act, and, if we can do so without doing violence to its clear language, we must carry out and give effect to the intention of the Legislature in passing it. We believe that the Legislature intended to have the Leasing Act apply to all cities alike, and that when it used the term "tidelands" in the act, it referred to all such tidelands whether inside or outside of the exterior boundaries of the city, and in using the phrase "fronting on an incorporated city" it referred to the line where these tidelands touched the balance of the incorporated city whether inside or at the outside of the exterior corporate boundaries thereof. The same may be said of its use of the term "submerged lands" in this act.

The last phrase of the proviso we have been considering, namely, "or for a distance of one mile on either side thereof," has been construed in the case of Joyner v. Kingsbury, supra. The facts in the Joyner Case are identical with those of the instant case, except the dates of filings and the description of the property which lies thirty-nine hundred and sixty feet northwesterly from the Carr location. An application to have that case heard in the Supreme Court after judgment in the District Court of Appeal was denied by the Supreme Court on April 25, 1929. We are aware of the rule announced by the Supreme Court that the denial of a petition for hearing by it does not approve the rules of law announced by the District Court of Appeal in its decision, but we do feel that such action by the Supreme Court should be construed by us as an approval of the ultimate decision of the District Court of Appeal in that case. In view of the identically similar facts and questions of law presented for decision in the two cases, and the ruling of the Supreme Court on the petition for hearing in the Joyner Case, we believe that case should be followed by us in the instant case.

[11-13] During the oral arguments of this case appellant urged that the proviso in question is unconstitutional and void, first, because its subject-matter is not embraced within the title to the act, and, second, because it is legislation applying to a special class and clearly discriminatory. We cannot agree with either of these contentions. The following authorities support our conclusions as to the first contention: Estate of Wellings, 192 Cal. 506, 221 P. 628; Ex parte Liddell, 93 Cal. 633, 29 P. 251; Ex parte Hallawell, 155 Cal. 112, 99 P. 490; People v. Jordan, 172 Cal. 391, 156 P. 451. It is too well-settled law to need the citation of authorities that an act is considered general in its effect if it applies to all cities, counties, or persons within a well-defined class. The proviso in question applies to all cities fronting on tide, overflowed, or submerged lands whether such lands be in the ocean or in the lakes or rivers of the state. Because but few of such cities now have proven oil fields within or near their exterior boundaries cannot be controlling in this case. Neither counsel nor this court can prophesy where or when the drill will find productive oil sands in fields unknown at the present time. Twenty years ago no one had the temerity to drill for oil in the now proven fields of Huntington Beach.

Judgment affirmed.

We concur: BARNARD, P. J.; WARMER, Justice pro tem.

111 Cal. App. 765

Roy MAGGART, Petitioner and Appellant, v. W. S. KINGSBURY, as Chief of the Division of State Lands, Department of Finance of the State of California, Respondent.

Civ. 187.

District Court of Appeal, Fourth District, California.

Jan. 16, 1931.

Rehearing Denied Feb. 11, 1931. Hearing Denied by Supreme Court March 16, 1931.

Appeal by petitioner from a judgment of the Superior Court of Orange County, G. K. Scovel, Judge, denying petition for a writ of mandate to compel issuance of permit or lease to prospect for oil and gas. Affirmed.

Head, Wellington & Jacobs, of Santa Ana, and I. B. Dockweiler, John Dockweiler, Roy Maggart, George B. Bush, and Philip Farman, all of Los Angeles, for appellant.

L. W. Blodget, City Atty., of Huntington Beach, amicus curiæ for appellant.

U. S. Webb, Atty. Gen., and H. H. Linney and John W. Maltman, Deputy Attys. Gen., for respondent.

William A. Barnhill, Hubert T. Morrow, James S. Bennett, Frank G. Finlayson, and Finlayson, Bennett & Morrow, all of Los Angeles, amici curiæ for respondent.

MARKS, J.

The facts in this case are identical with those in the case of Carr v. Kingsbury (Cal. App.) 295 P. 586, except the description of the property upon which appellant has made his location. The decision in the Carr Case has this day been filed. The questions of law involved in the instant case are identical with those in the Carr Case; therefore, for the reasons given in the case of Carr v. Kingsbury, the judgment in this case is affirmed.

We concur: BARNARD, P. J.; WARMER, Justice pro tem.

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111 Cal. App. 762

F. L. FEISTHAMEL, Petitioner and Appellant, v. W. S. KINGSBURY, as Chief of the Division of State Lands, Department of Finance of the State of California, Respondent.

Civ. 188.

District Court of Appeal, Fourth District, California.

Jan. 16, 1931.

Rehearing Denied Feb. 11, 1931. Hearing Denied by Supreme Court March 16, 1931.

Appeal by petitioner from a judgment of the Superior Court of Orange County, G. K. Scovel, Judge, denying petition for a writ of mandate to compel issuance of permit or lease to prospect for oil and gas. Affirmed.

Head, Wellington & Jacobs, of Santa Ana, and I. B. Dockweiler, John Dockweiler, Roy Maggart, George B. Bush, and Philip Farman, all of Los Angeles, for appellant.

L. W. Blodget, City Atty., of Huntington Beach, amicus curiæ for appellant.

U. S. Webb, Atty. Gen., and H. H. Linney and John W. Maltman, Deputy Attys. Gen., for respondent.

William A. Barnhill, Hubert T. Morrow, James S. Bennett, Frank G. Finlayson, and Finlayson, Bennett & Morrow, all of Los Angeles, amici curiæ for respondent.

MARKS, J.

The facts in this case are identical with those in the case of Carr v. Kingsbury (Cal. App.) 295 P. 586, except the description of the property upon which appellant has made his location. The decision in the Carr Case has this day been filed. The questions of law involved in the instant case are identical with those in the Carr Case; therefore, for the reasons given in the case of Carr v. Kingsbury, the judgment in this case is affirmed.

We concur: BARNARD, P. J.; WARMER, Justice pro tem.

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111 Cal. App. 763

C. C. CUMINGS, Petitioner and Appellant, v. W. S. KINGSBURY, as Chief of the Division of State Lands, Department of Finance of the State of California, Respondent.

Civ. 189.

District Court of Appeal, Fourth District, California.

Jan. 16, 1931.

Rehearing Denied Feb. 11, 1931. Hearing Denied by Supreme Court March 16, 1931.

Appeal by petitioner from a judgment of the Superior Court of Orange County, G. K. Scovel, Judge, denying petition for a writ of mandate to compel issuance of permit or lease to prospect for oil and gas. Affirmed.

Head, Wellington & Jacobs, of Santa Ana, and I. B. Dockweiler, John Dockweiler, Roy Maggart, George B. Bush, and Philip Farman, all of Los Angeles, for appellant.

L. W. Blodget, City Atty., of Huntington Beach, amicus curiæ for appellant.

U. S. Webb, Atty. Gen., and H. H. Linney and John W. Maltman, Deputy Attys. Gen., for respondent.

William A. Barnhill, Hubert T. Morrow, James S. Bennett, Frank G. Finlayson, and Finlayson, Bennett & Morrow, all of Los Angeles, amici curiæ for respondent.

MARKS, J.

The facts in this case are identical with those in the case of Carr v. Kingsbury (Cal. App.) 295 P. 586, except the description of the property upon which appellant has made his location. The decision in the Carr Case has this day been filed. The questions of law involved in the instant case are identical with those in the Carr Case; therefore, for the reasons given in the case of Carr v. Kingsbury, the judgment in this case is affirmed.

We concur: BARNARD, P. J.; WARMER, Justice pro tem.

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111 Cal. App. 764

Thomas A. JOYNER, Petitioner and Appellant, v. W. S. KINGSBURY, as Chief of the Division of State Lands, Department of Finance of the State of California, Respondent.

Civ. 190.

District Court of Appeal, Fourth District, California.

Jan. 16, 1931.

Rehearing Denied Feb. 11, 1931. Hearing Denied by Supreme Court March 16, 1931.

Appeal by petitioner from a judgment of the Superior Court of Orange County, G. K. Scovel, Judge, denying petition for a writ of mandate to compel issuance of permit or lease to prospect for oil and gas. Affirmed.

Head, Wellington & Jacobs, of Santa Ana, and I. B. Dockweiler, John Dockweiler, Roy Maggart, George B. Bush, and Philip Farman, all of Los Angeles, for appellant.

L. W. Blodget, City Atty., of Huntington Beach, amicus curiæ for appellant.

U. S. Webb, Atty. Gen., and H. H. Linney and John W. Maltman, Deputy Attys. Gen., for respondent.

William A. Barnhill, Hubert T. Morrow, James S. Bennett, Frank G. Finlayson, and Finlayson, Bennett & Morrow, all of Los Angeles, amici curiæ for respondent.

MARKS, J.

The facts in this case are identical with those in the case of Carr v. Kingsbury (Cal. App.) 295 P. 586, except the description of the property upon which appellant has made his location. The decision in the Carr Case has this day been filed. The questions of law involved in the instant case are identical with those in the Carr Case; therefore, for the reasons given in the case of Carr v. Kingsbury, the judgment in this case is affirmed.

We concur: BARNARD, P. J.; WARMER, Justice pro tem.

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111 Cal. App. 133

LOS ANGELES SURETY CO., Inc., v. MUNICIPAL COURT OF LOS ANGELES et al.

Civ. 7495.

District Court of Appeal, Second District, Division 2, California.

Jan. 16, 1931.

Rehearing Denied Feb. 14, 1931.

1. Certiorari ⚷5(2).

Certiorari did not lie when matter complained of could be corrected on appeal in mandamus proceeding (Code Civ. Proc. § 939).

2. Mandamus ⚷187(2).

Appeal lies from judgment in mandamus proceeding (Code Civ. Proc. § 939).

Application by Los Angeles Surety Company, Inc., for certiorari to review orders of the Municipal Court of the City of Los Angeles, refusing to vacate order forfeiting bail, and of the Superior Court of Los Angeles county denying writ of mandate, and from an order sustaining demurrer to a petition for writ of audita querela.

Proceeding dismissed.

A. Brigham Rose, of Los Angeles, for petitioner.

Charles P. Johnson, City Prosecutor, Joe W. Matherly and John L. Bland, Deputy City Prosecutors, all of Los Angeles, for respondents Municipal Court, Wilbur C. Curtis, and J. M. Askin.

Everett W. Mattoon, Co. Counsel, and S. V. O. Prichard, Deputy Co. Counsel, both of Los Angeles, for respondents Superior Court and Edward T. Bishop.

IRA F. THOMPSON, J.

By this proceeding it is sought to review an order of the municipal court refusing to vacate an order forfeiting bail; and also an order of the superior court denying a peremptory writ of mandate directed to the municipal court commanding it to vacate the order forfeiting bail and lastly to review an order sustaining a demurrer to a petition for the writ of audita querela.

The facts essential to a disposition of the proceeding are as follows: The petitioner gave bond for the appearance of Earl Wilson, who had been charged with a violation of the Wright Act (St. 1921, p. 79), and whose trial was set for November 1, 1929. The defendant failed to appear for trial, and his bail was declared forfeited. The petitioner thereupon instituted a search to determine his whereabouts, and, if possible, to return him to the court for trial. It discovered that on November 21 of the same year Wilson had committed suicide in Port of Spain, Trinidad, British West Indies. Thereupon and within ninety days of the time bail was ordered forfeited, the petitioner made a motion in the municipal court to vacate the forfeiture on the grounds that the disappearance of the defendant was without its connivance or knowledge; that upon ascertaining his default it instituted a search to locate his whereabouts; and that the investigation had disclosed his self-destruction at the time and place already mentioned. The court found these to be the facts, but declared that there was no evidence to satisfactorily or at all excuse the neglect of the defendant to appear for trial and denied the motion. Thereafter petitioner filed a proceeding in mandate in the respondent superior court in which it sought an order commanding the municipal court to vacate the order forfeiting bail. The alternative writ was issued. The respondents appeared by demurrer and after a hearing thereon the demurrer was sustained, and the petition was denied. Subsequently the petitioner also filed in the superior court a petition in which it attempted to secure what it denominated a writ of audita querela.

The contention of the petitioner is that the death of the defendant and the resulting impossibility of complying with the provisions of section 1305 of the Penal Code excuses the bail. That section provides that, if within ninety days after entry in the minutes of the order declaring the bail forfeited the defendant and his bail appear and satisfactorily excuse the neglect of the defendant and show that his disappearance was not with the connivance of the bail, the court may direct the forfeiture of the undertaking to be set aside.

[1, 2] It is unnecessary for us at this time to pass upon the question thus tendered, for the reason that we have concluded that the writ of review is not a proper remedy or proceeding in the present instance. From a judgment in the proceeding in mandamus the petitioner has an appeal by means of which it is possible for it to present the question fully and thoroughly. In Knowles v. Thompson, 133 Cal. 245, 65 P. 468, 469, we read: "An appeal lies from the judgment of the superior court denying the writ of mandate. Code Civ. Proc. § 939; Palache v. Hunt, 64 Cal. 474, 2 P. 245; People v. Perry, 79 Cal. 109, 21 P. 423; Heinlen v. Phillips, 88 Cal. 559, 26 P. 366. This furnishes a plain, speedy, and adequate remedy to the petitioner in the ordinary course of law. Santa Cruz, etc., Co. v. Supervisors, 62 Cal. 40." It is, of course, fundamental that certiorari will not lie when the matter complained of can be corrected on appeal. Baird v. Justice's Court, 11 Cal. App. 439, 105 P. 259; Southern Cal. Ry. Co. v. Superior Court, 127 Cal. 417, 59 P. 789.

Proceeding dismissed.

We concur: WORKS, P. J.; CRAIG, J.

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111 Cal. App. 761

EUREKA CASUALTY CO., Petitioner, v. MUNICIPAL COURT, etc., et al., Respondents.

Civ. 7496.

District Court of Appeal, Second District, Division 2, California.

Jan. 16, 1931.

Rehearing Denied Feb. 14, 1931.

Application for certiorari to review orders of the Municipal Court of the City of Los Angeles refusing to vacate order forfeiting bail, and of the Superior Court of Los Angeles County denying writ of mandate, and from an order sustaining demurrer to a petition for writ of audita querela. Proceeding dismissed.

A. Brigham Rose, of Los Angeles, for petitioner.

Charles P. Johnson, City Prosecutor, Joe W. Matherly, Deputy City Prosecutor, and John L. Bland, Deputy City Prosecutor, all of Los Angeles, for respondents Municipal Court, Wilbur C. Curtis, and J. M. Askin.

Everett W. Mattoon, Co. Counsel, and S. V. O. Pritchard, Deputy Co. Counsel, both of Los Angeles, for respondents Superior Court and Edward T. Bishop.

IRA F. THOMPSON, J.

This is a proceeding in certiorari brought for purposes identical with those in Los Angeles Surety Co. v. Municipal Court (Cal. App.) 295 P. 591, and upon the same state of facts except that in the present case the bond was given upon an appeal from a judgment punishing the defendant for another and different offense against the provisions of the Wright Act (St. 1921, p. 79). After affirmance of that judgment the defendant failed to present himself in satisfaction thereof and the bail was declared forfeited. Like proceedings were had as in the companion case just mentioned, and for the reasons stated in the opinion this day rendered in that case we must make like disposition of the writ heretofore issued.

Writ dismissed.

We concur: WORKS, P. J.; CRAIG, J.

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111 Cal. App. 293

PEOPLE v. LUCICH.

Cr. 1597.

District Court of Appeal, First District, Division 2, California.

Jan. 23, 1931.

Rehearing Denied Feb. 7, 1931.

1. Homicide 🔑166(5).

Admitting in evidence, for purpose of showing motive for murder, copy of indictment in liquor prosecution in which prosecution deceased turned state's evidence, *held* not error.

2. Criminal law 🔑400(2).

Copy of indictment for violating prohibition law *held* admissible as corroborative evidence in prosecution for murder of deceased who had turned state's evidence.

> Facts disclosed that the deceased and another had discussed with defendant, before the automobile ride on which deceased was killed, the prosecution for violating the federal prohibition laws and deceased's relation to it, and the copy of the indictment was merely corroborative evidence showing the nature of the case which had been discussed.

3. Criminal law 🔑400(2).

In murder prosecution, admission of minutes of federal court showing that deceased, who had turned state's evidence, had been sworn as witness in liquor prosecution, *held* not error.

4. Homicide 🔑166(5).

Minutes of federal court showing that deceased, who had turned state's evidence in liquor prosecution, had made damaging admissions against codefendants, *held* admissible in murder prosecution.

5. Criminal law 🔑1141(2), 1163(1).

Appellant must show both error and prejudice (Const. art. 6, § 4½).

6. Witnesses 🔑372(2).

Refusing to permit defendant in murder prosecution to question witness whether she had been on terms of illicit intimacy with deceased *held* not error.

> The exclusion was not error, since the witness' previous testimony that deceased was one of her best friends, and that she had feeling of loathsomeness toward defendant, could not have left doubt in minds of jury as to interest or feeling of witness.

Appeal from Superior Court, Marin County; Edward I. Butler, Judge.

Vincent Lucich was convicted of murder, and he appeals.

Affirmed.

Thomas P. Boyd, of San Rafael, Webster Clark, and Roy C. Lewis, of San Rafael, for appellant.

U. S. Webb, Atty. Gen., and Lionel Browne, Deputy Atty. Gen., Henry E. Greer, Dist. Atty., of San Rafael, and Robert Duke, Special Prosecutor, of San Francisco, for the People.

NOURSE, P. J.

Defendant was charged with the crime of murder. He was tried before a jury which returned a verdict of guilty and he was sentenced to imprisonment for life. He appeals from the judgment and from the order denying his motion for a new trial.

There is not, and could not well be, upon the record before us, any claim that the evidence adduced at the trial was insufficient to support the verdict, and it will, therefore, be unnecessary to state the evidence at length.

The deceased, one M. G. Sturtevant, was jointly indicted with a number of others for conspiracy to violate the federal prohibition laws in the operation of a still and in the manufacture of illicit liquor. Pending the trial of these defendants in the federal court at San Francisco the deceased turned state's evidence and voluntarily testified against his codefendants. While that trial was pending the deceased and a Mrs. Berri met the appellant in San Francisco and discussed the trial, the deceased's connection with it as a witness, and the fact that Mrs. Berri was unable to appear as a witness in that case because her husband was one of the defendants on trial, but that she had information valuable to the government which she might disclose. Two days later, at the invitation of the appellant, the deceased drove Mrs. Berri and appellant to a secluded spot on Tomales bay in Marin county on the pretense that appellant would show the deceased where illicit liquor could be hi-jacked, and upon appellant's promise that he would engage with the deceased to hi-jack liq-

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

uor which was to be landed at Tomales bay by a group of bootleggers who employed appellant to protect the landings.

On the trip to Tomales bay the deceased carried a 38-caliber S. & W. pistol. The gun was lying on the floor of the car and was a topic of conversation on the way over. When the party was ready to return to San Francisco with the deceased in the driver's seat with both hands on the steering wheel, Mrs. Berri seated beside him and appellant standing on the left side of the car beside the driver, the appellant suddenly shot the deceased in the chest, and as Mrs. Berri jumped from the car he shot her. She escaped with a severe wound, but the appellant continued shooting at the deceased. When he found that his victim was dead he dragged him into an old shack, took the car of the deceased and drove to his apartment in San Francisco. When the body of the deceased was found it was badly mutilated in addition to the wounds caused by gunfire.

[1, 2] The first point raised is that the trial court erred in admitting in evidence a copy of the indictment in the federal court. The offer was made for the purpose of showing motive. Evidence had theretofore been received that the appellant had boasted that he was a gunman for a "gang" of liquor smugglers, and that, on the trip to Tomales bay, he put on a pair of dark glasses and requested the deceased to drive over a back road because "he didn't want any of his gang to recognize him." It was the theory of the state that the appellant, being a member of a gang of rumrunners, racketeers, and hi-jackers, was interested in closing the lips of another member of such a gang who was about to give damaging testimony against his associates. We are not now concerned with the weight of the evidence to prove this theory—the single question is whether it was material and competent. Upon this point the authorities support the respondent and appellant has cited none to the contrary.

The general rule applicable is stated in People v. Soeder, 150 Cal. 12, 15, 87 P. 1016, 1017, where the Supreme Court say: "Evidence having a direct tendency, in view of the surrounding circumstances, to prove motive on the part of a person for a crime, and thus to solve a doubt 'either as to identity of the slayer, the degree of the offense, the insanity of the defendant, or to the justification or excusability of his act,' is admissible against a defendant, however discreditably it may reflect on him, and even where it may show him guilty of other crimes. See People v. Cook, 148 Cal. 334, 83 P. 43, 46, 50; People v. Suesser, 142 Cal. 354, 363, 75 P. 1093." In People v. O'Bryan, 165 Cal. 55, 59, 130 P. 1042, it was held that, for the purpose of showing motive, it was competent for the state to show that the defendant was a member of a labor union on strike against a manufacturing corporation of which the deceased was a nonunion employee. To the same effect is People v. Grow, 16 Cal. App. 147, 149, 116 P. 369, and in People v. Jo Fong, 59 Cal. App. 259, 271, 272, 210 P. 548, it was held that the state could show that deceased was a member of a Chinese tong and that the defendants were members of a rival tong.

The question of the competency of the evidence presents no difficulties. The copy of the indictment was the best evidence of the charge pending in the federal court. As to the materiality of the evidence, it having been shown that the deceased and Mrs. Berri discussed the federal prosecution with appellant before the fatal ride, and had discussed the character of the case and the deceased's relations to it, the copy of the indictment was merely corroborative evidence showing the nature of the case which was under discussion.

[3, 4] The second and third objections go to the admission of the minutes of the federal court showing that deceased had been sworn as a witness in the first trial and to a portion of his testimony showing the damaging admissions he made against his associates. In both instances the evidence offered was the best evidence which could have been had for the purpose, while its materiality to the issues on trial is determined by what we have said regarding the indictment.

[5] The suggestion is made that the trial court erred in refusing appellant's request to read the cross-examination of the deceased in the federal court, but it is merely a suggestion. We have frequently said that it is incumbent upon the appellant to show both error and prejudice. Such has been the rule since People v. Brotherton, 47 Cal. 388, 404, and more particularly since the enactment of section 4½ of article 6 of the Constitution.

[6] Finally it is argued that the trial court erred in sustaining the objection to a question asked by appellant of the witness Berri on cross-examination. This witness was the same woman who accompanied appellant and the deceased on the fatal ride. Her testimony was clear and convincing. The appellant admitted the shooting and set up a wholly improbable story of self-defense. Presumably for the purpose of impeaching the witness she was asked if she had been on terms of illicit intimacy with the deceased. The objection was properly sustained. The witness had already testified that the deceased was one of her best friends, and that, as to the appellant, she had "a feeling of loathsomeness toward him for the cowardly way in which he murdered Mr. Sturtevant and tried to murder me." There could have been no doubt in the minds of the jury as to the interest or feeling of the witness, and the question objected to was designed merely to degrade her. On this point the case is in line with People v. Smith, 61 Cal. App. 259, 266, 214 P. 468.

The judgment and order are affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

111 Cal. App. (Supp.) 757

PACIFIC STATES FINANCE CORPORATION v. FREITAS et al.

Civ. 21.

Appellate Department, Superior Court, City and County of San Francisco, California.
Feb. 5, 1931.

1. Automobiles 🔑363.

Statute giving garage keeper lien, must be strictly construed in ascertaining persons to whom, and subject-matter to which, it applies (Civ. Code, § 3051).

2. Automobiles 🔑363.

Statute giving garage keeper lien, in remedial aspect, must be liberally construed in furtherance of beneficial purpose intended (Civ. Code, § 3051).

3. Automobiles 🔑376.

One claiming garage keeper's lien on automobile need not have acted at request of legal owner, but lien may attach because of debt created by conditional buyer in lawful possession (Civ. Code, § 3051).

4. Automobiles 🔑376.

Where debt was created by conditional buyer, garage keeper's lien claim was limited by statute (Civ. Code, §§ 3051, 3051a).

> Civ. Code, § 3051a (St. 1923, p. 695), limits lien given by section 3051 to $100 under any contract for work, services, care, or safe-keeping made at request of one not holder of legal title, unless such holder shall have had actual written notice from lienor.

5. Sales 🔑467.

Conditional buyer in possession of automobile could use automobile as such property is customarily used, and was under duty to give automobile proper protection.

6. Automobiles 🔑381.

Statute declaring voluntary restoration of property to owner extinguishes lien did not apply where automobile was stored in garage and removed daily by conditional buyer (Civ. Code, § 2913, and § 3051).

7. Automobiles 🔑381.

Under statute giving garage keeper lien, dependent on possession, lien for storage charges, repairs, and supplies continued as against conditional seller, notwithstanding conditional buyer in possession withdrew automobile daily (Civ. Code, § 3051).

8. Automobiles 🔑383.

Clause in conditional sales contract that buyer should not permit lien to attach to automobile did not affect garage keeper's lien for storage charges, repairs, and supplies (Civ. Code, § 3051).

9. Automobiles 🔑379.

Charge for supplies garage keeper furnished conditional buyer of automobile before statutory amendment authorizing lien for supplies was merely personal claim against buyer (Civ. Code, § 3051, as amended by St. 1877–78, p. 89, St. 1911, p. 887, and St. 1929, p. 1923).

10. Sales 🔑472(1).

Conditional seller of automobile must assert right of recaption in subordination to subsisting liens created by statute (Civ. Code, §§ 3051, 3051a).

Appeal from Justices' Court, City and County of San Francisco; Frank W. Dunn, Justice.

Action by the Pacific States Finance Corporation against Tony Freitas, doing business under the firm name and style of "Motor Arms Garage," and another. From a judgment for plaintiff, defendant named appeals.

Reversed and remanded.

Edgar C. Levey and Marvin E. Lewis, both of San Francisco, for appellant.

John P. Beale, of San Francisco, for respondent.

William S. Downing and Philander B. Beadle, both of San Francisco, amici curiæ.

JOHNSON, P. J.

This case presents the legal question of the right of a garage keeper to assert a lien, under section 3051 (limited somewhat by section 3051a) of the Civil Code, for accumulated compensation for storage of an automobile and for repairs made and supplies furnished therefor, when the owner or person having control of the automobile is allowed to remove it day by day for use in his own pursuits.

The defendant Freitas is the proprietor of a garage known as the Motor Arms Garage in San Francisco.

In the month of January, 1929, the defendant Bonilla, who was then in lawful possession of a De Soto sedan automobile under a contract of conditional sale, made an arrangement with Freitas whereby, in view of certain financial exigencies of Bonilla, Freitas agreed to house the car on credit until December 1, 1929, at the rate of $7 per month. During that period of time the car was in daily use by Bonilla, being returned to the garage at night and there kept until again wanted by Bonilla. On December 1st, in addition to the storage charge for approximately eleven months, there appear to have been unpaid bills amounting to $40.28 for labor performed and for gasoline and other supplies furnished for the De Soto sedan. Bonilla being still unable to pay his indebtedness, Freitas thereupon notified Bonilla that the car could not be again taken from the garage until the bills were paid, and that the charge for storage from December 1st would be 50 cents per day. No payment was made by Bonilla, and storage charges continued to accumulate until plaintiff instituted this action of claim and delivery, and caused the sheriff to take the car on February 8, 1930, from the possession of Freitas.

Plaintiff's cause of action is based on a contract in the form of a conditional sale agreement made on September 13, 1929, between Bonilla and San Francisco Sales Company, and assigned by the latter to the plaintiff. The San Francisco Sales Company seems not to have been the seller of the car to Bonilla, but by the terms of the contract Bonilla promised to make certain monthly payments; and, in case of default, the creditor was authorized to take possession of the car and sell it at public or private sale. Bonilla having made default, plaintiff acted under the authority so conferred.

Before the action was begun, plaintiff, insisting that the car had been allowed to be taken from the garage as late as December 24, 1929, tendered to Freitas $20 as the amount payable for storage from that date to the time of tender, January 31, 1930, and demanded delivery of the car. The tender having been refused, this action followed.

In his answer to the complaint Freitas asserted a lien for all the compensation owing to him by Bonilla for storage, repairs, and supplies.

In this connection it may be well to note that charges for several months had already accrued before the contract under which plaintiff claims was made on September 13, 1929, and that in that contract Bonilla undertook to house and protect the car against the elements. At the same time the contract provides that Bonilla should not create or permit any lien for storage, repairs or otherwise.

Plaintiff's contention on this appeal, and made also at the trial, is that a garage keeper's lien for accrued charges is utterly lost, if he voluntarily parts with physical possession, even though the car is to be returned after a brief interval.

The defendant Freitas contends, on the other hand, that temporary release of the car to Bonilla for daily use did not terminate the bailment or invalidate his statutory lien. The judgment of the trial court was based on acceptance of the view urged by plaintiff. Up to December 1, 1929, Bonilla was permitted to have the car by day; but Freitas contends that from that time on the car was continuously in his actual possession. While there is a conflict of evidence on this point, the trial court apparently accepted the testimony of Freitas, for, though the court, adopting plaintiff's view of the law, awarded possession of the car to plaintiff, the judgment made provision for payment to Freitas of $35, which represented the storage charge from December 1, 1929, to the time of the sheriff's seizure.

The question before us, then, is whether Freitas had a lien also for charges from January to December, which was superior to the interest of plaintiff.

An automobile is a horseless carriage; and a garage is the modern adaptation with some refinements, of the almost obsolete livery stable. The proprietors in both cases house and care for common instruments of transportation; and, in a sense, may be said to be cousins german. The ubiquitous use of automobiles necessitates a multiplicity of housing places; and, quite generally, the safeguards securing payment of compensation to keepers of livery stables have been extended to garage proprietors.

Section 3051 of the Civil Code as amended in 1878 (St. 1877–78, p. 89), provided for a lien on behalf of livery stable keepers; and in 1911 (St. 1911, p. 887), there was appended to the section the clause reading: "And keepers of garages for automobiles shall have a lien, dependent on possession, for their compensation in caring for and safekeeping such automobiles." Then by the amendment which became effective August 14, 1929 (St. 1929, p. 1923), the lien was broadened to secure also charges "for making repairs and performing any labor upon or furnishing supplies or materials for such automobiles."

[1, 2] Both in the case of proprietors of livery stables and of garages, the lien is declared to be "dependent on possession." While the statute, being in derogation of the common law, is to be strictly construed in ascertaining and determining the persons to whom, and the subject-matter to which, it is applicable, yet at the same time in its remedial aspect the enactment is to be liberally construed in furtherance of the beneficial purpose intended. Ogle v. King & Goodheart, 2 City Ct. R. (N. Y.) 83; Johanns v. Ficke, 224 N. Y. 513, 518, 121 N. E. 358.

The statute expresses a legislative intention to provide a remedy which did not inhere in the common law; and, where such statutes have been adopted in relation to stable keepers, they have been construed in the light of business usages and the customs of the people. Both in the case of draft horses and motor vehicles, temporary withdrawals from their housing places are characteristic of the stabling and garage business; and, if the continuance of the lien must be held to be dependent on actual uninterrupted physical possession, the heart is cut out of the statute.

As regards proprietors of stables, the rule has not been that uninterrupted possession must be maintained; and the court in State v. Shevlin, 23 Mo. App. 598, gives a construction to such statutes which has become almost universal. The court there says at pages 601, 602:

"* * * In the view we take of the meaning of the statute, the lien thereby conferred is not dependent upon an actual physical custody by the stable keeper at every moment of time. We think that the lien conferred by the statute subsists, even as against third persons without notice, while the horse is boarded in the stable of the lienor, although it may, with his consent, be used during the day by the owner in his business. To hold otherwise would be to construe the statute so as to deprive stable keepers of the protection which the legislature probably intended to give them; since, as is well known, in most cases where horses are boarded, the owner is allowed to use them in his business during the day. This being so, the statute could not have intended to allow the owner to destroy the lien of the stable keeper while having the possession of the horse on the street during the day, by selling or mortgaging it to a stranger without notice of the lien. On the contrary, we are of opinion that every person is bound so far to take notice of the statute, that, when he is about to become the purchaser or mortgagee of a horse found upon the street in the custody of its owner, it is incumbent upon him to make inquiry as to the place where the horse is boarded, and whether anything is due for its keeping. There is no greater hardship in this rule than there is in the general rule in respect of purchases of personal property, that the purchaser gets no better title than the seller has."

So also in Walls v. Long, 2 Ind. App. 202, page 206, 28 N. E. 101, 103, a like view is expressed in the following language:

"* * * It was a necessary part of that arrangement that the horses should be delivered to the defendant as they were needed, and this is part of the ordinary course of business of livery stable keepers, and therefore must be consistent with the right of lien that belongs to the occupation. * * * When it is considered to what extent livery stables are made use of by the public as places most suitable, in many respects and instances, for the boarding of horses in daily use, it is difficult to believe that the legislative intent or meaning is that which is contended for by the appellant's counsel. If the keepers of such stables were intended to be benefited by the statute only where the animal being fed and cared for was not taken from the stable and used by the owner or his family at all, the benefits both to the keepers and owners would be slight; for few persons would consider such an arrangement as either convenient or economical. It is obvious in our opinion, that such is not the meaning of the statute. The appellees had no knowledge or reason to believe or suspect that the horse would not be returned as usual to the stable when last taken out. While the horse was being boarded by the appellees, the appellant was at their stable, and expressed himself as pleased with the care the horse was receiving. The appellees were not required to announce, on each occasion that the horse went out, that they had a lien upon him, and that therefore he must be returned. There was nothing in the contract between them and Beal inconsistent with the existence of the lien, nor had it been terminated by the payment of the board. There is nothing in the record from which it can be inferred that the appellees intended to waive their lien, nor does the evidence furnish any ground whatever for the belief, if it exists, by either the appellant or Beal, that there was any such intent."

See, also, Young v. Kimball, 23 Pa. 193; Goldsmith v. Gensenleiter, 14 Pa. Dist. R. 516, and Id., 28 Pa. Co. Ct. R. 399; Caldwell v. Tutt, 10 Lea (78 Tenn.) 258, 43 Am. Rep. 307; Welsh v. Barnes, 5 N. Dak. 277, 278–279, 65 N. W. 675; McGlasson v. Hennessy, 161 Ill. App. 387; Heaps v. Jones, 23 Mo. App. 617; 38 C. J. 81.

In New York the Court of Appeals in Johanns v. Ficke, 224 N. Y. 513, 121 N. E. 358, had occasion to construe section 183 of the Lien Law of that state giving to stable keepers a lien "dependent on possession" for the sum due for animals kept and vehicles stored pursuant to any express or implied agreement made with the owners. In this case the owner of certain horses obtained a year's credit from plaintiff on accrued charges of $860 for boarding and keeping the animals; and additional charges incurred later increased the indebtedness in favor of plaintiff to $1,056.82. With this amount owing, the horses were removed to defendant's stable without plaintiff's knowledge or consent. In the action brought by plaintiff to enforce his lien, the defendant asserted a lien under the statute and also under a chattel mortgage. The plaintiff was held entitled to priority; and, upon the subject of maintenance of physical possession, the court, after quoting the statute, spoke thus (pages 518–520 of 224 N. Y., 121 N. E. 358, 360):

"* * * It expresses the legislative intention to give to a livery stable keeper the lien which the common law did not give. In case the lien does not arise for the reason (the other statutory essentials to the lien existing) that the possession of the livery stable keeper is not actual, continuous, and exclusive, the statute is nugatory as to the stable keeper. The temporary absences of horses and vehicles from the livery stable where there are boarded or kept is a characteristic and condition inseparable from and integral to the business. Temporary removals of the property are inherent in it. It was within the legislative comprehension that unbroken actual possession of the property by the stable keeper was impracticable. To enact that a livery stable keeper shall have the lien, provided he does not part with the actual and exclusive possession, which he gets, generally speaking, to enable the owner to take and use the property away from the stable and his control, is unreasonable and of slight effect. * * *

"Unless the language compels, we will not regard a statute as purposeless. It is always presumed, in regard to a statute, that a result reasonable and enforceable was intended by it. Travelers' Insurance Co. v. Padula Co., Inc., 224 N. Y. 397, 121 N. E. 348. The courts must, under the proper rules of construction, ascertain the intended result and enforce it if expressed. The language of the statute reveals that the word 'lien' within it was intended to have its common-law meaning, namely, the right to detain the property until the charges, in which the lien originated, are satisfied. The right to retain or detain property is exercisable only as to that possessed. The property may, however, be possessed either actually or constructively. Its owner cannot destroy the possession of the lienholder by force, trick, or fraud or against his will. Bigelow v. Heaton, 4 Denio, 496. He cannot destroy the possession, or the lien, as between himself and the lienholder, at least, by receiving the property under the agreement to use it in a certain way for a special purpose, and thereupon return it, provided the agreement be reasonably consistent with the existence of the bailment, and there is not a voluntary relinquishment of the lien."

While in New York the rights of a stable keeper are fixed by section 183 of the Lien Law, those of a garage proprietor are governed by section 184, which, as amended in 1926 (Laws 1926, c. 373), gives the garage keeper a lien for storage, repair, and supplies, with the right to detain the automobile as security "at any time it may be lawfully in his possession until such sum is paid," subject, however, to the exception, added in 1926, that, if after thirty days from the accrual of the lien the lienor allows the car to go "out of his actual possession," the lien shall become void as against conditional sales agreements and mortgages executed prior to the accrual of the lien, notwithstanding subsequent repossession by the lienor.

With the judicial construction of section 183 in mind, it is instructive to ascertain how far a like rule has been applied to section 184. There are cases dealing with this section both before and after the amendment of 1926.

In Rapp v. Mabbett Motor Car Co., 201 App. Div. 283, 194 N. Y. S. 200, 203, decided in 1922, it was said in reference to sections 183 and 184 that they had respectively changed the common law in regard to livery stable keepers and garage keepers, and that "in both cases the temporary surrender of the chattel to the owner does not terminate the bailment or invalidate the lien."

This case was followed by Willys-Overland v. Prudman Automobile Co. (Mun. Ct. N. Y.) 196 N. Y. S. 487, decided also before the addition of the exception. This latter action was brought by plaintiff as mortgagee under a purchase-money mortgage against the defendant then in possession of an automobile stored by it for the owner, and held for payment of charges for service and supplies. The automobile, while being housed by defendant, had been surrendered from time to time to the owner for his use; and the plaintiff contended that its rights under its chattel mortgage were paramount to the lien of the defendant, and also that defendant's lien had been destroyed by interruption of its possession. The trial court, besides denying priority to the mortgagee, held that the garage keeper's lien had not been forfeited; and upon this point said (page 488 of 196 N. Y. S.):

"* * * This latter contention I do not think is sound, and is authoritatively disposed of by the case of Johanns v. Ficke, 224 N. Y. 515, 519, 121 N. E. 358, 360, where the Court of Appeals, construing an identical section (183) under the Lien Law (Consol. Laws, c. 33) applicable to horses and horse-drawn vehicles stored in a livery stable, said that:

"'It was within the legislative comprehension that unbroken actual possession of the property by the stable keeper was impracticable.'

"That case determined (224 N. Y. 521, 121 N. E. page 361) that the statute quoted was intended to protect livery stable keepers against the rule of the common law that interruptions of actual, continuous, and exclusive possession were inconsistent with the existence of a lien. I conclude, therefore, that the defendant did not lose his lien because he permitted the use of the car by Schiffler."

The foregoing New York decisions were quoted, and the rule therein declared was applied, in Re Carter (D. C.) 21 F.(2d) 587, where the question arose between a garage keeper and the creditors of a bankrupt.

So far as cases are affected by the amendment of 1926, the exception then added is held to limit the garage keeper's lien as against conditional vendors and mortgagees to charges which accrued during a period of thirty days prior to the last day on which the motor vehicle was taken from the garage keeper's actual possession with his consent. Smith v. Pierce Arrow Sales Corp., 224 App. Div. 769, 230 N. Y. S. 194; C. I. T. Corp. v. Schubert, 137 Misc. Rep. 514, 243 N. Y. S. 748; Kamaran v. Sidney Garage, 137 Misc. Rep. 744, 244 N. Y. S. 337.

We have not this exception in our statute, but section 3051a, adopted in 1923 (St. 1923, p. 695), limits the lien given by section 3051 to $100 under any contract for work, services, care, or safekeeping made at the request of one not the holder of the legal title, unless such holder, if known, shall have had actual written notice from the lienor, given either by personal service or registered letter. Hessel v. Pickwick Stages System, 100 Cal. App. 682, 280 P. 1016; Lindsay v. Kleiber Motor Truck Co. (Cal. App.) 294 P. 454.

[3] Under section 3051 it is not necessary that the lien claimant should have acted at the request of the legal owner; and a preferential lien may attach by reason of a debt created by one in lawful possession under a contract of conditional sale. Davenport v. Grundy Motol Sales Co., 28 Cal. App. 409, 152 P. 932; Goodman v. Anglo-California Trust Co., 62 Cal. App. 702, 217 P. 1078.

[4] In the present case Bonilla was a lawful possessor, but was not the holder of the legal title, and therefore the restriction of section 3051a puts a limitation on the lienor's claim as against plaintiff. The plaintiff urges, however, that no lien can be asserted against it for any charges up to the time when unbroken possession began; and in support of this contention relies on Goodman v. Anglo-California Trust Co., 62 Cal. App. 702, 217 P. 1078; Davis v. Young, 75 Cal. App. 359, 242 P. 743; and Covington v. Grant, 82 Cal. App. 749, 256 P. 213. These were all cases where, after an automobile had been repaired by a mechanic at the request of a conditional vendee and surrendered to him without payment, the automobile had, some weeks or months later, been brought back for other repairs, and the mechanic then sought to detain the automobile for the earlier, as well as the later, charges. It was held in the cases cited that under such circumstances no lien on account of the earlier repairs could be asserted against the conditional vendor. In each of those cases there had been a voluntary unconditional surrender after the first repairs were made, and the lien was in consequence lost.

The distinction between such cases and those of stable keepers and garage proprietors allowing periodic removal is concisely stated in the language of the court in Gould v. Hill, 43 Idaho, 93, 107, 251 P. 167, 171, where the court, speaking of an agister's statutory lien dependent upon possession, said: "As a general rule, a common-law or a statutory lien, dependent upon possession, is waived or lost by the lienholder voluntarily and unconditionally parting with possession or control of the property to which it attaches. However, the lien is not waived or destroyed where there is an intention to preserve the same, the lienholder only conditionally parting with possession."

[5] In the arrangement made between Bonilla and Freitas for Bonilla's accommodation while in financial straits, it is manifest that neither intended a termination of the bailment in the morning followed by a renewal at night, or a daily yielding of possession by Freitas on the mere individual credit of Bonilla. The arrangement between the two had been in existence several months before Bonilla entered into his contract with plaintiff's assignor on September 13, 1929; and those making, or later becoming interested in, such contract with Bonilla, may well have been put on inquiry as to where Bonilla's automobile was kept and upon what conditions, especially as the contract imposed on Bonilla the duty to protect the car against the elements. As a conditional vendee in possession, Bonilla had the right to use the car in the way in which such property is customarily used and for all reasonable purposes; and he was under duty to give the car proper protection and maintenance.

[6] In asserting its claim to superiority, plaintiff takes the position also that by parting with possession Freitas lost his lien by virtue of section 2913 of the Civil Code, declaring that "voluntary restoration of property to its owner" causes extinguishment of a lien dependent on possession. But since Bonilla, though in lawful possession, was not the legal owner, the section cited has no application to this case. Davis v. Young, 75 Cal. App. 359, 363, 242 P. 743.

[7] The evidence shows that there was at no time any unconditional relinquishment of possession or permanent withdrawal of the automobile from the place of keeping. The very nature of the bailment required temporary release, and it must be assumed that the statute was not enacted as a piece of futile legislation. The ways of the world and the usages of business were known to the legislators, and, except for any special limitations, all classes of lienors designated in section 3051 have the same rights and remedies. First Nat'l Bank v. Silva, 200 Cal. 494, 497, 254 P. 262. Hence, when the provision in

favor of garage keepers was tacked on to section 3051 in the year 1911, it is reasonable to infer that there was no more intention to require absolutely uninterrupted possession of an automobile than, under the great weight of authority, had previously been required in the case of animals housed and cared for by stable keepers, who had had the protection of that section since 1878. We are therefore of the opinion that the garage keeper's lien upon the car did not become detached when the automobile was temporarily out of the garage in Bonilla's care. There had been an inchoate lien from the beginning of the bailment, and the indebtedness had matured before plaintiff's seizure of the car in the garage where actual physical possession was then being maintained by the proprietor. His lien (subject to the limitations of section 3051a) possessed at that time, as we believe, the same inviolability as if the actual possession had been continuously preserved.

[8] Nor do we think that an impairment of the lien results from the clause in plaintiff's contract that Bonilla should not permit any lien to attach for storage, repairs, or other cause. Such a provision was under review in Albemarle Supply Co. v. Hind & Co., L. R. [1928] 1 K. B. 307; and not only was it held that such uncommunicated limitation of authority did not affect the lien of a garage keeper making repairs on taxicabs for a conditional vendee, but also that the lien persisted even though the cabs went out each day to ply for hire. Speaking on this subject, Lord Justice Scrutton said (pages 317, 318):

"The plaintiffs' first line of attack on the lien claim was a clause in their hire-purchase agreement providing that 'the hirer shall not have or be deemed to have any authority to pledge the credit of the owners for repairs to the vehicle or to create a lien upon the same in respect of such repairs.' This Court in Green v. All Motors, Ld. (1917) 1 K. B. 625, has held that the mere knowledge by the repairer that there is a hire-purchase agreement without knowledge of its exact terms relating to the car which he repairs does not deprive him of his lien. The owner leaving the cab in the hands of a man who is entitled to use it gives him an implied authority to have it repaired with the resulting lien for repairs. Rowlatt J. had held in a previous case, and the judge below in the present case followed his decision, that a contractual limitation of authority not communicated to the repairer does not limit the implied authority derived from the hirer's being allowed to possess and use the car. I agree with this view; if a man is put in a position which holds him out as having a certain authority, people who act on that holding out are not affected by a secret limitation, of which they are ignorant, of the apparent authority. The owners can easily protect themselves by requiring information as to the garage where the cab is kept, and notifying the garage owner that the hirer has no power to create a lien for repairs. They will thus escape the lien, though they may not get their cab repaired.

"The plaintiffs next contended that any lien was lost because the cabs went out of the possession of the garage each day to ply for hire. The defendant proved an agreement with Botfield at a time when the lien existed, that the cabs should go out for hire each day on the terms that they should be returned to the garage each night, the lien continuing while the cabs were in possession of the garage. I do not think any plying for hire under this agreement prevented the lien, if any, from continuing, and in my view repair of a damaged cab, though it may be described as 'maintenance,' gave rise to a repairer's lien."

[9] The bill of charges presented by the defendant Freitas at the trial of the action amounted to $183.72; but it contained certain items for which a lien did not attach to the De Soto sedan automobile. Before Bonilla acquired that car in January, 1929, he had had another car which was stored with Freitas between November, 1928, and January, 1929, and, the storage charge for that car having been included in the bill presented by Freitas at the trial, his attorney thereupon disclaimed any right to a lien for those items. The bill presented included also charges for gasoline, oil, and other supplies furnished to Bonilla from November, 1928, to December, 1929. But no lien for such supplies was authorized under section 3051 before the amendment which took effect on August 14, 1929; and accordingly the charge for supplies previously furnished was merely a personal claim against Bonilla.

There are decisions in reference to a stableman's lien in which the common-law rule of continuous possession is applied with the utmost strictness; and reference to them is to be found in the annotation in 3 A. L. R. 664, appended to the case of Clarksburg Casket Co. v. Valley Undertaking Co., 81 W. Va. 212, 94 S. E. 549. The predominant view, however, has favored a more liberal and beneficial application of the law; and, in so far as garage keepers are concerned, the modern trend is toward an extension of the remedy so as to keep the lien alive and authorize detention for sums due, if the automobile of which possession has been relinquished comes at any time thereafter into the lawful possession of the lien claimant. Such is the statutory law in New York, New Jersey, New Mexico, Oregon, and District of Columbia.

C. I. T. Corp. v. Schubert, 137 Misc. Rep. 514, 243 N. Y. S. 748; Frank v. Daily, 92 N.

J. Law, 118, 105 A. 9; Abeytia v. Gibbons Garage, 26 N. M. 622, 195 P. 515; Courts v. Clark, 84 Or. 179, 164 P. 714; Barrett v. Commercial Credit Co., 54 App. D. C. 249, 296 F. 996.

The statute in California does not go that far; but, in our opinion, the lien of a garage keeper upon an automobile is not destroyed because of his conditional relinquishment of the possession while the car is temporarily in use by the bailor.

[10] It is urged, however, upon the authority of Thourot v. Delahaye Import Co., 69 Misc. Rep. 351, 125 N. Y. S. 827, that, whatever the rule as to constructive possession may be between the garage proprietor and the bailor, actual continuous possession is essential when other interests, such as those of a mortgagee or conditional vendor, are affected. In our opinion, no such distinction is contemplated in our statutes. Section 3052 of the Civil Code prescribes the method of foreclosing liens acquired under section 3051, and, in relation to liens on automobiles, contains specific directions concerning service of notice of sale on both the legal and the registered owner, gives the legal owner a right of redemption on payment of the lien charges and costs, and, in case of sale, a right to any surplus remaining after satisfaction of the lien and the expenses of foreclosure. In First Nat'l Bank v. Silva, 200 Cal. 494, 254 P. 262, Mortgage Securities Co. v. Pfaffmann, 177 Cal. 109, 169 P. 1033, L. R. A. 1918D, 118, and Kranzthor v. Faulkner Co., 43 Cal. App. 441, 185 P. 305, the rule is promulgated that every lien claimant under section 3051 (subject now to the limitation of section 3051a) has the same rights and remedies, and that every lien so authorized is entitled to preference over the lien of a pre-existing chattel mortgage. There is no logical distinction between a lien for repairs and a lien for storage and supplies (Wolfman Co. v. Eisenberg, 116 Misc. Rep. 43, 190 N. Y. S. 259); and the provisions of section 3052 show indisputably an intention to make the lien of a garage keeper for storage, repairs, and supplies superior to the interest of a conditional vendor. Contracts of conditional sale equally with chattel mortgages must be deemed made with knowledge of the lien law; and when, for default of the vendee, the vendor asserts his right of recaption, he must do so in subordination to subsisting liens created under section 3051 as limited by section 3051a. See Singer Mfg. Co. v. London & S. W. Ry. Co., L. R. [1894] 1 Q. B. 833, 837. In our view, the lien is preserved by constructive possession, not only against the conditional vendee, but against the conditional vendor as well. Albemarle Supply Co. v. Hind & Co., L. R. [1928] 1 K. B. 307.

The judgment is reversed and the case remanded to the municipal court for further proceedings in accordance herewith.

We concur: CABANISS, J.; GOODELL, J.

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113 Cal. App. (Supp.) 773

GENERAL MOTORS ACCEPTANCE CORPORATION v. SILVA et al.

Civ. 49.

Appellate Department, Superior Court, City and County of San Francisco, California.

Feb. 5, 1931.

Automobiles ⚷381.

Conditional buyer's temporary conditional removal of automobile, almost daily, with garage proprietor's consent, did not work destruction of lien claim for storage, supplies, and repairs, as against conditional seller (Civ. Code, § 3051).

Appeal from Municipal Court, City and County of San Francisco; Daniel S. O'Brien, Judge.

Action by the General Motors Acceptance Corporation against Ruth Silva and another. From the judgment, plaintiff appeals.

Affirmed.

Wm. S. Downing and Philander B. Beadle, both of San Francisco, for appellant.

Edgar C. Levey and Marvin E. Lewis, both of San Francisco, for respondent.

JOHNSON, P. J.

This is an action in claim and delivery instituted by plaintiff on February 25, 1930, because of default in certain payments owing for a Hudson automobile, which had been delivered by plaintiff's assignor into the possession of the defendant Mrs. Ruth Silva pursuant to a contract of conditional sale made April 11, 1929.

Mrs. Silva, having the lawful possession of the automobile, kept it at the Sixth Street Garage, under an agreement with the proprietor that the storage charge should be at the rate of $6 per month, payable at the end of each month, together with charges for any supplies furnished and repairs made. All bills for storage, supplies and service up to September 16, 1929, were paid by Mrs. Silva; but between that time and the time of suit there were bills incurred by her for storage, supplies, and repairs amounting to $66.10, which remained unpaid.

From the time when the storage began, until December 25, 1929, Mrs. Silva was in the habit of taking the car almost daily from the garage, but always returned it at night. By reason, however, of the charges which had accumulated, the car was detained in the garage at all times after December 25, 1929, until it was seized in this action on February 26, 1930, by the sheriff, acting under a writ issued at the instance of plaintiff.

Before beginning suit, plaintiff tendered the garage keeper the sum of $25 on February 20; but the amount so tendered was refused, and plaintiff was notified that the car was being detained, as authorized by section 3051 of the Civil Code, as security for payment of the accrued charges of $66.10.

Mrs. Silva having made no appearance in the action, and the defendant Sixth Street Garage having by its answer asserted its claim of lien, the trial court upon the evidence presented rendered judgment establishing a lien under section 3051 in favor of the defendant Sixth Street Garage for the sum of $66.10, with interest. From this judgment, the plaintiff has appealed.

The question of law involved is the same as in the case of Pacific States Finance Corporation v. Tony Freitas et al., 295 P. 804, this day decided by this court, namely, the question whether temporary conditional removal of an automobile, with consent of the garage proprietor, works destruction of a lien claimed under section 3051 of the Civil Code. It was decided in that case that, when such temporary or periodic withdrawal is permitted, the automobile continues to be constructively in the possession of the keeper of the garage, and that his statutory lien is therefore not lost by reason of his parting conditionally with the physical possession.

The two cases are closely parallel in their facts. In this case there was a contract for storage, made with a conditional vendee in lawful possession, at an agreed rate payable monthly; in the other case mentioned a contract was made with the conditional vendee in January, 1929, for storage at a monthly rate with payment deferred to December 1, 1929. The duration of the credit granted is the only material feature distinguishing the one case from the other; and in principle the legal rights and remedies of the parties in both cases are the same.

Upon the reasoning contained in the opinion rendered in the case of Pacific States Finance Corporation v. Freitas, the judgment is affirmed.

We concur: **CABANISS, J.**; **GOODELL, J.**

211 Cal. 408

UNITED STATES v. ACKERMAN et al.

S. F. 13412.

Supreme Court of California.

Jan. 27, 1931.

1. Appeal and error ⚷151(2).

Roomers *held* not parties "aggrieved," within statute, entitled to appeal from decree closing hotel as nuisance (Code Civ. Proc. § 938; National Prohibition Act tit. 2, §§ 21, 22 [27 USCA §§ 33, 34]).

[Ed. Note.—For other definitions of "Aggrieved Party," see Words and Phrases.]

2. Judgment ⚷812(3).

Decree closing hotel as nuisance, being in rem, is binding on roomers, though they were not made parties defendant to action (National Prohibition Act tit. 2, §§ 21, 22 [27 USCA §§ 33, 34]).

3. Intoxicating liquors ⚷259.

Means reasonably necessary to abate hotel, where intoxicants are sold, as nuisance, even to extent of taking innocent owner's property, are constitutional (National Prohibition Act tit. 2, §§ 21, 22 [27 USCA §§ 33, 34]).

In Bank.

Appeal from Superior Court, Santa Clara County; J. R. Welch, Judge.

Action by United States of America against Rosa Ackerman and others. Judgment against defendants. From an order denying motion to vacate or modify judgment, Paul Bahr and others appeal.

Order affirmed.

See also 208 Cal. 99, 280 P. 359.

William H. Johnson, of San Jose, for appellants.

Fred L. Thomas and Frank J. Waterhouse, both of San Jose, for the United States.

WASTE, C. J.

This action was instituted under and pursuant to the provisions of sections 21 and 22 of title 2 of the National Prohibition Act (41 Stat. 305, 314, 27 USCA §§ 33, 34, pp. 99, 111). It terminated in the court below with the entry of a decree adjudging the "Alviso Hotel," situate in the county of Santa Clara, owned and conducted by defendant Rosa Ackerman, to be a common nuisance, and ordering the entire building closed for a period of one year. No appeal was taken by the owner of the building. Certain occupants of the hotel, none of whom had been made parties to the action, made themselves such, and moved the court below to vacate or modify its judgment on the ground, among others, that the moving parties were aggrieved by the effect of the judgment, and were materially injured as to their substantial rights. An affidavit filed in support of this motion set out that the several moving parties had been occupying rooms in the Alviso Hotel "as their private place of dwelling"; that at none of the times mentioned in the complaint had intoxicating liquors been kept or dispensed in any of their said rooms; and that by reason of the judgment and decree of abatement they had been ousted and ejected "from their several rooms and places of dwelling." From the order denying their motion to vacate or modify the judgment the moving parties prosecute this appeal.

A motion of the government to dismiss the appeal on the ground that the appellants "at no time had any interest in the subject matter of the action, for the reason that they were mere lodgers in said hotel," and were not, therefore, parties "aggrieved" within the meaning of section 938 of the Code of Civil Procedure, was denied, with leave to the respondent to renew the motion upon the final submission of the appeal, if so advised. United States v. Ackerman, 208 Cal. 99, 280 P. 359. The motion was renewed when the cause was argued.

[1] As the conclusion we have reached disposes of the cause on its merits in keeping with the intent of the motion, we will consider merely the appeal. The transcript of the evidence heard in the court below discloses that the Alviso Hotel was an ordinary hotel or rooming house. There was no showing that the building was divided into separate sets of apartments or suites of rooms intended or used as homes or for residences of persons or families living independently of one another. The essential elements constituting an apartment or home were lacking. The occupants of the hotel who made themselves parties to the action after judgment, for the purpose of making the motion, were regarded and described by the proprietors of the hotel as "roomers." Most of them "worked in a nearby cannery." In the only affidavit filed in support of the motion it is alleged that the moving parties "engaged and rented of and from Rosa Ackerman * * * their various and several rooms in said hotel." In the light of all the surroundings as disclosed by the entire record, the averment that these parties used and occupied the rooms "as their private place of dwelling" adds nothing on which the movants can predicate an interest in those parts of the premises occupied by them which would render them "aggrieved" within the meaning of the law relating to appeals. Code Civ. Proc. § 938. See, in this connection, Fox v. Windemere Hotel, etc., Co., 30 Cal. App. 162, 164, 157 P. 820. They were mere lodgers, occupying rooms or portions of the hotel which was under the control and in the occupancy of the Ackermans, who owned and conducted it. They, therefore, had no interest in the real estate of which the building was a part. McDowell v. Hyman, 117 Cal. 67, 71, 48 P. 984.

[2] Assuming that the appellants had such an interest, the decree of the court below closing the building for one year is binding on them, notwithstanding they were not made parties defendant before the cause was heard and judgment entered. The principal purpose of an action to abate a nuisance is a proceeding in rem, primarily against the property because it is maintained and used in violation of law.

[3] It must be regarded as settled law that, whatever means are reasonably necessary to abate such a nuisance, even to the extent of taking or destroying the property of an innocent owner, may be adopted without infringing any constitutional rights. United States v. Boynton (D. C.) 297 F. 261, 266, and cases cited. The object of the proceeding to abate is preventive in its nature, and, to effect this, the interest of innocent persons in the property may be divested. Engler v. United States (C. C. A.) 25 F.(2d) 37, 39.

"In the exercise of its authority, and in compliance with the duty imposed upon it by the Eighteenth Amendment, to enforce such amendment 'by appropriate legislation,' Congress has declared that any place where intoxicating liquor is unlawfully manufactured, sold, kept, or bartered is a public nuisance, and has made suitable provisions for the abatement of such a nuisance in proper legal proceedings. One of the means adopted by Congress as advisable and appropriate for the accomplishment of that object is permissive authority in a proper court of equity to order that the place of location of the offending nuisance 'shall not be occupied or used for one year thereafter,' unless such court, in its discretion, shall permit such place to be occupied or used 'if the owner * * * shall give bond.' * * * This power to 'padlock' a place which has thus become a public nuisance is not made dependent upon a finding of knowledge or notice, on the part of any owner of such a place, of the existence of such nuisance." United States v. Boynton, supra, page 266 of 297 F.

The order appealed from is affirmed.

We concur: SHENK, J.; CURTIS, J.; LANGDON, J.; SEAWELL, J.; RICHARDS, J.; PRESTON, J.

211 Cal. 387

CYPRESS LAWN CEMETERY ASS'N v. CITY AND COUNTY OF SAN FRANCISCO.

MOUNT OLIVET CEMETERY ASS'N v. SAME.

S. F. 13118, 13125.

Supreme Court of California.

Jan. 27, 1931.

Rehearing Denied Feb. 19, 1931.

1. Taxation ⚿196, 204(2).

Constitutional provisions and statutes exempting property from taxation must be strictly construed.

2. Taxation ⚿204(2).

Grants of exemption from taxation cannot be allowed, unless intention to do so is expressed in direct terms or is fairly inferable from language of instrument by which right is claimed.

3. Taxation ⚿245.

Hotel purchased by cemetery association, income from which was used exclusively for improvement and preservation of cemetery, *held* not exempt from taxation (Civ. Code, §§ 608–617; Const. art. 13, § 1b).

> Under Const. art. 13, § 1b, all property used or held exclusively for burial purposes, or for care, maintenance, or upkeep of such property, except as used or held for profit, is exempt from taxation.

In Bank.

Appeals from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Separate suits by the Cypress Lawn Cemetery Association and by the Mount Olivet Cemetery Association against the City and County of San Francisco, consolidated for purposes of appeal. From judgments for the plaintiffs, defendant appeals.

Reversed, with instructions.

Superseding 284 P. 506, 509.

John J. O'Toole, City Atty., and Walter A. Dold, Chief Deputy City Atty., both of San Francisco, for appellant.

Everett W. Mattoon, Co. Counsel, and W. Sumner Holbrook, Jr., Deputy Co. Counsel, both of Los Angeles, amici curiæ in support of appellant.

Brittain & Weise and Brobeck, Phleger & Harrison, all of San Francisco, for respondents.

WASTE, C. J.

The above-entitled causes, consolidated for purposes of appeal, present appeals from judgments rendered after the overruling of general demurrers, and require determination of the single legal question as to whether or not the properties described in the respective complaints are, under the allegations thereof, exempt from taxation by the provisions of section 1b of article 13 of the state Constitution, adopted November 2, 1926. As the facts involved in these appeals differ only as to the party plaintiff and the property owned, we will set out in substance only the allegations of the complaint filed by the Cypress Lawn Cemetery Association.

It is therein alleged that the defendant was and is a municipal corporation; that the plaintiff was and is a cemetery association incorporated under sections 608 to 617, both inclusive, of the Civil Code, and has been and is maintaining a cemetery in the county of San Mateo wherein it has sold and granted the perpetual right of burial to many thousands of persons, and the bodies of many thousands of human dead have been buried; that said plaintiff has received a surplus from the sale of lots which, under sections 610 and 611 of the Civil Code, can only be used for the improvement, embellishment, and preservation of said cemetery and not for dividends; that the plaintiff, under section 616 of the same code, has received trust moneys, and under section 617 has contracted for the perpetual care of certain lots in the cemetery for which it holds trust moneys; that, at the time of the assessment hereinafter mentioned, it was the owner, by the investment of such trust moneys in accordance with said sections 616 and 617, of land, improved with a hotel then operated by it for peculiar reasons set forth, located in the city of San Francisco; that "said cemetery is used and held exclusively for the burial or other disposition of the human dead, and the said trust funds with the proceeds thereof, and the entire net proceeds and income from the whole of said trust fund is used exclusively for the care, maintenance and upkeep of said cemetery and the care of said dead; and, no part of said trust fund, nor of the proceeds or income thereof ever has been, or lawfully can be used or held for profit of said plaintiff, or its members." Then, appropriately, the taking of the various steps required by law for the assessment and levying of taxes against such property and the payment of such taxes under protest is alleged. Plaintiff seeks recovery of the amount of taxes so paid and their cancellation.

The constitutional provision here involved, and decisive of the present dispute, reads as follows: "All property used or held exclusively for the burial or other permanent deposit of the human dead or for the care, maintenance or upkeep of such property or such dead, except as used or held for profit, shall be free from taxation and local assessment." Subject to the exception, this provision exempts from taxation and local assessment two kinds of property, classified on the basis of its use, but without consideration of the status or character of its owner or possessor, to wit: (1) That "used or held exclusively for the burial or other permanent deposit of the human dead"; and (2) that "used or held exclusively * * * for the care, maintenance or upkeep of such property" (i. e., the first class) "or such dead" (i. e., human dead so deposited or buried). The exception "except used or held for profit" qualifies the phrase "all property," and therefore restricts or limits both classes of property. We are here concerned only with the second class as affected by the exception.

[1-3] Constitutional provisions and statutes exempting property from taxation are strictly construed. People v. Board of Directors, 174 Ill. 177, 51 N. E. 198. Grants of exemption from taxation cannot be allowed, unless the intention to do so is expressed in direct terms or is fairly inferable from the language of the instrument by which the right is claimed. Pasadena Univ. v. County of Los Angeles, 190 Cal. 786, 791, 214 P. 868. It is apparent from a reading of the above constitutional provision that property falling within the second class, to be exempt, must possess two characteristics, namely, it must fall within the limitation that it be used or held exclusively for the care, maintenance, or upkeep of burial grounds, and it must also fall without the exception that it be used or held for profit. While it may be accepted as true that the entire income derived from the hotel is devoted exclusively to the care and maintenance of respondent's cemetery, we are not prepared to say that, because of such application of the income, the hotel itself, within the meaning of the constitutional provision, is therefore exclusively appropriated to such use. Its direct and primary use is the housing of guests. The mere fact that it was purchased with cemetery or perpetual care trust funds, and that the income therefrom must, under the law, be used or held solely for the care and maintenance of the burial grounds, cannot reasonably be said to work an exemption of the hotel itself. To so hold would be to read into the constitutional provision something not there present, for the exemption, if any, is given to the property itself, without regard to its income-producing capacity or the disposition of such income. The mere fact that the disposition of the income is beneficial to the burial grounds, which are exempt, should not serve to extend that exemption through the income back to the property from which the income is derived. While the application of the income derived from the operation of the hotel undoubtedly assists, and perhaps materially so, in the proper maintenance of the nontaxable burial grounds, and lends value thereto, this alone should not work an exemption of the hotel proper. Hart v. Plum, 14 Cal. 149, 154. Had it been the intention to grant the exemption upon the basis of the use of the income from property rather than upon the use of the property itself, such intention could, and probably would, have been directly and positively expressed. We conclude, therefore, that the property for which the exemption is now claimed does not satisfy the constitutional requirement that it be "used or held exclusively * * * for the care, maintenance or upkeep" of respondent's cemetery grounds. This conclusion makes it unnecessary for us to determine whether said property falls within or without the exception which excludes from the constitutional exemption property "used or held for profit." Nor do we find it necessary to here determine the kind or character of property, in addition to burial grounds proper, intended to be included within the constitutional exemption. We expressly confine our decision to the problem now before us.

It is in accordance with the common wish of mankind that the places where the dead are buried should be protected and preserved against interference of possible sales for unpaid taxes, and be kept free from molestation or desecration. Exemptions of cemetery property from taxation are but the expression of that wish. That this is true as regards section 1b of article 13, supra, appears from the argument made in favor of the proposed constitutional amendment and sent to all of the voters prior to the election at which it was adopted. The proponents of the measure urged that it "should have been adopted long ago in order to protect the last resting place of the departed. * * * The county assessors know that they cannot under the law seize and sell a burial lot containing a body and yet under the present law, they are compelled to levy an assessment against such a plot, thereby expending the time and money of the county in bookkeeping, etc., to no avail, and jeopardizing the title to a property that may be containing the last remains of some dear one. * * *

"Finally, only the cemetery property not held for profit and owned by those exclusively for burial purposes is exempted. It will not relieve from taxation property of cemetery associations and others which is to be sold for profit, but only property to be used exclusively for the burial of the dead, and this sacred property should be kept tax free. * * *" In City of Pasadena v. Railroad Commission, 183 Cal. 526, 530, 192 P. 25, 10 A. L. R. 1425, reference is made to the argument or address of the proponents of a constitutional measure as evidence of the intention with which it was adopted. We cannot perceive how the wish to protect and preserve the resting place of the dead would be made effectual by exempting property, such as is herein involved, and which may be disposed of at any time and for any purpose. The question before us being one of constitutional construction, the holdings of other courts, though interesting and informative, have been of little assistance because of the different wording of the laws involved.

The judgments are, and each is, reversed, with instructions to the court below to sustain the respective demurrers without leave to amend the complaints, and thereupon to render judgment in favor of the defendant in each case.

We concur: SHENK, J.; SEAWELL, J.; RICHARDS, J.; LANGDON, J.; PRESTON, J.; CURTIS, J.

LIEBELT v. CARNEY. *

S. F. 13671.

Supreme Court of California.
Jan. 26, 1931.

Rehearing Granted Feb. 19, 1931.

1. Usury 🔑31.

Creditor's advancement to debtor, who retained trucks but conveyed title for security, *held* usurious loan (Deering's Gen. Laws 1923, Act 3757, § 3).

> Evidence showed that creditor advanced money to pay balance due by debtor to third person for purchase of trucks under conditional sales contract, and that creditor, for security, took assignment of such contract from third person, together with bill of sale from debtor, and then issued inflated conditional sales contracts, which he immediately assigned to others, to whom debtor made payment.

2. Usury 🔑141.

Borrower could not recover statutory usury penalty from lender, who, guaranteeing performance thereof, transferred nonnegotiable conditional sales contracts, representing loan, to assignee, to whom borrower made all payments (Deering's Gen. Laws 1923, Act 3757, § 3).

In Bank.

Appeal from Superior Court, Alameda County; Warren V. Tryon, Judge.

Action by E. H. Liebelt against Thomas Carney, sometimes known as the Thomas Carney Company. Judgment for defendant, and plaintiff appeals.

Judgment of superior court affirmed.

Superseding opinion of District Court of Appeal in 289 P. 872.

Edison MacLeod, of Oakland, for appellant.

John M. Dvorin, of Los Angeles, for respondent.

PRESTON, J.

Action to recover the statutory penalty provided by section 3 of the Usury Act (St. 1919, p. lxxxiii, Act 3757, Deering's General Laws). Defendant had judgment; plaintiff has appealed.

[1] The transaction took the form of an advancement by defendant of the sum of $1,624.31, to discharge the final payments due from plaintiff to General Motors Acceptance Corporation for the purchase of two trucks under a conditional sales contract. Defendant to secure repayment of the sum advanced took from the Acceptance Corporation an assignment of the conditional sales contract; procured registration of the trucks in his own name as owner; then took a bill of sale of the trucks from plaintiff; then issued to plaintiff an inflated conditional sales contract, dated December 16, 1926, naming the sum of $3,531.88, reciting, however, the fictitious payment of $1,000 on account thereof, leaving the true amount claimed by defendant from plaintiff for said advancement as $2,531.88, which was to be paid in monthly installments over a period of approximately one year. Immediately upon the execution of this additional sales contract, defendant assigned it to Commercial Securities Corporation, Cons., with a written guaranty to said purchaser of all the covenants therein to be kept and performed by plaintiff. Plaintiff made all the payments due under this contract except the last one of $931.88, which fell due December 16, 1927. To take care of this payment, the above-described process was repeated; the $931.88 became $1,131.88; a new conditional sales contract to cover another twelve months' period was issued for this item and immediately assigned by defendant to the Merchants' Security Company.

It must be noted that the possession of the trucks never at any time passed from the plaintiff to defendant. Title was conveyed to the latter at all times for the purpose of security. Stripping the transaction of its entanglements, it is too clear for controversy that it was but a thinly disguised loan heavily charged with usury. Rosemead Co. v. Shipley Company, 207 Cal. 414, 278 P. 1038; Blodgett v. Rheinschild, 56 Cal. App. 728, 206 P.

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*Rehearing granted 2 P.2d 144.

674; San Joaquin Finance Corp. v. Allen, 102 Cal App. 400, 283 P. 117.

[2] But the foregoing observations do not entitle plaintiff to recover from the defendant, for the evidence shows that, immediately upon execution of said two contracts, the assignments above noted were made. The evidence also shows without conflict that each and every payment called for under said contracts was made to one or the other of the above-mentioned corporations and not to the defendant. This fact prevents the plaintiff from recovering, and such holding follows from the plain construction of the act itself, which provides that the penalties may be collected from the person "who shall have taken or received" the payment. We cannot say that the written guaranty made by the defendant should alter this rule. There was no showing of collusion or relation of any other kind between defendant and either of the assignees.

Appellant urges that only three cases could be found on this subject, and that these cases hold that the penalty may be collected from the party who makes the contract; they are Sanford v. Kane, 133 Ill. 199, 24 N. E. 414, 8 L. R. A. 724, 23 Am. St. Rep. 602; Taulbee v. Hargis, 173 Ky. 433, 191 S. W. 320, Ann. Cas. 1918A, 762; Harbaugh v. Tanner, 163 Ind. 574, 71 N. E. 145. We have examined each of these cases, and, without stopping to discuss them, we would say in passing that they are not parallel to any extent with the situation we have before us. Upon our own volition, however, we have found a number of cases giving to statutes and Constitutions, which read almost identically with our statute, the construction here given. In Anderson v. Tatro, 44 Okl. 219, 144 P. 360, 361, the court construed a provision of the Constitution of that state which allowed the recovery of double the amount of interest paid "from the person, firm, or corporation taking or receiving the same" (Const. Okl., art. 14, § 3), and it was there held that, where payments were made to the assignee, such assignee alone must answer to the penalties and that the maker of the usurious obligation was not a proper party to the action.

This doctrine was followed again by the Oklahoma Court in the case of First Nat. Bank v. Sensebaugh, 58 Okl. 462, 160 P. 455, wherein the court construed section 5198 of the United States Revised Statutes (U. S. Comp. Stats. 1913, § 9759 [12 USCA § 86]); the wording of this statute being similar to the Oklahoma constitutional provision above mentioned and to our own statute. It was there again held that, inasmuch as the interest was paid to the assignee, the maker of the contract was not a proper party to the action. To the same effect, see Webb v. Galveston, etc., Co., 32 Tex. Civ. App. 515, 75 S. W. 355, and Western Bank & Trust Co. v. Ogden, 42 Tex. Civ. App. 465, 93 S. W. 1102.

It is proper, of course, to here note that the instrument assigned was not a negotiable instrument under the law merchant, and, if it had been, an exception to the rule above announced might be made. Schlesinger v. Lehmaier, 191 N. Y. 69, 83 N. E. 657, 16 L. R. A. (N. S.) 626, 123 Am. St. Rep. 591. See, also, Culver v. Osborne, 231 Ill. 104, 83 N. E. 110, 121 Am. St. Rep. 302; Harbaugh v. Tanner, supra, and Kock v. Block, 29 Ohio St. 565.

Plaintiff having brought his action against the wrong party, it therefore follows that the judgment for defendant must be and it is hereby affirmed.

We concur: WASTE, C. J.; CURTIS, J.; LANGDON, J.; SEAWELL, J.; SHENK, J.; RICHARDS, J.

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211 Cal. 392

RICHARDES v. RICHARDES.

S. F. 13423.

Supreme Court of California.

Jan. 27, 1931.

1. Trial 🔑165.

Motion for nonsuit is in effect demurrer to evidence, and court must assume all evidence received in plaintiff's favor relevant to issues is true.

2. Trial 🔑165.

On motion for nonsuit, all presumptions, inferences, and doubtful questions must be construed most favorably to plaintiff's case.

3. Divorce 🔑147.

In action for divorce on ground of desertion, whether plaintiff husband's offers to resume matrimonial relations were made in good faith was fact question which could not be disposed of by order of nonsuit.

4. Divorce 🔑147.

In action for divorce on ground of desertion, nonsuit *held* improperly granted.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Thomas F. Graham, Judge.

Divorce suit by Ernest Burton Richardes against Ann Agnes Richardes. From a judgment of nonsuit, plaintiff appeals.

Reversed.

Harold H. Price, of San Francisco, for appellant.

Wal J. Tuska, of San Francisco, for respondent.

SEAWELL, J.

This appeal is from a judgment of nonsuit.

The action was brought by plaintiff to obtain a decree of divorce from defendant on the ground of willful desertion. Said desertion is predicated on the offers of plaintiff, alleged to have been made in good faith following a long voluntary separation, to resume matrimonial relations as prescribed by the Civil Code, § 101, but which offers of reconciliation and restoration defendant refused to accept, as hereafter will appear.

Appellant and respondent intermarried at the city of Montreal, Dominion of Canada, May 22, 1894. Shortly thereafter they removed to Brighton, England. Three daughters were born in wedlock. Suspicions which lurked in the mind of appellant as to the paternity of the last child born at Brighton in 1901, two months after appellant had left the family domicile, gave rise to discord, which resulted in appellant's departure for New Zealand, leaving family and all behind. The appellant and respondent met many years thereafter in California, where he unsuccessfully prosecuted in 1922 and 1924, respectively, two divorce actions against his wife, one on the ground of cruelty, and the other on the ground of desertion. Neither the judgment rolls nor any of the pleadings or proceedings had in said other cases were offered or received in evidence in this action. No witnesses were heard in the instant case except the appellant and witnesses called on his behalf. Consequently the testimony of himself and his witnesses stands uncontradicted.

[1, 2] A motion for a nonsuit is in effect a demurrer to the evidence, and the court must assume that all the evidence received in favor of the plaintiff relevant to the issues is true. All presumptions, inferences, and doubtful questions must be construed most favorably to the plaintiff's case. The rule is so well settled that it is not necessary to enlarge upon it.

From the evidence before us, appellant was residing with his family at Brighton, England, in 1901. The wife became pregnant. From his neighbors or from some other source he became suspicious that she was intimate with a man named Gay. The matter seems to have come to a head in the shape of a personal encounter in which the three were embroiled. Gay and the wife, in turn, had the appellant arrested on separate charges of assault. The wife was a witness against appellant, but he was acquitted on both charges. She also told the head of the railroad company which employed appellant that her husband had in his possession stolen property belonging to the company. She caused his discharge. During this period of storm and stress appellant informed his wife that he was going to New Zealand where his brother was located. The wife replied that she "didn't care a damn where I went, as long as I was out of her sight." In 1901, upon his arrival at New Zealand, he write to his wife, telling her of his arrival, and also of his departure in 1904 from New Zealand for San Francisco. That appellant made an earnest effort to locate his wife after he left England is clearly shown by letters which he wrote to her attorney, her clergyman, persons likely to know of her presence, the head of the police department, and by publication, there is no dispute. That the wife did not wish her whereabouts known to him is an inference equally certain. After the passing of a number of years he got into touch with one of his daughters, who said she did not know her mother's address. He afterwards brought one of his daughters to America, and the wife seems to have arrived at Boston in 1921. Said two divorce actions referred to were brought in the county of Marin and the city and county of San Francisco. It seems that the wife asked for no counter relief except alimony, which was allowed her in the last action at the rate of $60 per month. This allowance the appellant has continuously paid. The wife claims that the separation as herein related was desertion on the part of the husband, while the husband claims that his leaving and remaining away was not only with her consent, but it was her desire, as shown by her refusal to accept a reconciliation on any reasonable terms or conditions recognized by the law. Prior to the commencement of this action, appellant offered to furnish the spouse with a comfortable home and receive her as a husband should receive and treat his wife. Others at his solicitations attempted to induce the wife to return to the matrimonial status, but she has always steadfastly refused. As a final test of her intention, the following question was put to her by the attorney for appellant when in the presence of appellant in an interview with her he offered her a fit and suitable home in which to reside: "It is not your wish either to become reconciled to or live with your husband—is that the case?" Her answer was that such was the case. She also replied to the suggestion that appellant owned an automobile which they could enjoy, that it would be his purpose to get her into the automobile and tip her out and kill her. The parties to the action have lived separate and apart for a period of approximately thirty years. More than twenty years passed before appellant filed his first action for divorce. Both are well advanced in years. The only inference that can be drawn from the separation and its long duration is that both received the hearty approval of the wife, and that there is no reasonable inducement appellant can offer that would influence her to resume matrimonial relations with him. This is affirmatively established by her last words before his departure from England and at the last attempt at a reconciliation. If respondent was in fact entitled to a divorce on the grounds of desertion, she never at any time asserted her right.

A similar situation was treated in McMullin v. McMullin, 140 Cal. 112, 73 P. 808, 809. It was there said: "Defendant never sought to obtain the divorce to which she was entitled if the separation was without her consent. * * * It is clear from the record that the declared position of defendant for certainly three years preceding the commencement of this action has been that she insisted upon living separate and apart from her husband, and would consent to nothing else. * * * The character of the separation of a man and wife is not forever established by the status at the time they cease to live together. What was originally a separation without consent may become a separation by consent, and whether or not it has become such is a question of fact, depending for its solution upon all the circumstances of the particular case. Desertion is a continuing offense, but it continues only so long as there is a want of consent to the separation on the part of the deserted party. Of course, the original offense is not destroyed by the fact that, after the desertion has continued for the period essential to make it a ground for divorce, the status of the separation changes, and the separation becomes in every way agreeable to the deserted party. She has still her right of action for a divorce because thereof. * * * But she is compelled to assert that right within a reasonable time (Civ. Code, § 124, subd. 3), and the continuance of the separation after such change in the status is not a continuance of the desertion. The parties are by the change placed in the position of living separate and apart by consent, and under the provisions of our statute (section 101, Civ. Code) either party may revoke his consent, and in good faith seek a reconciliation and restoration; and the refusal of the other to conform thereto constitutes desertion on his or her part, which, if continued for one year, becomes a ground of divorce. * * * Our statute, after providing that a divorce must be denied when the action is not brought within a specified time in cases of adultery and conviction of felony, provides that it must be denied in all other cases where there is an unreasonable lapse of time before the commencement of the action (section 124, Civ. Code), and further provides that 'unreasonable lapse of time is such a delay in commencing the action as establishes the presumption that there has been connivance, collusion, or condonation of the offense, or full acquiescence in the same, with intent to continue the marriage relation, notwithstanding the commission of such offense' (section 125, Civ. Code). There cannot be the slightest doubt, under the circumstances appearing here, that, if it be admitted that defendant originally had a good cause of action for desertion, it is barred by the provisions of these sections. The law of this state does not contemplate the enforcement of any such condition of the parties to the marriage as that contended for by defendant—a continuance of the marriage relation with the parties living separate and apart against the will of one of them. It does not place it within the power of one of the parties to insist that he or she shall be free from the obligations of marriage, and that at the same time the other party shall be compelled to remain his or her husband or wife, simply because the other party had been guilty of some offense constituting a ground of divorce, at a time so far distant that a divorce could not now be granted therefor."

[3, 4] Whether or not appellant's offers to resume matrimonial relations were made in good faith is a question of fact which cannot be disposed of by an order of nonsuit. Besides, the testimony offered by appellant and his witnesses is not contradicted. In fact it is corroborated by the wife's express declaration and by her long acquiescence. It does not appear that she asked for a divorce from appellant in either of the two former actions brought by him against her on any grounds, but merely contented herself with contesting his right and obtaining an alimony allowance. The records in those cases, however, are not before us. The facts adduced at the trial required a decision upon the merits of the action, and the motion for a nonsuit was improperly granted.

Judgment reversed.

We concur: WASTE, C. J.; SHENK, J.; PRESTON, J.; RICHARDS, J.; CURTIS, J.; LANGDON, J.

211 Cal. 422

RELOVICH v. STUART et al.

L. A. 9849.

Supreme Court of California.
Jan. 28, 1931.

1. Waters and water courses 🔑158½(2).

That petition to establish easement in water prayed for mandatory injunction, but did not warrant specific performance of water contract, would not preclude equitable relief justified by facts.

> Portion of land supplied with water was conveyed to plaintiff, together with contract providing that vendor agreed to furnish purchaser water at certain rate from land retained by vendor with right of vendor to remodel or change system of water pipes furnishing water at vendor's option. Through various conveyances, land on which water system was located passed to defendants, who reconstructed water system so that no water could flow onto purchaser's land, and defendants refused to furnish water as originally contracted for. Defendants claimed that contract to furnish water was unenforceable for lack of mutuality by purchaser who was not obligated to take water.

2. Waters and water courses 🔑158(2).

Deed and contract by vendor to supply water from land retained executed at same time must be deemed one instrument in action to enforce right to water (Civ. Code, § 1642).

3. Waters and water courses 🔑158(1).

Where grantor contracted to furnish water to purchaser from land retained, right to water was substantial element in consideration passing to grantor.

4. Waters and water courses 🔑156(1).

Conveyance together with contract to furnish purchaser water from land retained by grantor created easement to take water for benefit of land conveyed (Civ. Code, § 801).

5. Waters and water courses 🔑156(5).

Purchaser's right to take water from land retained by grantor as agreed *held* binding on all who take with notice.

6. Waters and water courses 🔑156(1).

That purchaser agreed to pay certain price for water furnished by grantor from land retained did not prevent creation of easement in water (Civ. Code, § 801).

7. Contracts 🔑10(1).

Contract creating easement to take water is enforceable, though enjoyment of right is dependent on purchaser's payment for water.

8. Waters and water courses 🔑158½(1).

Owner of land benefited by easement to take water may sue to enforce easement if easement has attached.

9. Waters and water courses 🔑158(1).

Agreement to furnish water not specifying quantity *held* not void for uncertainty, where necessarily measured by requirements of land.

10. Waters and water courses 🔑158(1).

Vendor's agreement to furnish purchaser water from land retained was enforceable, though vendor reserved right to reconstruct water system.

In Bank.

Appeal from Superior Court, Ventura County; G. R. Freeman, Judge.

Action by Anton Relovich against S. L. Stuart and others. Judgment for defendants, and plaintiff appeals.

Reversed.

Superseding opinion in 286 P. 449.

Pierce & Gould, of Ventura, and J. L. Murphey, of Los Angeles, for appellant.

Clarke & Bowker, of Los Angeles, and James C. Hollingsworth, of Ventura, for respondent Mary Perkins Raymond.

PER CURIAM.

This is an appeal from a judgment entered upon an order sustaining a demurrer to the plaintiff's second amended complaint without leave to amend. The action has been dismissed against all of the original defendants with the exception of the defendant Mary Perkins Raymond and certain fictitious defendants. Hereinafter, whenever the word "defendant" is used, it will refer to said defendant Mary Perkins Raymond.

The plaintiff in his second amended complaint alleges substantially the following:

In October, 1910, Dr. S. L. Stuart and his wife were the owners of a certain tract of land in Ventura county, Cal., containing about 130 acres. This land was waste and barren, and worthless for agricultural use without irrigation. The Stuarts had developed a water system for the purpose of supplying and distributing water thereto. Sources had been discovered and developed to supply all of said land with abundant and sufficient water for all time. On October 27, 1910, Dr. Stuart and his wife sold and conveyed by grant, bargain, and sale deed to the plaintiff, Anton Relovich, a certain described portion of said lands containing twenty acres for the sum of $400. Upon the same date and as a part of the same transaction and for the same consideration the Stuarts also executed and delivered to the plaintiff the following instrument:

"This agreement made and entered into the 27th day of October, 1910, by and between S. L. Stuart, the party of the first part, and Anton Relovich, the party of the second part, Witnesseth: Whereas the party of the first part is the proprietor of a system of water works and pipe lines for the purpose of furnishing water for the irrigation of certain lands in Section 5, Township 4, North, Range 22, West, S. B. M.

"Whereas the party of the first part has conveyed to the party of the second part twenty (20) acres of land in Lot 3, Section 5, Township 4, North, R. 22 W., S. B. M., by deed of even date herewith and intended to be forthwith recorded in the office of the County Recorder of Ventura County, State of California.

"Now therefore, this agreement witnesseth:

"That the party of the first part agrees to furnish the party of the second part for the price or sum of twenty cents (20c) for each one thousand gallons of water used by the said party of the second part upon the land particularly described in said deed of even date herewith.

"It being understood that said water is to be supplied from the system of water pipes as now constructed and maintained by the party of the first part, and that all expenses in making connections to and with said systems of pipes and conducting said water to said land, including all tanks, measuring devices or meters for measuring said water, shall be at the sole cost and expense of the party of the second part. And it is also understood that the party of the first part reserves the right and privilege of remodeling, changing and reconstructing said system of water pipes at his option."

Both instruments were duly acknowledged and were recorded in January, 1911.

Subsequently the plaintiff went into possession of the land so conveyed to him and commenced the planting and cultivation of oranges, grapes, and nursery stock, irrigating the same as the cultivation progressed from and through the connection made by the plaintiff with the irrigating system so maintained by the Stuarts.

On January 4, 1912, the Stuarts conveyed the lands retained by them and upon which the water system was located to third parties, and said lands thereupon passed through various channels until on February 6, 1919, by mesne conveyances, it became the property of one George P. Raymond. All of the intermediate holders down to George P. Raymond had recognized the right of the plaintiff to take water from the water system for irrigation on the cultivated portions of his land. It is alleged that said George P. Raymond also recognized the plaintiff's right to receive and take water through and from said system, but that said George P. Raymond did not furnish water in sufficient quantities for the complete irrigation of the plaintiff's land although the supply was sufficient and abundant and the plaintiff was ready and willing to pay for all of the water required by him. On May 1, 1922, said George P. Raymond conveyed the premises on which the water system was situated to his mother, the defendant Mary Perkins Raymond, who ever since has been the owner thereof. Subsequently said Mary Perkins Raymond continued to furnish water through said system to the plaintiff, but also in insufficient quantities and in quantities considerably less than the plaintiff's requirements although there was an abundant supply of water for all of said purposes and for all of her own uses and to spare, and although the plaintiff has at all times been ready, willing, and able to pay therefor, by reason whereof the plaintiff's orchards, vines, and nursery stock have sustained injury and the plaintiff has suffered damages. It is further alleged that in January, 1924, while this condition still existed, the defendant Mary Perkins Raymond "remodeled, changed and reconstructed her said water system so that no water did or could flow into or enter plaintiff's receiving pipes or receiving line or could reach or be conducted thereby or at all to plaintiff's said land and said defendant declared and announced that she was under no obligation to supply plaintiff or his said lands with water and that said agreement did not bind or obligate her in any manner and that she would not furnish or supply him with water at all and this refusal she has persisted in to the present time and has not since supplied or furnished plaintiff with water in any amount or at all"; that because of the defendant's refusal to supply the required water the plaintiff has suffered further damage by reason of injury to his trees, vines, etc., some of which he has been able to mitigate temporarily by acquiring limited quantities of water from other neighbors but at excessive prices; that the aggregate of such damage amounts to the sum of $30,000.

The plaintiff prays for damages, for a declaration that a perpetual right and easement to a supply of water from a water system to be maintained on the lands of the defendant exists in favor of the lands owned by the plaintiff, and for equitable relief to protect the enjoyment and exercise of said right.

The question presented is whether, assuming the facts stated to be true, the plaintiff has alleged a cause of action entitling him to damages and equitable relief, or either thereof.

Much stress is laid by both sides upon the nature of the "agreement" which was executed by the Stuarts on October 27, 1910, as a part of the transaction of the sale of 20 acres of their lands to the plaintiff. The defendant insists that the instrument is nothing more than a contract to sell water as personal property and, viewed as such, is not specifically enforceable for the reason that it lacks mutuality of obligation and of remedy, is uncertain and indefinite in its terms, and that it calls for personal services on the part of the defendant. The defendant likens the contract to that involved in the case of Schimmel v. Martin, 190 Cal. 429, 213 P. 33, 34. There the parties to the agreement owned adjoining ranches. It was agreed between them, among their things, that the first party should let the second party have the continuous flow of 150 inches of water, the full capacity of first party's pumping plant, at 1½ cents per inch, to be applied on the 20 acres of land owned by the second party, the water to be furnished whenever a specified notice is given to the first party, the second party to pay monthly for the amount of water used. Judgment for damages for alleged breach was reversed on two grounds: (1) That the contract was lacking in mutuality; and (2) that the contract was void for uncertainty. As to the first ground the court said: "Considered as a contract for the sale of personal property, as the parties to the action treated and considered it, and as the trial court in effect found it to be, there is clearly no mutuality in the absence of an agreement by the plaintiffs to buy the water offered for sale by the contract." On the second ground it was stated: "The right to water to be used for irrigation is a right in real property. Fawkes v. Reynolds, 190 Cal. 204, 211 P. 449; Stanislaus Water Co. v. Bachman, 152 Cal. 716, 723, 725, 726, 15 L. R. A. (N. S.) 359, 93 P. [858]; Copeland v. Fairview Land, etc., Co., 165 Cal. 148, 153, 131 P. 119. Considered as a contract for the sale of a right to the use of water for the purpose stated in the complaint, all of the elements essential to the creation of such a contract may be said to be clearly expressed, save and except the price to be paid for the water. The contract contemplates payments from time to time at the specified rate of 1½ cents per inch; but whether that is the rate to be paid per hour, per day, per month, per year, or for any other period is uncertain and incapable of ascertainment from the terms of the contract."

[1-3] The defendant also urges that this is essentially an action in specific performance and that as such it may not be maintained because the contract to provide the water lacks mutuality in that there is no agreement on the part of the plaintiff to take the water. It may be assumed that the facts stated would not warrant a decree in specific performance; but the pleading may not be relegated to that sphere in equity jurisprudence. Under the facts alleged the relief sought is by way of injunction and damages and the fact that the injunction prayed for is mandatory in character would not prevent the court from rendering such relief in equity as the facts alleged and proved would justify. Certainly the facts alleged, if proved, disclose a situation which should make a strong appeal for equitable relief. No one can read the allegations of the complaint and not be impressed with the belief that both parties to the deed and contract (which must be deemed one instrument for the purposes of this case under section 1642 of the Civil Code) understood and intended that the plaintiff acquired with the land a right to the water without which the land was worthless. That right was a substantial element in the consideration passing from the plaintiff to the grantor. Relying on that right, he made his habitation on the land and continued to improve it when the right to take the water was cut off by the defendant.

[4-6] The entire transaction and the subsequent conduct of the parties as alleged in the complaint indicate that more was intended than a mere sale of water as a personal commodity. "Moreover," as stated in Fawkes v. Reynolds, 190 Cal. 204, 211, 211 P. 449, 452, cited in Schimmel v. Martin, supra, "it is now settled that water in use for irrigation is not personal property." It is not necessary to decide that the instruments created a covenant running with the land as contemplated by the statute and decisions. Civ. Code, §§ 1460, 1462; Pomona, etc., Co. v. San Antonio, etc., Co., 152 Cal. 618, 627, 93 P. 881; Fresno Canal, etc., Co. v. Dunbar, 80 Cal. 530, 22 P. 275. But the facts alleged sufficiently establish that a property right or easement to take water for irrigation from the water system on the adjoining land retained by the grantor was created for the benefit of the land conveyed. That such a right may be so created is provided in section 801 of the Civil Code and is recognized in the case of Schimmel v. Martin, supra, relied upon by the defendant (see, also, Stanislaus Water Co. v. Bachman, 152 Cal. 716, 93 P. 858, 15 L. R. A. (N. S.) 359; Henrici v. South Feather Land, etc., Co., 177 Cal. 442, 170 P. 1135; 7 Cal. Jur., p. 749); and that the same is binding upon all who take with notice is not questioned. Henrici v. South Feather Land, etc., Co., supra; Stanislaus Water Co. v. Bachman, supra; Bryan v. Grosse, 155 Cal. 132; 26 Cal. Jur., p. 204; Tulk v. Moxhay, 2 Phil. 774, 41 Engl. Rep. 1143; 7 R. C. L. 1125. The fact that a certain price was to be paid for the water to be used for irrigation does not necessarily change the character of the agreement

or the right thereby created. That factor was not considered to have such an effect in Schimmel v. Martin, supra, or Stanislaus Water Co. v. Bachman, supra. See, also, Henrici v. South Feather Land, etc., Co., supra. No contention is or can be made that the facts alleged do not establish that the defendant, Mary Perkins Raymond, became the owner of the land upon which the water system was constructed with actual notice of the existing right and burden.

[7, 8] Viewed as contract creating a real property right or easement in favor of the land conveyed to the plaintiff, no question of mutuality of obligation or of remedy may arise even though the continued exercise and enjoyment of the right may be dependent upon the ability and readiness of the owner of that land to pay for water taken and used for irrigation at the price stipulated by the agreement. Such considerations arise only in contemplating the enforcement of executory personal contracts and have no bearing in cases where the powers of a court of equity are invoked to protect the enjoyment of an existing executed right in real property. Mutuality is supplied by the existence of an executed consideration for the agreement (Spires v. Urbahn, 124 Cal. 110, 56 P. 794; Chrisman v. Southern Cal. Edison Co., 83 Cal. App. 249, 254, 256 P. 618), and if the right or easement has attached the owner or occupant of the land for the benefit of which it was created may maintain an action for its enforcement or protection (Los Robles Water Co. v. Stoneman, 146 Cal. 203, 79 P. 880).

[9] We think there is no merit to the contention that the agreement here is void for uncertainty. There is no uncertainty as to the price to be paid, viz, 20 cents per 1,000 gallons of water. No uncertainty exists by reason of the fact that a certain quantity of water for irrigation is not specified where the grant or agreement expressly or by necessary implication measures the right by the requirements of the land to which it is made appurtenant. Henrici v. South Feather Land, etc., Co., 177 Cal. 442, 448, 170 P. 1135. See, also, Stanislaus Water Co. v. Bachman, 152 Cal. 716, 93 P. 858, 15 L. R. A. (N. S.) 359.

[10] We do not deem it an insurmountable obstacle to the granting of relief that the deed and contract reserves to the grantor "the right and privilege of remodeling, changing and reconstructing said system of water pipes at his option." It is alleged in the complaint that the defendant has "remodeled, changed and reconstructed her said water system so that no water did or could flow into or enter plaintiff's receiving pipes or receiving line or could reach or be conducted thereby or at all to plaintiff's said land." It would be highly unreasonable to hold that the reservation in the grant was intended by the parties or contemplated that the grantor or his successors in interest with notice of the equities of the plaintiff could thereunder so modify, change, or reconstruct the system of water pipes as to deprive the plaintiff of his rights which had attached and continued as a servitude during the course of many years of operation under the grant.

It is obvious that the consideration paid by the plaintiff Relovich to the Stuarts supports both the conveyance of the twenty-acre tract sold by Dr. Stuart to Relovich and the agreement on the part of the grantor by which the plaintiff was given the right to enter the adjoining land of the Stuarts, make a connection with the water system thereon, and take therefrom sufficient water to irrigate the land conveyed. In other words, the land being worthless without water for irrigation, the agreement to furnish water therefor may be said to have been the chief inducement to the purchase by the plaintiff and an important element of consideration for the price paid.

Any defenses which the defendant may have on the merits do not, of course, now appear. We are merely passing on the sufficiency of the complaint, and we conclude that a cause of action has been stated both for equitable relief and for damages.

The judgment is reversed, with directions to the trial court to overrule the demurrer.

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211 Cal. 404

MEDCRAFT v. MERCHANTS' EXCHANGE.

S. F. 13402.

Supreme Court of California.

Jan. 27, 1931.

1. Negligence ⟹32(2), 67.

One having business in office building and, while searching for washroom, stepping through open door into totally dark space and falling down air shaft, *held* contributorily negligent and not then invitee.

It appeared that visitor in office building, after transacting business with tenant, passed down corridor seeking washroom, and, finding plain door bearing no invitational sign and entering, found himself in dimly lighted antechamber with swinging door leading into larger lighted room. Thinking washroom must be at some other place, he turned to another door on his right which stood ajar, there being sufficient light to make darkness visible within area to which last-mentioned door led, and proceeding toward aperture, moving in total darkness, and in attempting to set foot on supposed floor, he plunged into air shaft and was injured.

2. Negligence ⚷32(2).

Person may be invitee in one portion of building and not in others.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by R. C. Medcraft against the Merchants' Exchange, also known as the Merchants' Exchange, San Francisco, also known as the Merchants' Exchange of San Francisco. From a judgment of nonsuit, plaintiff appeals.

Affirmed.

J. F. Riley, of San Francisco, for appellant.

Chickering & Gregory, of San Francisco, for respondent.

PRESTON, J.

Action for damages for personal injuries. At the conclusion of the evidence the court, on motion of defendant, granted a nonsuit and judgment followed from which plaintiff appeals upon a full record. The facts are not in dispute and those here material may be set forth within a narrow compass:

Defendant owns a large office building in the city and county of San Francisco known as the Merchants' Exchange Building. Offices therein are rented to tenants for their own use and the use of all persons having business with them. Plaintiff, an insurance manager, on December 13, 1919, had business with the Pacific Adjustment Bureau, the offices of which were located on the tenth floor of defendant's said building. During the transaction of his business at this place, plaintiff stained his hands with ink. After concluding the business transaction, he passed down the corridor of the building seeking a washroom wherein to cleanse his hands. He was more or less familiar with the other floors of the building and knew the location thereon of the washrooms and urinals. Moving along the corridor to a point corresponding to the position of the washrooms and urinals on other floors of the building, he found a plain door, bearing no invitational sign, but, feeling that it must be the place he sought, he opened the door and found himself in a small dimly lighted antechamber with a swinging door between it and a larger room, which was lighted. The light from the larger room, shed over and under the swinging door, served to light dimly the antechamber. Plaintiff looked at the so-called usual place but saw no washbasin there and he did not seek it in the lighted room, where two urinals were located. He thought the washroom must be at some other place and recalled that upon opening the door and entering the room wherein he stood, his hand had come in contact with the bolt of another door to his right. This door was ajar. The light shed into the little room was just sufficient to make the darkness visible within the area to which this last mentioned door led. Pursuing the thought that this door must lead to a washroom, he proceeded toward the aperture, moving in total darkness, and in attempting to set foot on a supposed floor and to find a supposed electric switch button, he plunged into an air shaft some eighty feet in depth, but fortunately, after a fall of some fifteen or twenty feet, caught himself upon a ledge of some kind and was rescued, although severely and permanently injured. He thereupon brought this suit alleging negligence on the part of defendant owner of the building growing out of the above facts.

[1] In granting the nonsuit the court based its ruling upon the ground that plaintiff in the portion of the building where injured was at most a licensee and not an invitee, and upon the further ground that plaintiff himself was guilty of contributory negligence. We see no logical escape from a full approval on both grounds of the ruling of the court below. In so doing we grant to plaintiff the status of an invitee in the building and even in the anteroom or urinal, but when he failed to enter the lighted room in search of the washbasin and proceeded to set hand and foot in a place filled with impenetrable darkness, we cannot believe that the invitation was broad enough to cover this wandering search conducted by him nor believe that he exercised ordinary care for his own safety.

Both plaintiff and defendant have marshaled a long line of cases, each contending for their applicability to the case at hand. We find none of them exactly parallel to this case; hence an extended review thereof would not be profitable. We do find, however, a case which altnough different in fact seems to be the same in principle and clearly in point. Powers v. Raymond, 197 Cal. 126, 239 P. 1069. Plaintiff there had been engaged by the proprietor of the Raymond Hotel in Pasadena to take charge of the hairdressing and manicurist department beginning work on December 22 or 23, 1923. She arrived at the hotel, however, on December 21st and was assigned to a room. The hotel was situated some distance from the Raymond Hotel Santa Fé Railway station, and in going to this station it was necessary to proceed through the hotel grounds for about three hundred feet, the remaining distance being along city streets. The hotel maintained a well-lighted and safely traversable roadway through the grounds, but there was also about fifty feet east therefrom a narrow pathway maintained for the use of guests during the season the hotel was in operation, it being closed to the general public at the time in question. Along this narrow pathway were laid three twelve-inch boards, side by side, lengthwise on the walk. The pathway was unlighted and it was impossible for any one passing along it in darkness at that time of night to discern whether or not it was passable. Plaintiff instead of following the main lighted roadway, knowingly entered the dark pathway. She admitted she could not see at all, it was so dark. Stumbling into a hole, she received severe injuries and brought suit against the hotel proprietor to recover damages therefor. She was on a mission of her own at the time. The court held that whether negligence could be inferred from the evidence was a question of law for the determination of the court, but whether it ought to be inferred was a question for the jury, and concluded that as a matter of law plaintiff was not an invitee on that particular portion of the premises; and, furthermore, that in proceeding along that particular pathway in known darkness, plaintiff, as a matter of law, was guilty of contributory negligence.

[2] It is well recognized that a person may be an invitee in a portion of a building and not enjoy that status as to other portions thereof. Powers v. Raymond, supra; Kennedy v. Chase, 119 Cal. 637, 52 P. 33, 63 Am. St. Rep. 153; Peebles v. Exchange Bldg. Co. (C. C. A.) 15 F.(2d) 335; State Comp. Ins. Fund (Peterson, Intervener) v. Allen (Cal. App.) 285 P. 1053.

The judgment is affirmed.

We concur: WASTE, C. J.; CURTIS, J.; SHENK, J.; LANGDON, J.; SEAWELL, J.; RICHARDS, J.

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211 Cal. 440

In re RANDOLPH'S ESTATE.

RANDOLPH v. COLLISON.

L. A. 12577.

Supreme Court of California.
Jan. 29, 1931.

1. Wills ⚷337.

Proceeding by decedent's daughter attacking alleged surviving husband's petition for administration, alleging invalidity of marriage, and petitioning for probate of will executed before marriage, was "contest of will," authorizing motion for new trial (Code Civ. Proc. § 1714; Civ. Code, § 1300).

Proceeding was "contest of will" within Code Civ. Proc. § 1714, providing motion for new trial in probate proceeding can be made only in cases of contests of wills, in view of Civ. Code, § 1300, relating to revocation of will by testatrix's subsequent marriage, and that decree, finding marriage was invalid and permitting daughter, on making necessary proof, to probate will, permitted such probate on usual formal showing as to due execution, and like matters, and thus issue affecting validity of will was presented and determined.

[Ed. Note.—For other definitions of "Contest," see Words and Phrases.]

2. Wills ⚷317.

Statute prescribing as to which issues in will contest jury trial may be demanded does not limit issues (Code Civ. Proc. § 1312).

In Bank.

Appeal from Superior Court, Los Angeles County; Harry R. Archbald, Judge.

In the matter of the estate of May Wheeler Randolph, deceased. Petition by J. W. Randolph, alleged surviving husband, nominating and requesting the appointment of the Bank of Italy National Trust & Savings Association as administrator, opposed by Anzonetta Lloyd Collison, who requested her own appointment and petitioned for the probate of decedent's alleged will. From an adverse decree, J. W. Randolph appeals. On motion to dismiss appeal.

Motion denied.

H. H. Harris and David E. Field, both of Los Angeles, for petitioner.

Louis P. Pink, of Los Angeles, for respondent.

WASTE, C. J.

Motion to dismiss. Claiming to be the surviving husband of May Wheeler Randolph, deceased, the appellant filed a petition in the court below nominating and requesting the appointment of the Bank of Italy National Trust & Savings Association as administrator of her estate. The bank filed its petition requesting the issuance of letters to it as such nominee. Respondent, a daughter of the decedent, filed written objections to each of the petitions, alleging, in substance, that appellant was not legally married to the decedent at the time of her demise, and was not, therefore, in a position to nominate any one to serve as administrator of the estate. In addition, respondent requested that she be appointed administratrix of her mother's estate. She also filed a petition requesting the probate of what is alleged to be the decedent's last will and testament, and asking the appointment of an executor. These several petitions were heard together. Upon the conclusion of the evidence, the court found, among other things, that the purported marriage between decedent and appellant was illegal and void, for which reason he was not the surviving husband of the decedent, and therefore was not in a position to serve as, or to nominate any one to serve as, administrator of her estate; and that, upon making the necessary proof, respondent was entitled to have the will admitted to probate, and to be appointed administratrix of the estate. A decree in substantially the same language was accordingly entered on April 23, 1930. Appellant filed his intention to move for new trial on May 7, 1930, which was within ten days after service of notice of entry of judgment. Thereafter respondent moved to strike the motion for new trial from the files on the ground that such a motion was not available to appellant. No disposition was ever made of the motion to strike, but on June 27, 1930, the motion for new trial was denied. Thereupon, and on July 7, 1930, appellant filed his notice of appeal from the decree and each and every part thereof. It is thus apparent that the appeal was taken more than sixty days after the entry of the decree, and is therefore too late (section 1715, Code Civ. Proc.), unless the proceedings for new trial served to extend the time therefor (sections 1714 and 939, Code Civ. Proc.).

In support of her motion to dismiss, respondent urges that, under the provisions of section 1714, supra, proceedings by way of new trial were not available, and could not serve to extend the time for appeal. The section reads: "The provisions of part two of this code, relative to new trials and appeals, except in so far as they are inconsistent with the provisions of this title, apply to the proceedings mentioned in this title; provided, that hereafter a motion for a new trial in probate proceedings can be made only in cases of contests of wills, either before or after probate, in proceedings under section one thousand six hundred and sixty-four of this code and in those cases where the issues of fact, of which a new trial is sought, were tried by a jury or were of such character as to entitle the parties to have them tried by a jury whether or not they were so tried." In opposition to the motion, appellant contends that the situation presented to the court below upon the hearing of the several petitions was a will "contest" within the meaning of section 1714, supra, so as to authorize the institution of new trial proceedings.

The record on appeal has not as yet been filed in this court, but, in connection with the motion to dismiss, there have been filed an affidavit, and an amended affidavit of the trial judge. In the original affidavit, he states that the "case was tried upon the theory that the court, among other things, was called upon to determine the validity or invalidity of the will presented for probate by respondent and objector Anzonetta Lloyd Collison; that in order to determine the validity or invalidity of said will and the consequent right of said respondent to probate same, it was necessary for affiant as such judge to receive evidence on and determine numerous issues of fact, among the more important of which were the following: (a) Was May Wheeler Randolph (formerly May Wheeler Moore) a bona fide resident of the county of Washoe, state of Nevada, at the time she obtained an alleged divorce from her first husband, James E. Moore? (b) Was the defendant in said divorce proceedings, to-wit, James E. Moore, duly, or at all, served with process in said divorce action? (c) Was the affidavit of service of summons filed in said divorce action fraudulent? (d) Was the petitioner, J. W. Randolph, a mulatto within the meaning of section 60 of the Civil Code of the state of California? And by reason of the determination of said issues of fact, the court was further called upon to determine whether J. W. Randolph, the petitioner, was the husband of the deceased, May Wheeler Randolph; that the petitioner, J. W. Randolph, throughout said trial contested the validity of the last will and testament of May Wheeler Winnett (Randolph) on the ground that the same was void by reason of his marriage to the said decedent after the making and execution of said will as provided by section 1300 of the Civil Code and alleged and urged that by reason thereof he was entitled to one-half of the property left by said decedent; that in order to determine the right of said J. W. Randolph to receive the said one-half of said estate, affiant was called upon to determine the validity or invalidity of the marriage of said J. W. Randolph to the deceased.

"That affiant heard testimony, received evidence and listened to argument upon all of the said issues of fact and did try the case upon the theory above set forth, and did make a final determination thereof as is more fully shown by findings of fact, conclusions of law, and judgment on file herein, and by the [notes] of the phonographic reporter who reported said proceedings."

The amended affidavit was made in order to more accurately state the issues before the trial court. It states in part that, "so far as I can find, no written opposition or contest to the probate of said will was filed; that at said trial proof was made by the petition of J. W. Randolph of a marriage ceremony entered into between him and the decedent, and evidence was introduced by the objector and contestant Anzonetta Lloyd Collison tending to show that said decedent had theretofore married one Moore and that a certain decree of divorce obtained in the state of Nevada by the decedent from said Moore, was void and of no effect, and that the subsequent marriage was, in consequence thereof, null and void; that the determination of this issue without question would determine the right of said petitioner to share in said estate as the surviving husband of said decedent, and also determine his right to nominate an administrator and, in view of the fact that the alleged marriage occurred after the execution of the will presented for probate, the determination of that issue would necessarily determine the validity or invalidity of said will so far as the issue of marriage is concerned. It is a fact, however, that at no time in the trial of said case was said will offered for probate or any evidence offered as to its execution, or was any proof made as to publication or notice of the probate thereof at any time. * * *

"The record further shows that thereafter the petition for probate of will was continued from time to time * * * pending the decision of the Supreme Court on the question at issue on appeal, which will determine the validity or invalidity of the will indirectly so far as the issue of marriage is concerned. * * *"

[1, 2] While this proceeding originated as one for letters of administration, there had also been filed a petition for the probate of decedent's last will, and from the foregoing affidavits it is apparent that the trial court concluded that it was required to determine under the allegations of these several petitions what effect, if any, appellant's marriage or purported marriage with the decedent had upon her previously executed will. Examination of the findings and the decree indicate that this issue was determined adversely to the appellant, and further, that respondent, upon making the usual formal showing as to due execution, etc., might thereafter have the will admitted to probate. An issue affecting the validity of the decedent's will was thus presented to, and determined by, the court below. This, in our opinion, constituted a "contest of will," at least in this particular, within the meaning of section 1714, supra, and warranted the institution of new trial proceedings. Section 1312 of the Code of Civil Procedure does not purport to define or enumerate all the issues that may be raised upon opposition to the probate of a will, but merely such issues as must be submitted to a jury if a jury is demanded. Alden v. Superior Court, 186 Cal. 309, 311, 199 P. 29. It follows, therefore, that the new trial proceedings extended the time for appeal.

The motion to dismiss is denied.

We concur: SHENK, J.; SEAWELL, J.; RICHARDS, J.; CURTIS, J.; PRESTON, J.; LANGDON, J.

211 Cal. 430

DELLEPIANI et al. v. INDUSTRIAL ACCIDENT COMMISSION et al.

S. F. 13982.

Supreme Court of California.

Jan. 28, 1931.

Master and servant ⚷375(2).

Where trolley company furnished employees free transportation on cars, death of employee struck by automobile after leaving car and while crossing street to place of employment *held* not one "arising out of or in course of employment."

[Ed. Note.—For other definitions of "Arising Out of Employment" and "Course of Employment," see Words and Phrases.]

In Bank.

Proceedings under the Workmen's Compensation Act by Genevieve Dellepiani and others for compensation for the death of Emilio Dellepiani, employee, opposed by the Market Street Railway Company. To review an order of the Industrial Accident Commission denying compensation, the claimants bring certiorari.

Affirmed.

George C. Faulkner, of San Francisco, for petitioners.

Edward O. Allen, of San Francisco, for respondents.

CURTIS, J.

Emilio Dellepiani was on the 10th day of December, 1928, in the employ of the Market Street Railway Company as a car cleaner. The place of his employment was at the car barn of the company located at the southeast corner of San Jose avenue and Geneva avenue in the city of San Francisco. Dellepiani resided at 251 Tingley street, San Francisco, and in going to and from his work, he usually boarded one of the company's street cars at or near Tingley street and San Jose avenue, and traveled south on San Jose avenue some eight or nine blocks to Geneva avenue, where he would leave the street car and cross the

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

street to his place of employment. The company permitted its employees to ride on its cars without paying fare, and for this purpose it issued to some of its employees, including Dellepiani, tickets, each one of which entitled the holder thereof to a ride free of charge. Dellepiani's work began at 5:30 in the evening and continued for ten hours. On the evening of December 10, 1928, following his usual custom, Dellepiani boarded one of the company's cars at or near Tingley street and rode therein to Geneva avenue and San Jose avenue, arriving there at about 5:28 o'clock. Upon the car stopping at that point, Dellepiani left the car and started to walk across San Jose avenue to the car barn, his place of employment, when he was run over by a passing automobile and killed. On this evening Dellepiani paid no fare for riding on the company's car. He was acquainted with the motorman, who admitted him to the car through the front door, and, when the conductor came forward to collect Dellepiani's fare, the motorman informed the conductor that Dellepiani was an employee of the company, and thereupon the conductor permitted him to ride free of charge and without collecting from him any fare or taking up his employee's ticket. Dellepiani left surviving him as dependents a wife and two minor children. An application was presented to the Industrial Accident Commission for compensation by said dependents, which was denied by the commission on the ground that the injury sustained by Dellepiani and which caused his death did not arise out of or in the course of his employment with the respondent company.

The position of respondents is that Dellepiani at the time he met his death had not yet reached his employer's premises and "therefore the injury which caused his death did not arise out of or occur in the course of his employment." In other words, respondents rely upon "the coming and going rule," which denies to employees, or their dependents, any relief for an injury sustained while the employee is going to or returning from his work or place of employment.

On the other hand, petitioners contend that the facts of this case bring it within an exception to the above rule, which exception permits a recovery for an injury sustained by an employee whether going to or returning from his work, when the employer furnishes to the employee transportation to and from his place of employment. In the type of cases coming within this exception, it is held that, "where transportation is furnished by an employer, as an incident of the employment, to convey an employee to and from the place of employment, an injury suffered by the employee going or coming in the vehicle so furnished by the employer, and under the control of the employer, arises out of and is in the course of the employment within the meaning of the Compensation Act." Dominguez v. Pendola, 46 Cal. App. 220, 188 P. 1025, 1026; Harlan v. Ind. Acc. Com., 194 Cal. 352, 228 P. 654.

In each of these two cases, however, the employee was injured while riding in the vehicle or conveyance provided by his employer for the express purpose of transporting the employee to the place of his employment. They differ in this respect from the present action where the facts show that the employee sustained the injury which caused his death after he had left the conveyance of his employer and while he was crossing a public street for the purpose of reaching the premises of his employer. The same may be said regarding the case of Lamm v. Silver Falls Timber Co. (Or.) 286 P. 527, cited and relied upon by petitioner. In that case the plaintiff was employed by the defendant at the latter's logging camp. The defendant maintained a logging railroad from its camp to the town of Silverton. Practically the only way to reach this camp was to take passage upon said railroad at Silverton, and to ride thereon to the logging camp. Defendant furnished free transportation on its said railroad to all of its employees. The plaintiff was a passenger on said railroad and was returning from a week-end visit with his family who resided at Silverton. The train, after moving at a speed of from fifteen to twenty miles per hour, stopped suddenly, with the result that the plaintiff was seriously injured. He instituted an action at law to recover damages sustained by reason of his injuries and recovered a judgment for $25,000. On appeal the Supreme Court of the state of Oregon reversed the judgment on the ground that the injury sustained by plaintiff was an industrial injury and one within the exclusive jurisdiction of the Industrial Accident Commission of that state.

To the same effect are the Donovan Case, 217 Mass. 76, 104 N. E. 431, Ann. Cas. 1915C, 778, and numerous other cases cited by counsel for petitioners in his points and authorities. In each and all of these cases the injury to the employee was sustained while such employee was being conveyed to or from his work in a conveyance furnished by his employer. In none of them was the question presented or decided as to the liability of the employer for an injury sustained by an employee while crossing a public street for the purpose of reaching the place of his employment, after leaving the conveyance of his employer.

Upon this latter question, and in support of their contention that the employee under such circumstances is within the protection of the Workmen's Compensation Act, petitioners have cited a large number of authorities. Among them are Cudahy Packing Co. v. Parramore, 263 U. S. 418, 44 S. Ct. 153, 68 L. Ed. 366, 30 A. L. R. 532; Le Blanc v. Ohio Oil Company, 7 La. App. 721; Lumberman's Reciprocal Ass'n v. Behnken, 112 Tex. 103, 246 S. W. 72, 28 A. L. R. 1042; and Procaccino v. E. Horton & Sons, 95 Conn. 408, 111 A. 594. A reading of these cases will show that each of them presents some special and particular feature that takes it out of the general rule applicable to injuries sustained upon public streets.

In the case of Cudahy Packing Co. v. Parramore, supra, the practicable way of ingress and egress for employees to and from the plant of the Cudahy Packing Company was along a way or road crossed by the track of the Rio Grande Western Railroad. While crossing this track in an automobile of a fellow employee, Parramore was killed. The Supreme Court of the United States affirmed a judgment in favor of the dependents of Parramore. The basis of its decision may be found in the following statement found on page 426 of the opinion in 263 U. S., 44 S. Ct. 153, 155: "The railroad over which the way extended was not only immediately adjacent to the plant, but, by means of switches, was connected with it, and in principle it was as though upon the actual premises of the employer." In Le Blanc v. Ohio Oil Company, supra, the plant of the employer was bisected by a public highway. Employees were continually required in the performance of their duties to pass over this highway in going from one department of the plant to another. It was accordingly held that the employer by this peculiar location of its plant had made the intervening highway a part of its premises, and that, when an employee alighted thereon from a conveyance in which he was riding for the purpose of commencing his work, he was upon the premises of his employer, and any injury sustained while on said highway was an injury sustained while on the premises of his employer, and therefore it was an injury which arose out of and in the course of his employment. Practically the same state of facts was presented in the case of Lumberman's Reciprocal Association v. Behnken, supra. In Procaccino v. E. Horton & Sons, supra, the employee was injured while crossing over a footbridge along a path maintained by the employer over private property for the use of his employees in reaching his plant from the public highway. The Court held that, as the employer provided this means of approach to the place of employment, any injury sustained while using the same was an injury sustained on the premises of the employer and therefore compensable under the Workmen's Compensation Act.

Petitioners also cite, in support of their contention that the deceased was on the premises of his employer while crossing the street after leaving the street car of the company, the case of Howes v. Stark Bros. Nurseries & Orchards Co. (Mo. App.) 22 S.W.(2d) 839. They also rely upon Scott v. Willis, 150 Va. 260, 142 S. E. 400, 401, to support their claim that "going from street car to curb, or vice versa, is part of free transportation." Neither of these cases is applicable to the case now under consideration. They are cases in which the employer engaged to transport his employee in a private conveyance of his own to and from the place of employment. In those cases the engagement of the employer was to deliver his employees to the place of employment, and at the close of the employment to the homes of the employees. In such cases, if the employer compels or permits his employees to leave the vehicle in which they are being transported in the middle of the street, so that to reach their destination the employees are compelled to cross over a part or the whole of the street, any injury sustained by an employee while thus upon the street is compensable. This principle was aptly stated by the court in the case of Scott v. Willis, supra, in the following language: "We think it can certainly be said that the transportation of this claimant to his home was not completed until he had reached a point which exempted him from the risks incident to that particular journey. He was not relieved of the peculiar risks incident to his journey while alighting from the truck or while necessarily in that part of the highway allotted to vehicles as distinguished from the sidewalks allotted to pedestrians. As in most accidents, it is a question of seconds. We think in this case that his journey had not ended at the time of the claimant's injury; that he was in the act of leaving the vehicle of his employer, seeking a safe place on the sidewalk; and that the injury was so close in time and space as to be an incident of the transportation, and hence that it arose out of and in the course of his employment."

In the case of the deceased, the respondent railway company made no agreement to deliver him to the place of his employment, or to his home after the day's employment had ended. The agreement or undertaking between said employee and the company was that the latter would furnish free transportation to the employee on its street cars as the same were operated on and along the streets between the home of the employee and the premises of the company upon which the employee was employed. The intervening space between the employee's home and the place where he boarded said street cars and that in the street between the car tracks and the premises of his employer were not covered by or embraced within the agreement of the company to transport him on its cars. While crossing the street from the street car to his employer's premises he was not subjected to any of the hazards or dangers incident to the transportation which the company had agreed to furnish. These hazards were independent of and entirely distinct from those which might have been encountered or which might confront him after entering upon the employer's premises for the purpose of following his employment. They were hazards which the employee assumed when he entered upon the street for the purpose of reaching his place of employment, to the same extent as any other passenger who leaves a street car and crosses a public street risks the dangers of the street.

The theory upon which it is held that an injury sustained by an employee while traveling to or from work in a vehicle provided by the employer is compensable is that the transportation so furnished to the employee is an incident to his employment, and therefore the employee, while being transported, is engaged in the employer's business, and any injury sustained during said time is an injury arising out of and in the course of his employment within the meaning of the Workmen's Compensation Act (St. 1923, p. 375). Dominguez v. Pendola, supra; Harlan v. Ind. Acc. Com., 194 Cal. 352, 228 P. 654. It follows, therefore, that any injury sustained by the employee before the period of transportation has commenced, or after it has ended and before the employee has reached the employer's premises, would not be an injury arising out of or in the course of his employment. This was decided in a late case by the Supreme Court of Utah, Denver & R. G. W. R. Co. v. Ind. Acc. Comm., and reported in 269 P. 512, 513, 62 A. L. R. 1436. In that case the employer furnished free transportation by means of a truck operated by one of its employees from its section house to the place of employment. An employee named Massey, together with a number of his fellow workmen, lived near where the truck driver resided and kept his truck, which was about one mile from the section house. These workmen were in the habit of boarding the truck near their homes, and riding thereon to the section house. During one of these trips Massey was injured and sought to recover compensation for his injury. The Industrial Accident Commission made an award in his favor which was annulled by the court. In the course of the opinion, the court said: "Upon the facts, we think it plain that the employment in the present case included the transportation of the employee by the employer only from the section house to and from his place of work. That was the limit of the employer's engagement both with the employee and the truck driver. Before arrival at the section house in the morning, neither were under the control or direction of the employer. * * * We are led by the facts in this case to conclude that the relation or status of the parties herein as employer and employee did not exist until the employee reported for duty to the section house."

Another case with a similar ruling is that of De Voe v. New York State Rys., 218 N. Y. 318, 113 N. E. 256, 257, L. R. A. 1917A, 250. In that case the employee was furnished free transportation upon the railway of his employer. After he had finished work for the day and as he was hurrying from his place of employment to catch one of his employer's trains, which was just coming to a stop in front of the car barn in which he was employed, he was struck by an automobile while crossing the street, and sustained injuries which caused his death. It was held by the Court of Appeals of New York that the injury was not compensable, the court saying: "The question is whether death resulted from 'an accidental personal injury sustained by the employee arising out of and in the course of his employment.' * * * The employee is not insured generally against accident while working for the street railway corporation. At home or on the street he may meet with accident not arising out of or in the course of his employment. The act does not cover such cases. * * * He [the injured employee] was not injured while on duty * * * within the precincts of the company."

A third case in harmony with the two just cited is the case of Ex parte Taylor, or Taylor v. Birmingham Electric Co., 213 Ala. 282, 104 So. 527, 529. In that case Berry Taylor was an employee of the Birmingham Electric Company, and as part of his compensation received free transportation on the street cars of the company. He was fatally injured in a public street just after he had left one of the company's cars on his way from his place of employment to his home. His wife, sole dependent, was denied compensation by judgment of the circuit court, and on appeal therefrom the Supreme Court of the state of Alabama affirmed the judgment. In its opinion affirming the judgment, the court said: "The findings of fact, well supported by evidence set out in bill of exceptions, show deceased had left the street car and was in the public street when struck by a passing automobile. It was immaterial whether he alighted or was struck within the zone covered by passing street cars on the track. He was in the public street, using it as such, and such use had no relation to service for the employer, was not the premises of the employer within subd. (j) of our compensation law. We adhere fully to the principles declared in Ex parte Majestic Coal Co., 208 Ala. 86, 93 So. 728, and Ex parte Louisville & N. R. Co., 208 Ala. 216, 94 So. 289. Those cases and many others, holding that our Workmen's Compensation Law should have a liberal construction in furtherance of the humanitarian purposes leading to its enactment, are distinguishable from the case at bar."

It is our opinion that the principles announced in these three cases are sound, and that they govern the case now before us. The engagement of the employer in this case was to transport the deceased employee to a point along its line nearest his place of employment. Beyond that point and until he reached the premises of his employer, whether that distance was the width of only a part of an ordinary street, or whether it was a block or more, the employee was not under the control, direction, or protection of the employer. He could choose any route of travel, and any means of conveyance that might appear to him to be feasible or desirable to reach the premises of his employer. The latter was without any authority or right to govern or interfere with the movements of the employee during this period of time. Under this state of facts, it cannot be held that the employee had either reached his employer's premises or was being conveyed thereto by his employer. The injury thus sustained was not one which arose out of or in the course of his employment. On the other hand, it was sustained by the employee while on his way to the premises of his employer and under such circumstances as to bring him within the "coming and going rule" as announced by the court in the case of the Ocean Acc., etc., Co. v. Ind. Acc. Com., 173 Cal. 313, 159 P. 1041, L. R. A. 1917B, 336.

We have not attempted to analyze and distinguish all of the authorities which the industry of counsel has assembled and cited in his points and authorities in this proceeding. We have, we think, given consideration to the principal cases cited, and sufficient to indicate that the award of the commission must be affirmed, and it is so ordered.

We concur: WASTE, C. J.; SHENK, J.; LANGDON, J.; PRESTON, J.; SEAWELL, J.

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211 Cal. 457

In re SHOEMAKE et al.

S. F. 13429.

Supreme Court of California.
Jan. 30, 1931.

Rehearing Denied Feb. 24, 1931.

1. Deeds 🔑93.

Grantor's intention must be ascertained from entire deed.

2. Remainders 🔑1.

Remainders are construed as vested rather than contingent, wherever possible.

3. Deeds 🔑97.

Where habendum clause of deed is ambiguous, granting clause controls (Civ. Code, § 1070).

> Civ. Code, § 1070, provides that if several parts of a grant are irreconcilable, the former part prevails.

4. Deeds 🔑133(1).

Where granting clause of deed to grantor's son, made while grantee had daughter living, was to grantee "and his heirs," and habendum clause was to grantee "during his natural life, and to issue and heirs" of his body, grantee took life estate, with remainder to grantee's issue who became heirs of his body, and grantee's daughter took contingent remainder.

In Bank.

Appeal from Superior Court, Fresno County; Charles R. Barnard, Judge.

Application by Helen Wilson Shoemake and others to determine interest in real property. From a judgment denying the claim of petitioners to undivided interests in certain real property, petitioners appeal.

Affirmed.

Hawkins & Hawkins, of Modesto, and Charles A. Reynolds, of Seattle, Wash., for appellants.

Harris & Hayhurst, and Frank H. Marvin, all of Fresno, for respondents.

PER CURIAM.

This is an appeal from a judgment of the superior court of Fresno county denying the claim of appellants to undivided interests in certain real property.

The land was originally owned by B. B. Barnett. On March 14, 1890, he executed a deed of it to his son, F. Joseph Barnett. The instrument recites that "the said party of the first part * * * doth by these presents, give, grant, alien and confirm unto the said party of the second part, and to his heirs, all those certain lots. * * *" Following is a description of the property and then the habendum clause: "To have and to hold all and singular the said premises, together with the appurtenances, unto the said party of the second part, for and during his natural life, and to the issue and heirs of the body of the said party of the second part." At the time of the execution and delivery of this deed, the grantee had a daughter living, Lela Barnett. The grantor died April 17, 1891. Thereafter the grantee, F. Joseph Barnett, brought an action against his daughter, his brothers, and his sisters, claiming title to the property in fee simple. It was eventually held that the deed gave him only a life estate. Barnett v. Barnett, 104 Cal. 298, 37 P. 1049. It necessarily follows from this decision that the daughter had an estate in remainder.

Lela Barnett never married, and died on March 11, 1909. F. Joseph Barnett never had any other issue. He died March 29, 1928.

[1] The appellants are the successors in interest of Lela Barnett. The respondents are the legal representatives of B. B. Barnett, the original grantor, his heirs, and successors in interest of his heirs. A single question is presented on this appeal. It is agreed by all parties that under the decision in Barnett v. Barnett, supra, Lela Barnett had an estate in remainder, but the disagreement is as to whether it was vested or contingent. If it vested in her immediately upon the execution and delivery of the deed, then she had at all times an alienable interest, and one that would descend to her heirs. If it was contingent until the death of her father, the holder of the life estate, then she never received any estate, since she predeceased her father. The claims of appellants, of course, are based upon the theory that the remainder was vested in Lela Barnett upon its creation.

The language which must be interpreted is in the granting and habendum clauses of the deed. The granting clause clearly refers "to his heirs." The habendum refers "to the issue and heirs of the body" of the grantee. If this last clause had used only the word "issue," there could be no doubt that under it, Lela Barnett, as the daughter of the grantee, would have acquired a vested remainder. See Cal. Civ. Code, § 694; In re De Vries, 17 Cal. App. 184, 119 P. 109; Miller v. Oliver, 54 Cal. App. 495, 202 P. 168; Estate of Backesto, 71 Cal. App. 409, 235 P. 670; 23 R. C. L. 533, § 77. And if it contained only the words "heirs of the body," it is equally clear that she would not have acquired a vested remainder but would have had a contingent interest only, subject to her surviving the holder of the life estate and becoming his heir. County of Los Angeles v. Winans, 13 Cal. App. 234, 109 P. 640; Hall v. Wright, 17 Cal. App. 502, 120 P. 429. The terms, used separately, have each a different legal effect, and it becomes our task to determine what can be their effect when coupled together in this manner. The question is, of course, as to the grantor's intention, which must be ascertained from an examination of the entire instrument, in the light of certain established rules of construction.

[2] There are two chief grounds upon which it is contended that the remainder vested in Lela Barnett at the time of the execution of the deed. One is that she was clearly embraced within the meaning of the term "issue" and, irrespective of other provisions in the instrument, took a vested remainder by virtue of that language. This is reinforced by the other proposition that, wherever possible, a remainder will be construed to be vested rather than contingent. In re De Vries, 17 Cal. App. 184, 119 P. 109; Estate of Washburn, 11 Cal. App. 735, 106 P. 415; 1 Tiffany, Real Property, 577; 3 Thompson, Real Property, 206.

On the other hand, it is just as clear that Lela Barnett never came within the meaning of the words "heirs of his body." In order to apply the rule of construction just referred to, it would be necessary either to ignore this language, or to consider it as the equivalent of, or at least not in conflict with, the term "issue." But it hardly appears reasonable that when the grantor referred to "issue *and* heirs of his body" he meant "issue *or* heirs of his body." The language was not aptly chosen to indicate that a person coming under either class would be sufficient. It rather appears that the words "issue and heirs of his body" were intended to be read together, and together constituted a description of the class of persons who should take the remainder. This being so, can we ignore part of the language? Is it not reasonable to conclude that he intended the property to go to such of his issue as were heirs of his body; that is, such issue as survived him?

[3] While the foregoing discussion is somewhat speculative, it cannot be denied that the interpretation sought by appellants requires, in effect, the striking out of vital words in the deed. It is also true that the interpretation of the respondent requires, if not the striking out of the word "issue," at least the modification of its ordinary meaning by reason of other language used in connection with it. We should find difficulty in supporting this latter interpretation were it not for an additional element which seems almost conclusive. The granting clause does not mention "issue"; the grant is to Barnett "and to his heirs." The word "issue" is found only in the habendum. While the habendum clause may limit the estate apparently granted, where it is itself ambiguous there is every reason for holding the granting clause as controlling. Indeed, the statute expressly provides that if several parts of a grant are irreconcilable, the former part prevails. Cal. Civ. Code, § 1070; see Barnett v. Barnett, supra.

[4] There are, moreover, certain indications of the grantor's intent to be derived from the circumstances existing at the date of the grant. At that time Lela Barnett was living and could have been specially mentioned; she was not. She might have been clearly identified as the holder of a vested remainder by the use of the term "children" without other language, but was not. What could the grantor have had in mind? Certainly not the intention to provide for Lela Barnett in particular, but in general for his descendants, including Lela Barnett. The intention to have his property go to persons in his own line of descent seems plain. If, however, a vested re-

mainder came to Lela Barnett, it was possible for her prior to her actual possession of the property to alien her future interest so that it might go to strangers. Again, the grantor's intent that the grantee, F. Joseph Barnett, should take only a life estate, is satisfactorily established in the earlier decision of this court. Lela Barnett's heirs were her mother and F. Joseph Barnett, her father. When she died, her father became heir to half of her estate. If her interest in the property granted by B. B. Barnett, was vested, then her father had a vested remainder in fee simple in property in which the grantor intended that he should have only a life estate. Such a result would be destructive of the grantor's purposes, and an interpretation which leads to it should be avoided.

Our conclusion is that the effect of the deed was to grant a life estate to F. Joseph Barnett, with a remainder to such of his issue as became heirs of his body. Lela Barnett, as a possible heir of his body, had a contingent remainder which vanished when she predeceased the holder of the life estate. Her successors in interest therefore take nothing.

It follows that the judgment must be affirmed. It is so ordered.

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211 Cal. 445

WEDDLE v. HEATH.

S. F. 13382.

Supreme Court of California.
Jan. 30, 1931.

Rehearing Denied and Opinion Amended Feb. 24, 1931.

1. Negligence ⚿32(1).

Owner of premises need only use ordinary care for safety of invitees.

2. Negligence ⚿134(3).

Where injured person failed to satisfactorily explain accident and admitted injury from moving belt was obvious, owner of premises was not liable to injured person as invitee.

3. Negligence ⚿67.

One injured by coming in contact with moving belt, portion of pumping machinery, *held* guilty of contributory negligence.

4. Master and servant ⚿296(3).

Instruction denying employer right to rely to any extent upon employee's contributory negligence if jury believed place of work was unsafe *held* erroneous (St. 1911, p. 796, § 1; St. 1917, p. 862, §§ 34, 35).

The instruction was, in substance, that statute law makes it unlawful for employer to permit employee to be in any employment or place of employment which is not safe, and that, if jury found employer was violating statute law at time and place employee was injured and that such violation of statute proximately caused injuries, then law conclusively presumes that employee was not guilty of contributory negligence.

5. Master and servant ⚿101, 102(1).

Statute relating to violation of statute providing for safety of employees applies to specific requirements set forth by statute imposing specific duties upon employer (St. 1911, p. 796, § 1).

6. Release ⚿12(2).

Consideration is unnecessary where writing is plain and explicit and given for express purpose of effecting complete release of obligation (Civ. Code, § 1541).

7. Release ⚿24(2).

Notice of rescission with tender back of amount received are indispensable prerequisites to successful showing that by mutual mistake or upon other grounds release should be rescinded.

In Bank.

Appeal from Superior Court, Alameda County; E. C. Robinson, Judge.

Action by E. C. Weddle against F. E. Heath. From a judgment for plaintiff, defendant appeals.

Reversed.

Clark, Nichols & Eltse, of Berkeley, for appellant.

Ford, Johnson & Bourquin, Frank J. Creede, and Gordon S. Keith, all of San Francisco, for respondent.

PRESTON, J.

This is an action for damages for personal injuries received by plaintiff by coming into contact with a rapidly moving endless belt running on revolving pulleys, a part of certain pumping machinery located on the lands of defendant. Plaintiff had a verdict for $15,000, followed by judgment in said sum, from which defendant has appealed on a bill of exceptions.

The amended complaint is in six counts, all having for their basis the charge of negligence, in that defendant failed to properly guard the said pumping machinery or, putting it in another form, that defendant failed to furnish a safe place in which plaintiff might perform his work in connection with the use of said pump for irrigation purposes.

The first four causes of action set forth in the complaint count upon the relation of master and servant between defendant and plaintiff; the remaining counts rest upon the relation of invitor and invitee between the same parties.

It will be observed that, under the relation of employer and employee, the rule of damages and negligence is modified by the so-called Roseberry Act (St. 1911, p. 796), the first section of which, so far as here material, is as follows: "In any action to recover damages for a personal injury sustained * * * by an employee while engaged in the line of his duty or the course of his employment as such, * * * in which recovery is sought upon the ground of want of ordinary or reasonable care of the employer * * * the fact that such employee may have been guilty of contributory negligence shall not bar a recovery therein where his contributory negligence was slight and that of the employer was gross, in comparison * * * and it shall be conclusively presumed that such employee was not guilty of contributory negligence * * * where the violation of any statute enacted for the safety of employees contributed to such employee's injury; and it shall not be a defense: (1) That the employee either expressly or impliedly assumed the risk of the hazard complained of. (2) That the injury * * * was caused in whole or in part by the want of ordinary or reasonable care of a fellow servant."

Under the relation of invitor and invitee, it is conceded that ordinary common-law rules of negligence and contributory negligence obtain. The difference between these two sets of causes of action are important in the discussion of many serious questions urged by defendant and appellant, which said questions may be summarized as follows:

(1) That the relation of employer and employee did not exist between the defendant and plaintiff, but instead that the plaintiff was the employee of the brother of defendant, who, as an independent contractor, had charge of the premises upon which the pumping machinery which caused plaintiff's injuries was located.

(2) That, conceding that plaintiff was an invitee on defendant's premises, defendant is not liable, as any danger there encountered by plaintiff was obvious and moreover was well known to and appreciated by him.

(3) That, in any event, plaintiff's own negligence defeats the cause of action resting upon the foundation of invitee and likewise the cause of action resting upon the foundation of employee, in that the alleged contributory negligence of plaintiff was so gross as to overcome in comparison any negligence of any kind on the part of defendant.

(4) That plaintiff released defendant's brother from the cause of action in suit and from any standpoint defendant and his brother were joint tort-feasors, and the release of the one summarily released the other.

(5) Defendant also complains of numerous instructions, some of which are to be hereinafter mentioned.

(6) Lastly, defendant makes complaint of certain rulings of the court during the progress of the trial.

We are not required to consider all of these questions, as the course of the appeal will be determined short of this full task. The facts out of which the causes of action arose may now be set out more fully.

Plaintiff, then a man of about 28 years of age, experienced since the age of about 13 in the use of machinery similar to that in question, and familiar for several years with the specific machinery in question, was injured, as above noted, on July 14, 1926, by coming in contact with a moving belt, a portion of certain pumping machinery. The evidence fails to show with any great degree of certainty just how the accident occurred. It is, however, shown that on the day in question plaintiff had been left in charge of the ranch and of the pump used to irrigate the orange orchard thereon. He had shut the machinery down just prior to the injury and had oiled the pump, and, after starting the motor, had observed that everything was in its usual ordinary working condition except that, after starting it again, he heard what he thought was a squeak in a bearing inclosed in boxing and resting upon a cement pier. While standing in front of the wheel carrying the belt, he thinks he stooped over to listen for this noise and may have put his hand on the covering over the bearing. In turning either to the left or to the right, he does not recall which, he remembers nothing further as to what happened except that he was found a distance of some eight feet from this position badly injured in the arm, and he had evidently been unconscious for an unknown period of time. He was wearing a shirt with the sleeves rolled up rather loosely. An examination of the machinery after the accident disclosed that shreds of his shirt were embedded in the belt and also on the boxing inclosing the said bearing, and he found the right sleeve torn in shreds up to the neck of the garment. From these facts it is easily deducible that plaintiff unintentionally came in contact with the moving belt and was probably thrown against the pulley, resulting in his being hurled some eight feet to the place where he found himself upon regaining consciousness. It is useless to recount the injuries received by him except to say that they were serious and permanent, resulting among other things, in practically the entire loss of use of his right arm.

The pump was electrically driven, and was located in a house on a north and south line therein, being nearer the westerly than the easterly wall thereof. Plaintiff was injured at the northwest end, but there was a reasonable amount of space for him to stand or move about the place where he was injured without contact with the belt or machinery. It is true that the machinery was not guarded by a rail, housing, or any other method, but plaintiff, as above noted, was well acquainted with it and with dangers incident thereto. He offers as an excuse for his injury that he thought he was standing a safe distance from the endless belt. Plaintiff, over objection of appellant, introduced certain safety orders of the Industrial Accident Commission, which showed that such regulations, if applicable, would have necessitated the installation of a guard or protection of some other kind on this machinery. Expert evidence along the same line was also admitted over objection.

The relation between defendant and his brother was as follows: Defendant, F. E. Heath, about the year 1921, owned certain orange grove lands near Lindsay, Cal. At that time he induced his brother, who was then residing in Michigan, to come and reside upon one of the tracts of land. Accordingly, about 1922, defendant's brother, L. W. Heath, established a residence upon one of said tracts and he and defendant entered into a contract whereby for $50 per acre per annum he would cultivate, irrigate, and sucker said orange groves, and, as defendant sold portions of the tract or added others, the brother's contract was to contract or expand accordingly. The place where the injury occurred was known as the Decker place, which defendant acquired some years prior to 1926. This arrangement between the brothers had obtained as to management of the ranch for some time prior to the date of the accident and during all the times in question. The fertilizing of the soil, spraying of the trees, and picking of the fruit were not covered by the contract between defendant and his brother, but this work too was superintended by the brother. Over a period of years plaintiff had frequently been engaged and paid by the brother to work upon various properties owned by defendant and had worked in the various departments of the labor thereon.

For several years plaintiff had been employed at various times by the brother to work at the place in question. Likewise he had over a period of years been assisting in the use of said pumping machinery for the irrigation of said properties. He had used the pump when it was driven by gasoline and later when it was driven by electricity. He was as familiar with the pump as the brothers themselves. Just prior to the accident the brother had returned to his former home in Michigan on business and had left plaintiff in charge of the said ranch and said pump, and it was while using the pump under the above agreement that the accident occurred. Plaintiff was paid invariably with the check of the brother and never by the check of defendant. During the absence of the brother in Michigan, and during the period plaintiff was in charge of the property, defendant visited it at one time to inspect conditions on the ranch. When plaintiff received said injuries, he incurred a doctor's bill of some $325, which the brother paid, and the brother also sent plaintiff in cash the sum of $50. The exact date when the original complaint was filed does not appear in the record, but it is in evidence that plaintiff started the action prior to June 6, 1927, and that he included as defendants certain fictitious names. He approached the brother with the idea of causing summons to be served upon him as a codefendant in the action in lieu of one of said fictitious persons, whereupon the brother caused his attorney to prepare, and plaintiff executed without further consideration than the items above mentioned, the following release: "The undersigned, for and in consideration of the sum of three hundred seventy-five dollars ($375.00), does hereby release, cancel, discharge and satisfy all claims, demands, charges, sums due for any money or demands whatsoever, either for damages accruing or heretofore accrued or claimed to have accrued in favor of the undersigned and I do bind my heirs, executors and administrators by these presents. The purpose of this agreement is to show my good faith in relieving Louis W. Heath from any and all liability by reason of any damage heretofore suffered which I realize he is not responsible for. Executed at Lindsay, California, June 6, 1927, E. C. Weddle."

The court instructed the jury on both theories of plaintiff's causes of action and gave two instructions at the request of plaintiff, denominated Nos. 9 and 29, to which strenuous exception is made. One of these instructions will be made the subject of discussion hereafter.

[1] The contention that, under the evidence, plaintiff as a matter of law, was not the employee of defendant, but was the employee of the independent contractor, the brother, we are not required to resolve on appeal, as upon other grounds the case must be reversed. Defendant, of course, admits that plaintiff was an invitee upon his premises, but contends that the danger to which he was exposed was an obvious one, which position we think must be sustained. The rule in this respect is well stated in the case of Shanley v. American Olive Co., 185 Cal. 552, 555, 197 P. 793, 794, where the court says: "A person so invited upon the premises of another may recover from such owner 'for any injuries received owing to the dangerous condition of the premises known' to the owner and not

known to the person so invited; but such owner 'is not bound to keep his premises absolutely safe.' 29 Cyc. 453. The responsibility of such owner for the safety of such person in such a case is not absolute; he is only required to use ordinary care for the safety of the persons he invites to come upon the premises. If there is a danger attending upon such entry, or upon the work which the person invited is to do thereon, and, such danger arises from causes or conditions not readily apparent to the eye, it is the duty of the owner to give such person reasonable notice or warning of such danger. But such owner is entitled to assume that such invitee will perceive that which would be obvious to him upon the ordinary use of his own senses. He is not required to give to the invitee notice or warning of an obvious danger. 29 Cyc. 471, 474; 26 Cyc. 1213." See, also, Dobbie v. Pac., etc., Co., 95 Cal. App. 781, 273 P. 630; 15 Cal. Jur. 1058.

[2, 3] Plaintiff not only fails to satisfactorily explain the accident, but also admits that the injury to which he was exposed was obvious, justifying himself only by the statement that he thought he was a safe distance from the belt; therefore we conclude that the evidence fails to sustain the causes of action predicated upon the theory of invitor and invitee, and for this reason it was error to submit this issue to the jury. On the same facts it necessarily follows that the plaintiff was guilty of contributory negligence. Ergo v. Merced Falls, etc., Co., 161 Cal. 334, 339, 119 P. 101, 41 L. R. A. (N. S.) 79; Brett v. Frank & Co., 153 Cal. 267, 274, 94 P. 1051. Whether this negligence of plaintiff was slight in comparison with the negligence, if any, of the defendant need not at this time be determined, inasmuch as the facts may differ on a retrial of the cause.

[4, 5] It is here appropriate to discuss plaintiff's instruction No. 9, reading as follows: "You are instructed that the statute law of this state makes it unlawful for any employer to require, permit or suffer any employee to go or be in any employment or place of employment which is not safe, and no such employer shall fail to furnish, provide and use safety devices and safeguards or fail to adopt and use methods and processes reasonably adequate to render such employment and place of employment safe, and no such employer shall fail or neglect to do every other thing reasonably necessary to protect the life and safety of such employees, and no such employer shall occupy or maintain any place of employment that is not safe; and the statute referred to in this instruction was enacted for the safety of employees, and in this connection I charge you that if you find that defendant Frank E. Heath was the employer of E. C. Weddle and was violating such statute law at the time and place that said E. C. Weddle was injured, and you further find from the evidence that such violation of such statute proximately caused the injuries described in the complaint to the said E. C. Weddle, then and in that event the law conclusively presumes that said E. C. Weddle was not guilty of contributory negligence and you must so find."

It is manifest that this instruction is intended to apply that portion of section 1 of the Roseberry Act, relating to a violation of a statute providing for the safety of employees, to sections 34 and 35 of the Workmen's Compensation, Insurance and Safety Act (St. 1917, p. 862), which provide generally that the employer may not allow the employee to be in a place of employment which is not safe, but must furnish for the use of the employee safety devices and safeguards, and must adopt all methods and processes reasonably adequate to make the place of employment safe and must do every other thing reasonably necessary to protect the life and safety of the employee. The instruction does not set forth any specific requirement of any section of the law that might be here involved. It simply leaves the question to the jury as to whether or not the defendant did everything reasonably necessary to protect the life and safety of his employees, or, putting it in other language, the defendant is denied the right to rely to any extent upon the contributory negligence of plaintiff if the jury believed, for any cause, known or unknown, that the place where plaintiff performed his work was unsafe.

We cannot come to any other conclusion than that the giving of this instruction was serious and far-reaching error. The Workmen's Compensation Act followed and did not precede the Roseberry Act, and its provisions are largely a restatement of the general common-law principles applicable to the law of negligence. It has always been the duty of the employer to exercise ordinary care in providing a safe place for the servant to work and in providing all reasonable safeguards for him while engaged in such work. These sections of the Workmen's Compensation Act do little more than codify said principles. We think it must be held that the provisions of section 1 of the Roseberry Act are intended to apply to concrete and specific requirements set forth by statute entailing specific duties upon an employer. Any other construction would for all practical purposes destroy the right to rely to any extent upon the contributory negligence of the servant. No specific construction of this act has been made, but the question is inferentially discussed in Frinier v. C. J. Kubach Co., 177 Cal. 722, 726, 171 P. 952.

[6] We are next to examine the so-called release executed by plaintiff to L. W. Heath and set out above. If the release is valid as to L. W. Heath and he and the defendant are joint tort-feasors, it is clear that such release is binding on plaintiff until avoided upon some ground authorized by law for the rescission of a written instrument. In this connection, the court instructed the jury as follows: "I instruct you that if you believe from the evidence that the instrument offered by F. E. Heath as a release in his favor from the plaintiff, was not supported by a valid consideration, then and in that event said purported release is not a bar to the plaintiff's action or a defense available to the defendant F. E. Heath."

It must be admitted that, if the said L. W. Heath was an independent contractor on the property of F. E. Heath, he owed plaintiff, his employee, at least the same if not greater duty than the defendant to guard and protect the machinery in question. We think also that, even if the relation between the two brothers was only that of master and servant, in this particular case at least it was L. W. Heath's duty in any event to provide a safe place for the plaintiff to work. It is not always true that master and servant are joint tort-feasors where a tort is committed, but that may well be their relation and it is where they both participate in the commission of the tort. The rule is stated in Gosliner v. Briones, 187 Cal. 557, 563, 204 P. 19, 22, as follows: "In the prosecution of actions for causes ex delicto all persons concerned in the commission of the tort may be joined as defendants, or either or any of them may be sued severally, and where an employer and an employee have participated in a tortious act against a third person, they may be jointly sued for damages. Rogers v. Ponet, 21 Cal. App. 577, 581, 132 P. 851."

But if either of the above propositions is sound, then the release becomes a material factor in this case, at least when weighing the above instruction given by the court. We then first inquire: Was the giving of the instruction that a consideration was required for said instrument error? If section 1541 of the Civil Code is to be respected, it must be so held. Said section reads: "An obligation is extinguished by a release therefrom given to the debtor by the creditor, upon a new consideration, or in writing, with or without new consideration." Said section was taken from section 741 of the Field Draft of the New York Civil Code, reading as follows: "An obligation is extinguished by a release therefrom given to the debtor by the creditor, upon a new consideration, or under seal." The Code commissioner's note recommending its adoption reads as follows: "A release under seal extinguishes the debt, notwithstanding the provision of the Revised Statutes allowing the want of consideration for a sealed instrument to be shown (Stearns v. Tappin, 5 Duer [12 N. Y. Super. Ct.] 294). But by the present law, a release, with neither a seal nor a new consideration, is void Von Gerhard v. Lighte, 13 Abb. Prac. [N. Y.] 101; Seymour v. Minturn, 17 Johns. [N. Y.] 169 [8 Am. Dec. 380]; Dewey v. Derby, 20 Johns. [N. Y.] 462; Jackson v. Stackhouse, 1 Cow. [N. Y.] 122 [13 Am. Dec. 514]. The justice of its restrictions may well be doubted. The commissioners recommend the substitution of the words 'in writing' for 'under seal'."

When our state adopted the section, we apparently accepted it by putting in effect substantially the suggested amendment of the New York Code Commissioner. It has several times been clearly intimated that a consideration is not necessary where the writing is plain and explicit and given for the express purpose of effecting a complete release of the obligation. Upper San Joaquin Canal Co. v. Roach, 78 Cal. 552, 21 P. 304; Rogers v. Kimball, 121 Cal. 247, 253, 254, 53 P. 648. The department opinion in the latter case is found in 5 Cal. Unrep. 725, 731, 49 P. 719, 721, where it is said: "This section gives to a release 'in writing' the same effect as was given at common law to a release under seal, which is in general valid without reference to the consideration." See, also, Jordan v. Scott, 38 Cal. App. 739, 742, 177 P. 504.

[7] Further considering the release in question, we cannot but say that plaintiff is estopped by his own deliberate act to deny that the $375 received by him was a proper consideration therefor, although there is evidence which supports the view that the doctor's bill was a voluntary gift, but in reality the action of the brother was an attempt to compensate the plaintiff without admitting liability to him. This being true and the claim being unliquidated, notice of rescission together with a tender back of the amount received would be indispensable prerequisites to a successful showing that by mutual mistake or upon other grounds the release should be rescinded. Garcia v. California Truck Co., 183 Cal. 767, 192 P. 708; Winstanley v. Ackerman (Cal. App.) 291 P. 273.

Discussion of many other assignments might be had, but we deem the above sufficient.

The judgment is reversed.

We concur: WASTE, C. J.; RICHARDS, J.; SEAWELL, J.; SHENK, J.; CURTIS, J.; LANGDON, J.

211 Cal. 411

LOS ANGELES & WEST SIDE TRANSPORTATION CO. v. SUPERIOR COURT IN AND FOR SACRAMENTO COUNTY et al.

S. F. 13831.

Supreme Court of California.

Jan. 28, 1931.

1. Automobiles 🔑97.

Since constitutional amendment, license tax, as distinguished from property tax, may not be imposed on transportation companies operating as common carriers, as defined therein (Const. art. 13, § 15).

> Const. art. 13, § 15, adopted in 1926, provides for tax on property of those operating motor vehicles for hire in transportation of persons or property on public highways as common carriers, operating between fixed termini or over regular routes, and contemplates tax based on percentage of gross receipts, providing that such taxes shall be in lieu of all other taxes and licenses, whether state, county, or municipal, on such property.

2. Statutes 🔑250.

Where repealing act and amending statute were approved same day, repeal to be effective subsequent to amendment, amendment fell with original act on effective date of repeal (St. 1925, p. 833, amended by St. 1927, p. 1742, and repealed by St. 1927, p. 1708).

3. Licenses 🔑8(2).

Whether repeal, without saving clause, of statute imposing license tax, takes away right to collect unpaid tax, depends on legislative intention.

4. Licenses 🔑8(2).

Rule that repeal, without saving clause, of statute imposing license tax abrogates right to collect unpaid tax, does not apply, where contemporaneous enactments show intent to continue revenue from particular source in same or similar form.

> In such case, general rule would not apply, and those subject to payment under repealed act would be held for payment under continued revenue plan.

5. Automobiles 🔑74.

Unpaid license taxes *held* collectible by state against transportation companies operating as common carriers, notwithstanding repeal of statutes before action, in view of constitutional amendment continuing same system, as regards such carriers (St. 1923, p. 706; St. 1925, p. 833, amended by St. 1927, p. 1742, and repealed by St. 1927, p. 1708; Const. art. 13, § 15).

> State may collect such tax against such carriers as defined in constitutional amendment, notwithstanding general rule that repeal, without saving clause, of statute imposing license tax, abrogates right to collect due and unpaid tax, in view of Const. art. 13, § 15. adopted before St. 1927, p. 1708 (repealing St. 1925, p. 833), wherein is evinced clear purpose to continue state revenue exaction from such common carriers, based on fixed percentage of gross receipts.

6. Automobiles 🔑74.

Unpaid gross receipts license taxes *held* not collectible by state against contract carriers not included in constitutional amendment, in view of repeal of statutes before commencement of action (St. 1923, p. 706; St. 1925, p. 833, amended by St. 1927, p. 1742, and repealed by St. 1927, p. 1708; Const. art. 13, § 15).

> Such due and unpaid taxes cannot be collected by state against carriers not operating as common carriers between fixed termini and over regular routes, since Const. art. 13, § 15, does not continue such taxes against such private carriers, and hence general rule applies that repeal, without saving clause, of such statute, deprives state of right to collect such taxes.

7. Automobiles 🔑100.

Superior Court had jurisdiction of actions against motor carriers for unpaid license tax under repealed statutes, and to determine whether defendants were carriers of class subject to tax (St. 1923, p. 706; St. 1925, p. 833, as amended by St. 1927, p. 1742, and repealed by St. 1927, p. 1708; Const. art. 13, § 15).

In Bank.

Application by the Los Angeles & West Side Transportation Company for writ of prohibition to restrain the Superior Court in and for Sacramento County and Peter J. Shields, Judge thereof, from proceeding with the trial of an action pending in said court to recover on behalf of the state certain license taxes imposed on motor vehicles for hire.

Peremptory writ denied, and alternative writ discharged.

Superseding opinion in 289 P. 167.

Harry A. Encell and Samuel T. Bush, both of San Francisco, for petitioner.

Elmer P. Bromley, H. E. Lindersmith, Frank M. Smith, and Phil Jacobson, all of Los Angeles, amici curiæ in support of petitioner.

U. S. Webb, Atty. Gen., R. L. Chamberlain and Charles A. Wetmore, Jr., Deputy Attys. Gen., for respondents.

SHENK, J.

This is an application for a writ of prohibition to restrain the respondent Superior Court from proceeding with the trial of an action pending in said court to recover on behalf of the state certain license taxes imposed on motor vehicles for hire. A determination of the proceeding requires a review of the legislation on the subject.

[1, 2] At its session in 1923 the Legislature passed an act to impose a license fee, measured at 4 per cent. of the gross receipts, for the transportation of persons or property for hire by motor vehicles upon public streets, roads and highways of the state. The act was approved on June 13, 1923, and by its terms became effective on January 1, 1924. St. 1923, p. 706.

At its session in 1925 the Legislature passed an act on the same subject, and repealed the 1923 statute. St. 1925, p. 833. The 1925 statute changed the 1923 act in minor particulars, but in substance was a re-enactment and continuation of the 1923 act. Bacon Service Corporation v. Huss, 199 Cal. 21, 248 P. 235. In the 1925 act the license tax was also fixed at 4 per cent. of the gross receipts from operations.

At its session in 1925 the Legislature proposed a constitutional amendment adding section 15 to article 13 and providing for a tax on the property of persons, firms, and corporations operating motor vehicles for hire in the transportation of persons or property on the public highways of the state as common carriers operating between fixed termini or over regular routes. This proposal contemplated a tax based on 4¼ per cent. of the gross receipts in the case of common carriers of persons, and 5 per cent. on common carriers of property, subject to the power of the Legislature to change the percentage by a two-thirds vote. It also contained the following provision: "Such taxes shall be in lieu of all other taxes and licenses, state, county and municipal, upon the property above enumerated of such companies." This constitutional amendment was adopted at the general election held on November 2, 1926.

In an apparent endeavor to comply with the new constitutional scheme of providing revenue from this class of motor vehicle transportation and use of the highways of the state, the Legislature, at its session in 1927, enacted certain legislation. By an act approved March 5, 1927, effective immediately, sections 3664aa, 3670bb, and 3670cc were added to the Political Code (St. 1927, p. 17), to carry into effect the newly adopted constitutional provision in so far as the latter was not self-executing. Section 3664aa was again amended in 1929 (St. 1929, p. 1554), but in no way affecting this controversy. The license tax act of 1925 was also amended as to sections 1, 3, 4, 6, 7, 8, and 9 thereof (St. 1927, p. 1742). This enactment was by its terms to become effective on October 1, 1927. On the same day that the latter act was approved, to wit, May 31, 1927, the Governor approved an act to repeal in toto the 1925 act. St. 1927, p. 1708. By its terms the repealing act became effective on January 1, 1928. On the same day, to wit, May 31, 1927, an act was approved amending section 77 of "The California Vehicle Act," wherein the registration fees on all motor vehicles used for the transportation of persons or property for hire were substantially increased. St. 1927, p. 1708. By the terms of this act it was to become effective when the act repealing the 1925 License Tax Act should become effective; namely, on January 1, 1928. This direction was rendered ineffective by reason of the fact that the act containing it was subjected to the referendum and its effective date was suspended until after its approval by the electors of the state at the general election held on November 6, 1928. At the same 1927 session the Legislature, in order to provide further revenue for highway purposes, increased the gasoline tax on motor vehicle consumption from two to three cents. St. 1927, p. 1565.

The foregoing review of our legislation indicates that the Legislature intended to conform to the new plan of providing revenue from the operations of motor vehicles for hire as contemplated by the constitutional amendment of 1926. From and after the adoption of that amendment, any license tax, as distinguished from a property tax, could not be imposed on common carriers as defined in the constitutional amendment. As to carriers for compensation other than common carriers, the act of 1925 was amended and continued in force to January 1, 1928, when the repealing act went into effect, on which day also the act amending the California Vehicle Act with reference to increased registration fees on all carriers for hire was intended to take effect, but, as stated, did not then become operative because of the filing of a referendum petition against it.

[3, 4] With the foregoing legislation in mind, we approach the problem affected by it and presented by the application herein, wherein it appears that the petitioner is a corporation engaged at all times involved in the controversy in the business of transporting persons and property for hire by means of motor vehicles operated on the public highways of the state.

On March 16, 1928, the Attorney General commenced an action in the respondent Superior Court to recover from the petitioner certain unpaid and delinquent license taxes alleged to have accrued to the state during the years 1924 and 1925 under the acts of 1923 and 1925 above referred to. This action was one of a hundred or more similar actions brought in the same court for the same purpose about the same time. The petitioner appeared and filed a demurrer to the complaint, asserting, among other things, that the complaint did not state a cause of action, and that the court had no jurisdiction to proceed with the action, for the reason that the legislation authorizing the collection of said license taxes had been wholly repealed by the Repealing Act effective January 1, 1928. The basis of the contention was and now is that said Repealing Act (St. 1927, p. 1708) was unqualified and contained no saving clause preserving to the state the right to pursue the collection of license taxes accrued but unpaid under the repealed legislation. The demurrer was sustained on grounds other than the jurisdictional one, an amended complaint was filed, and the state and the respondent court are proceeding to set the case for trial and to adjudicate the cause, notwithstanding the petitioner's objections of want of jurisdiction in the court so to do.

It is the contention of the petitioner that the act of 1927 repealing the act of 1925 without a saving clause rendered the cause of action on behalf of the state for the collection of the license tax unenforceable. The contention is based on the general rule stated in volume 25 of Ruling Case Law, at page 940, as follows: "The repeal, without a saving clause or provision, of a statute imposing a license tax or fee takes away the right to collect an unpaid tax which is due even though a suit to collect the tax is pending. By the repeal of statutes which authorize the making of assessments and the collection thereof, not only the remedy for the collection of an assessment but also the lien or right is taken away, although expenses have been incurred on the faith of such assessment. And nothing less than a plain exception of existing cases or claims from the operation of the Repealing Act or a continuance of the same system of taxation under new regulations will save such cases or claims from the effect of the repeal." Certain cases in this state claimed to be in accordance with the general rule are relied upon. The first in point of time is Napa State Hospital v. Flaherty, 134 Cal. 315, 66 P. 322. In that case the right conferred by statute on certain state authorities to maintain an action against a parent for the support of an adult insane child, a right which did not exist at common law was abrogated, and it was held that the remedy was lost by a repeal of the statute without a saving clause, since the right was inchoate and not reduced to possession or judgment.

The next is City of Sonora v. Curtin, 137 Cal. 583, 70 P. 674. In that case a city board of trustees, acting under the authority of general law to impose a license tax for regulation and revenue, passed an ordinance imposing a license tax for revenue on persons engaging in certain business and callings, including attorneys at law. A civil action was commenced to collect a delinquent tax. Before judgment the Legislature amended the statute, without a saving clause, so as to deprive the city of the power to license for revenue. The tax was held to be a revenue measure, and that the repeal before judgment abrogated the right to enforce it. This case ruled the subsequent case in the same volume Santa Monica v. Guidinger, 137 Cal. 658, 70 P. 732. The next case is County of Plumas v. Wheeler, 149 Cal. 758, 87 P. 909. In that case the power of counties under the County Government Act (St. 1897, p. 465, § 25, subd. 25) to impose a license tax for revenue was cut off by section 3366 of the Political Code. It was held that the enactment of the Code section abrogated the power of the county to pursue the collection of a license tax, held to be a revenue measure, for conducting a sheep-raising business. Next is People v. Bank of San Luis Obispo, 159 Cal. 65, 112 P. 866, 37 L. R. A. (N. S.) 934, Ann. Cas. 1912B, 1148. In that case the Attorney General commenced an action under the Banking Act of 1903 (St. 1903, p. 365) to have the defendant bank declared insolvent. Judgment to that effect was entered, and a receiver appointed to liquidate the affairs of the bank. This judgment became final, but an appeal was taken from an order denying a motion for a new trial. Pending this appeal, the cause of action on which the judgment was founded was repealed by the Banking Act of 1909. (St. 1909, p. 87). The authorities are quite extensively reviewed, and the court concluded that the judgment had become final, and that its finality was not disturbed by the pending motion for a new trial, the order denying which was affirmed.

Great reliance is also placed on Flanigan v. Sierra County, 196 U. S. 553, 25 S. Ct. 314, 49 L. Ed. 597. In that case the county brought an action in the Superior Court to collect a license tax on the business of raising sheep under the same statute involved in County of Plumas v. Wheeler, supra. The action was removed to the United States Circuit Court, which rendered a judgment in favor of the plaintiff after an order overruling a demurrer to the complaint and the refusal of the defendants to answer. The Circuit Court of Appeals, 122 F. 24, affirmed the judgment. The Supreme Court reversed the judgment, leaning in agreement with the holding in this court in the cases relied upon by the petitioner herein to the effect that the license tax imposed by the county ordinance was a revenue measure, and that the absolute repeal of the statute abrogated the right of recovery under it.

Finally, the petitioner cites the case of Pioneer Oil & Refining Co. v. State (Tex. Civ. App.) 273 S. W. 615, 617, which followed the general rule that, "where a right given by a statute is not by nature a vested right, and at the time of the repeal of the statute has not been reduced to judgment, or otherwise executed, it will fall with the statute, unless expressly excepted," citing 36 Cyc. p. 1226, and the extensive note reporting the case of Crow v. Cartledge, 99 Miss. 281, 54 So. 947, which note is found in Ann. Cas. 1913E, p. 471 et seq.

There can be no question as to the existence of the general rule relied upon by the petitioner, but its operation in the last analysis depends on the intention of the legislative branch in dealing with the subject. This is indicated by the note in Ann. Cas. 1913E, above referred to, and cases therein cited and other cases relied upon by the respondents, such as Commonwealth v. Mortgage Tr. Co., 227 Pa. 163, 76 A. 5. The latter case recognized the existence of the general rule, but also declared the legislative intention to be the true subject of ascertainment in applying the general rule, saying, at page 182 of 227 Pa., 76 A. 5, 11: "No doubt the general rule is that, when a statute is repealed without a saving clause, it is to be considered as though it had never existed, except as to transactions past and closed. The rule, however, like any other legal principle of general application, must be understood and applied, if at all, so as to give effect to the legislative intention. It is not so much what the general rule of construction is, as, what did the Legislature intend by repealing all acts or parts of acts inconsistent with the new law which did not abolish taxation on this particular class of corporations, but only provided a different method of ascertaining the taxable value."

We think it is not strictly true to say that the legislative intention must be ascertained solely from the language of the Repealing Act. Rather it should be said that, if from contemporaneous enactments it is disclosed that the Legislature did not intend to abandon the revenue from this particular source, but did intend to continue it in the same or a similar form of revenue exactions, then the general rule would not apply, and those subject to payment under the act repealed would be holden for payment under the continued revenue plan. This phase of the rule is epitomized in Sutherland on Statutory Construction (2d Ed.) § 238, as follows: "Where there is an express repeal of an existing statute and a reenactment of it at the same time, or a repeal and a reenactment of a portion of it, the reenactment neutralizes the repeal as far as the old law is continued in force. It operates without interruption when the reenactment takes effect at the same time." The rule in this respect is illustrated by decisions of this court giving effect to continuing inheritance tax laws of this state. Riley v. Havens, 193 Cal. 432, 225 P. 275; Riley v. Howard, 193 Cal. 522, 226 P. 393. The inheritance tax cases in other respects may be deemed inapplicable here in so far as they hold that upon death the right of the state to the tax becomes vested (see Trippet v. State, 149 Cal. 521, 86 P. 1084, 8 L. R. A. [N. S.] 1210, affirming Estate of Stanford, 126 Cal. 112, 54 P. 259, 58 P. 462, 45 L. R. A. 788), but the rule of continuing legislation is the same in both classes of cases.

The question then resolves itself to this: Did the system of providing state revenue under the 1923 and 1925 Highway Transportation License Tax Acts continue upon the adoption of section 15 of article 13 of the Constitution and laws enacted pursuant thereto?

A reference to the circumstances and some of the reasons for the proposal and adoption of said constitutional amendment may be helpful. The 1923 act had been attacked in 1924 in the Superior Court in and for Fresno county. The attack was made on the ground generally that certain exceptions provided for in the act rendered the entire act invalid. The Superior Court held the act unconstitutional in an injunction suit brought by Bacon Service Corporation against Fred C. Huss, a traffic enforcement officer. While the appeal from the judgment of injunction was pending, the Legislature in 1925 proposed the constitutional amendment obviously on the theory that the act of 1923 was unconstitutional. The argument to the voters in support thereof contains the following: "The nineteen twenty-three legislative effort enacting a 4 per cent. tax was declared unconstitutional. The last legislature [1925] passed a similar 4 per cent. act, to fill the gap until this proposed constitutional amendment might be adopted." But the Legislature proceeded on the erroneous assumption of the finality of the judgment declaring the 1923 act invalid, for on June 30, 1926, this court held the 1923 act valid and reversed the judgment. Bacon Service Corporation v. Huss, 199 Cal. 21, 248 P. 235.

[5-7] In the entire legislative program we find no evidence of an intention to abandon or relinquish the exaction of revenue from common carrier motor transportation companies based on a tax on their gross receipts. On the contrary, we find a determined effort on the part of the legislative branch to fasten upon and continue this source of revenue, even to the extent of proposing that it be anchored in the organic law and placed beyond the power of the Legislature to abolish.

The constitutional percentage is greater than the statutory one by one-quarter of 1 per cent. in the case of passenger carriers and 1 per cent. in the case of property carriers. But there is a compensating element under the new system which, undoubtedly, is greatly to the advantage of common carriers. By the new system they are relieved of all other taxes and licenses, both state, county, and municipal. In the aggregate, their total tax obligation is probably less than under the old system.

We deem it of no controlling importance that under the old system the revenue was called a license tax while under the new system it is designated a property tax. The constitutional tax is a lieu tax. It merges the property tax and the license tax, is based on a percentage of gross receipts, and in effect may reasonably be said to constitute a continuance of the same system of producing revenue. There has not been a moment of time since the enactment of the 1923 statute when motor transportation companies operating as common carriers for compensation on the public highways of the state between fixed termini and over regular routes were not subject to the state revenue exaction based on a fixed percentage of their gross receipts. We therefore conclude that the license taxes due from common carriers described in the constitutional amendment under the 1923 and 1925 acts may be collected by the state in the pending actions in the Superior Court.

A different situation presents itself with reference to so-called private or contract carriers; that is, those carriers not constituted by law as common carriers operating between fixed termini and over regular routes. No provision is made in the constitutional amendment of 1926, or in legislation adopted pursuant thereto, for the payment of a tax or license on their gross receipts or otherwise. The tax to which they are subject would seem to be relegated to the ad valorem tax provided for in section 1 of article 13 of the Constitution with additional revenue from them provided by the increased registration fees prescribed in chapter 844, St. 1927, p. 1708, above referred to. As to private carriers, the gross receipts tax was not continued beyond January 1, 1928, when the 1925 act was repealed without a saving clause, at which time the amendments to the 1925 act (effective October 1, 1927, St. 1927, p. 1742), fell with the act of which they were a part. As to private carriers, there is evidenced a clear intention to abandon the gross receipts tax, and the general rule of law with reference to unqualified repeal and abandonment would apply as to them.

From the foregoing discussion, it necessarily follows that the respondent court has jurisdiction to proceed with the trial of the action pending before it. In the exercise of that jurisdiction, the court has the power to decide whether the petitioner and the defendants in the other actions are common carriers, as defined by the constitutional amendment, and subject to the payment of the charges sued for, or are private carriers as to whom the state has relinquished its right to proceed.

The peremptory writ is denied, and the alternative writ is discharged.

We concur: WASTE, C. J.; RICHARDS, J.; PRESTON, J.; LANGDON, J.; CURTIS, J.

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111 Cal. App. 81

SHARP v. JOINT HIGHWAY DIST. NO. 6 et al.

Civ. 7712.

District Court of Appeal, First District, Division 2, California.

Jan. 13, 1931.

Rehearing Denied Feb. 11, 1931.

1. Highways ⚿90.

Constitutional provision prohibiting incurring of indebtedness exceeding income and revenue for year does not apply to joint highway districts issuing revenue bonds (St. 1917, p. 46, as amended; Const. art. 11, § 18).

2. Highways ⚿99.

Power to build and pay for roads is one vested in local board of supervisors.

3. Constitutional law ⚿70(3).

Solution of doubt, if any, whether the statute respecting joint highway districts was necessary, rested with Legislature and not with court (St. 1917, p. 46, as amended).

4. Constitutional law ⚿292.

Highways ⚿90.

Statute authorizing creation of joint highway districts and issuance of revenue bonds *held* not invalid as depriving property owner of property without due process of law (St. 1917, p. 46, as amended).

The statute did not necessarily imply that assessment could be levied on individuals, and in instant case, in which property owner sought to restrain proceedings to issue revenue bonds, record disclosed that board had passed resolution that no assessments on individuals would be made, and statute requires, when assessments are to be made on private holdings, that notice must be given and hearing must be held to ascertain amount of benefits if any.

⚿For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Appeal from Superior Court, Ventura County; Edward Henderson, Judge.

Action by J. M. Sharp against Joint Highway District No. 6, etc., and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Edson Abel, of San Francisco, for appellant.

Sheridan, Orr, Drapeau & Gardner, of Ventura, and Arthur M. Ellis, of Los Angeles, for respondents.

STURTEVANT, J.

Claiming that the defendants were about to issue a series of illegal "revenue bonds," the plaintiff commenced this action to obtain an injunction against the defendants restraining them from further proceeding with the issue. The defendants answered and a trial was had before the trial court sitting without a jury. The trial court made findings in favor of the defendants, and from a judgment entered thereon the plaintiff has appealed and has brought up typewritten transcripts.

The case arises under an act of the Legislature known as "Joint Highway District Act," chapter 52, Statutes of 1917 (page 46), as amended in 1921 (page 1111), 1925 (page 433), and 1927 (page 249). Under the statute two or more counties may create a joint highway district. The board of supervisors of one county can initiate the proceedings by adopting a resolution. That resolution can be certified to the board of supervisors therein named. The other boards may give a tentative approval and notify the board initiating the proceedings. When notices have been received from those several boards, the board initiating the proceedings shall notify the clerk of each board. Upon receipt of that notice each board shall appoint one of its members as a director of the joint highway district. Within thirty days those directors shall meet and organize and employ individuals to make preliminary surveys. The board shall tentatively fix the route of the proposed highway and determine the approximate cost and proportion to be borne by each county. A copy of the report shall be filed with the clerk of the board of supervisors of each county, and within thirty days thereafter each board shall by ordinance accept or reject the proposal. A certified copy of the ordinance shall forthwith be transmitted to the board initiating the proceedings, and when each board has acted, the one initiating the proceedings shall make a finding of the approval and notify the clerk of each of the other boards of supervisors. If the vote is in favor of the creation of the district, a certified copy of the finding shall be filed with the secretary of state, and thereupon the district shall be deemed created and shall be "a public corporation under the designation of Joint Highway District No. ——— of the State of California." The purpose for which a district may be created is to provide the necessary authority and means to construct and maintain the highway described in the initiatory resolution. The district shall be managed by a board of directors. Each board of supervisors shall select one of its members and those members shall constitute the district board. The board shall fix a place within the district for holding meetings, a majority shall constitute a quorum, and it shall have power to appoint a secretary and employ additional help. The district so formed shall have power to construct a highway, obtain property therefor, to adopt a seal, and to sue and be sued. The boards of supervisors are authorized to appropriate moneys out of funds received from the state of California as for a contingent fund for the district board. As soon as practicable after its organization, the district board shall cause a survey to be made and the engineer shall file his report thereof. When that report is received, the board shall fix a time and place for considering it, and for the purpose of making an assessment of the estimated cost "upon the State of California, the several counties composing the district, and upon lands in private ownership as may be benefited by said highway." The notice of said hearing shall be by publication in a newspaper at least two successive weeks before the hearing. The statute contains many provisions relative to assessments on private property that may be benefited. As the defendant board of directors declined to make any such assessment, that feature is not involved and those provisions need not be further mentioned. When no assessment is made on private property, the board shall make an assessment upon the several counties and upon the state of California. "Upon the conclusion of such hearing such board of directors shall make an order determining the amount of the benefits, if any, to accrue to each county comprising the district, and to the people residing therein, and to the State of California, and shall make an assessment against said counties and state in proportion to the benefits so to accrue. * * *" St. 1925, p. 438, § 9. Ordinarily, the assessments so made shall be charges on the respective entities so assessed and payable in five annual instalments, but, under certain facts, the payments may be given a longer spread. The annual installments are payable on the 1st of July of each calendar year. The statute contains provisions for the collection of the taxes at the same time and place and by the same officers as the collection of county taxes in general. It is further provided: "At any time after the assessment, either against the state, the several counties or the land within an assessment district has been made, the board of directors of the district may anticipate the payment thereof and may issue 'revenue bonds' against the fund into which shall be paid all sums paid on account of the assessments imposed. * * * The intent of the foregoing provisions is that there shall be available for the payment of the principal and interest of all bonds issued a sum sufficient to pay the same at the time such interest and principal become due, and it shall be the duty of the board of directors to make provision for the payment of all bonds issued and interest thereon prior to their sale and delivery." St. 1925, p. 441, § 21. The statute prescribes the form, denomination, etc., of the bonds. Continuing the statute provides that when the last bond has been paid the district shall be dissolved and the manner of the dissolution.

The first point which the plaintiff makes is that he adopted the proper remedy. The defendants do not dispute the claim except to assert that the plaintiff has no cause of action.

[1] In his second point the plaintiff claims that the bond issue is void because it is prohibited by the provisions of section 18, article 11, of the state Constitution. A state Legislature has such powers, in these matters, as are not prohibited by the Constitution. A bare reading of the section cited shows that it does not contain any prohibitions directed to such an entity as the defendant district. See, also, In re Madera Irrigation District, 92 Cal. 296, 342, 343, 28 P. 272, 675, 14 L. R. A. 755, 27 Am. St. Rep. 106.

[2, 3] In his third point the plaintiff claims that the issuance of bonds can not be justified under the authority of a special assessment district because the proceedings would deprive the plaintiff of his property without due process of law. He quotes many of the provisions of the statute which we have epitomized, and then he cites Gadd v. McGuire, 69 Cal. App. 347, 231 P. 754, and contends that the statute gives him no opportunity to state his objections, gives him no hearing, and operates to deprive him of his property without due process of law. The defendants reply that if the statute provides for due notice and a hearing at some time in the proceedings, the parties interested may not complain. Henshaw v. Foster, 176 Cal. 507, 514, 515, 169 P. 82. They also assert that the plaintiff was represented in the Legislature that enacted the enabling act and he was represented by his supervisor, one of whom acted as a member of the local board which initiated the proceeding, and that he has had all of the notice that the law requires. Gadd v. McGuire, 69 Cal. App. 347, 363, 231 P. 754; Allied Amusement Co. v. Bryam, 201 Cal. 316, 256 P. 1097. Furthermore, the power to build and pay for roads is one of the powers which is vested in the local board of supervisors. Many county roads are built to the county line, there to be met by a road to be built by the adjoining county; however, no taxpayer would claim the right to be given any notice, regarding such construction, different than the notice regarding other road expenditures. Continuing, the defendants claim that joint highway district No. 6 is a quasi-municipal corporation and not an assessment district and therefore no additional notice was necessary. In re Orosi Public Utility District, 196 Cal. 43, 50, 235 P. 1004. With this claim we understand the plaintiff disagrees. He claims the statute is but a subterfuge, that the powers to be exercised are merely those powers which, under general statutes, now rest with the several boards of supervisors, and that the entire statute is but a sham for giving some support to the issuance of the bonds. But we cannot so hold. Let us consider a supposititious set of facts. Let us assume that the total mileage is twenty-five miles; that ten miles lie in the county of A and that the cost of construction is $5,000 per mile; that ten miles lie in the county of B and that the cost of construction is $4,500 per mile; and that five miles lie in the county of C and that the cost of construction is $150,000 per mile; and that if constructed such road would be highly valuable as an outlet to each and every one of said counties. It is clear that, as to the county of C the cost may be prohibitive. However, spreading the cost over three counties the cost may not be prohibitive, and the benefits may greatly outweigh the pro rata costs of construction. Under such facts it is clear that a statute authorizing cooperation is not necessarily a subterfuge. The solution of the doubt, if any, rested with the Legislature and not the courts. In re Madera Irr. Dist., 92 Cal., 296, 309, 310, 28 P. 272, 675, 14 L. R. A. 755, 27 Am. St. Rep. 106.

[4] Finally the plaintiff asserts that the defendant district has no valid existence as a taxing agency and therefore it has no authority to issue bonds based upon a nonexisting taxing power. This is not a proceeding in quo warranto and there are no allegations showing that the defendant district has not complied with every provision of the statute. The point is, therefore, but another claim that the statute is invalid. The plaintiff cites and relies on People v. Van Nuys Lighting District, 173 Cal. 792, 162 P. 97, Ann. Cas. 1918D, 255. The case is not helpful. In that case the court held that the defendant was not authorized to operate beyond the confines of certain towns and villages and that the relator's property did not lie within the confines of such towns and villages. He also quotes from Fallbrook Irrigation Dist. v. Bradley, 164 U. S. 112, 174, 17 S. Ct. 56, 69, 41 L. Ed. 369, showing that after the organization of the Fallbrook district would be completed it would "* * * almost necessarily be followed by, and result in, an easement upon all the lands included within the boundaries of the district." That feature is not

present in the instant case. The statute before us does not necessarily imply that assessments will be levied on individuals and the record discloses that the defendant board has passed a resolution that none will be made. For the purposes of this decision we must assume that said resolution is true and that it was passed and adopted in good faith. When assessments in fact are to be made on private holdings, the statute provides that notice must be given and a hearing must be held to ascertain the amounts of benefits if any.

We find no error in the record. The judgment is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

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111 Cal. App. 565

WILDEY v. SEAVER.

Civ. 6453.

District Court of Appeal, Second District, Division 2, California.

Feb. 4, 1931.

1. Fraud ⚷25.

Misrepresentations without damage do not support cause of action.

2. Fraud ⚷58(1).

Finding that purchaser was not damaged by misrepresentations concerning acreage of land sold, which was of same value, though containing larger acreage, *held* sustained by evidence precluding recovery of damages for misrepresentations.

3. Appeal and error ⚷1011(1).

Findings based on conflicting evidence are conclusive on appellate court.

4. Appeal and error ⚷996.

Where two or more inferences can be made from same evidence, one drawn by trial court must stand on appeal.

Appeal from Superior Court, Los Angeles County; Edward T. Bishop, Judge.

Action by Violet Reid Wildey against Everett H. Seaver. Judgment for defendant, and plaintiff appeals.

Affirmed.

Chapman & Chapman and John S. Frazer, all of Los Angeles, for appellant.

Gibson, Dunn & Crutcher and Norman S. Sterry, all of Los Angeles, for respondent.

ARCHBALD, Justice pro tem.

This is an appeal from a judgment in favor of defendant and against the plaintiff.

Plaintiff brought the action for damages alleged to have been sustained by her due to certain alleged fraudulent representations of the defendant in the exchange of lot 27, tract 3357, referred to at the trial as the Seaver lot, which lot and other real estate and cash were exchanged for certain property belonging to plaintiff. It was alleged in the complaint and found by the trial court that at the time of the exchange and prior thereto the defendant represented to the plaintiff that said lot contained an area of 3 acres, by erecting and maintaining on said lot two signs which stated, "This beautiful 3 acres for sale," and, "For sale this beautiful 3 acres," respectively, and otherwise representing to plaintiff that the area of said lot was 3 acres with a variation of one-sixteenth more or less. The court also found that said representations were not true and that the area of said lot was not in excess of 2.379 acres; that said representations were believed by the defendant and his agent to be true but were made in a manner not warranted or justified by their information; and that they were not made for the purpose of inducing plaintiff to enter into said agreement of exchange. The trial court further found that plaintiff was not damaged by said representations; that she did not rely on them in making the exchange; that she did not accept said lot on a basis of $25,000 per acre; and that said lot would not have been worth any more if it had contained 3 acres instead of 2.379 acres. The plaintiff attacks these latter findings as being wholly unsupported by the evidence.

The evidence shows without contradiction that the exterior boundaries of the lot were in the shape of an irregular horseshoe, and with the exception of the boundary across the heel, the lot was surrounded by Cove way and Summit drive, a hedge clearly marking its exterior boundary, from which the lot arose rather abruptly on all sides to a summit, the building site being on the highest point, with a possible second site on a lower knoll of the summit. The property was restricted to use for residence purposes only and the topography would seem to further restrict it to two, or three such sites at the most. It also appears from the evidence that the area of 2.379 acres was inside the boundaries outlined by the hedge, although the regular lines extending to the middle of the surrounding streets embraced about 2.69 acres. In the deal the plaintiff was exchanging a property known as the Reid studio apartment building for the Seaver lot, a store building in Alhambra, and $20,000 cash. In testifying about a conversation with defendant about the area of the lot, the plaintiff said: "He just said there were three acres." "I don't remember that he said more or less." "Mr. Norton told me there was a possibility of its being a fraction more or less." She further said: "Always he (Mr. Norton) and Mr. Merwin both represented it to me as three acres, at $25,000 an acre, and the conversation going out to the piece was always a 3 acre piece, worth $25,000 an acre; that it was a good buy for me." She further testified that she would not have made the deal if she had known that there were not more than 2.69 acres in the piece. The plaintiff testified in regard to the properties she was offered: "I told Mr. Norton and Mr. Merwin that I liked the Beverly acreage very much and I really thought I could get my price out of it. I was a little doubtful about the Alhambra stores. * * * I thought I would have to take a loss on them. This was before I entered into the deal. That I would check up the Beverly acreage with Mr. Meline * * * and if he said the Beverly Hills acreage was worth $25,000 an acre I would take the deal, because I was reasonably certain that on the Alhambra stores I would have to take a loss, and was willing to take a ten or fifteen thousand dollar loss on the deal and that was all." She further testified: "If anyone had offered me $25,000 an acre, less 1/16, I would have been glad to take it." At the time referred to plaintiff did not know the exact shortage, but did know that there was a possibility that it was 1/16 of an acre short and she was being interrogated about that. So the court could very well have concluded from the testimony of the plaintiff herself that she was only interested in having the Seaver lot stand up to a value of approximately $75,000, regardless of its content and that the $25,000 per acre was all a matter of mathematical calculation based on such value and the supposed content of three acres or a little less. Mr. Norton, who represented the defendant Seaver in the deal, testified: "To the best of my remembrance in submitting this property to Mrs. Wildey I submitted it in the nature of a site rather than acreage. She asked the value of it and then analyzed its value from the point of acreage." As to the value of the property at the time, Mr. Rose (a witness for defendant) testified that the value of the lot at the time was from $75,000 to $80,000. He also said that in the sale of such a property the three main elements that gave it value were the contour of the land, the elevation "from the view point of whether we get an ocean view or a mountain view," and the area contained in it, and also that in this particular property even if the boundaries could be extended so as to make the area three acres that it would not increase either value or the salability of the lot because of the contour of the ground. Other witnesses testified to the same thing. Dr. Edwin Janss fixed the value at the time as $80,000.

[1-4] We have not attempted to quote all the conflicting evidence or all of the evidence which supports the conclusions reached by the trial court, but have quoted sufficient to show not only that there is a conflict in the evidence, but also that there is evidence to support the findings complained of by appellant and to show that even from the testimony of plaintiff herself the court could draw an adverse inference on the question of whether she relied upon the representations complained of in making the exchange or whether or not she accepted the lot on a basis of $25,000 per acre, or as a site of the value of $75,000. The court having come to this latter conclusion and there being evidence to support such value, his finding that there was no damage would seem to be supported, and of course misrepresentations without damage do not support a cause of action. Gaffney v. Graf, 73 Cal. App. 622, 238 P. 1054. Where findings are based on conflicting evidence such as we find here, they are conclusive on the appellate court, and where two or more inferences can be made from the same evidence the one drawn by the trial court must stand on appeal. Wilbur v. Wilbur, 197 Cal. 1, 239 P. 332.

Judgment affirmed.

We concur: CRAIG, Acting P. J.; IRA F. THOMPSON, J.

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111 Cal. App. 192

COUCHMAN v. SNELLING.

Civ. 7460.

District Court of Appeal, First District, Division 1, California.

Jan. 19, 1931.

1. Automobiles ⚷245(80).

Whether motorist, seeing automobile approaching intersection 75 feet away, was contributorily negligent in proceeding to cross, *held* for jury.

Evidence showed that plaintiff was driving west and defendant was driving south, and that northeast corner of intersection, being occupied by apartment house, was admittedly obstructed within California Vehicle Act (St. 1923, p. 553), § 113, as amended by St. 1927, p. 1436, and that plaintiff, traveling about 15 miles an hour when 20 feet from intersection, saw defendant's automobile approaching 75 feet away at about 25 miles an hour. Plaintiff did not again look directly at defendant's automobile, and was about three-quarters of way across intersection when collision occurred.

2. Negligence 🔑136(26).

Contributory negligence is usually question of fact.

3. Negligence 🔑136(9).

Contributory negligence becomes question of law only when evidence will support no other legitimate inference.

4. Negligence 🔑122(1).

Since contributory negligence is affirmative defense, defendant has burden of proof.

5. Automobiles 🔑171(13).

Motorist first entering intersection is entitled to assume he will be given right of way, and be permitted to cross without danger of collision.

6. Automobiles 🔑171(4).

Motorist approaching intersection need not yield right of way to another driver considerable distance away, whose duty it is to slow down in crossing intersection.

7. Appeal and error 🔑1053(2).

Error, if any, in admitting, contrary to statute, motorist's accident report to police, *held* harmless, where it was subsequently stricken and jury instructed to disregard it, and facts contained therein appeared elsewhere in evidence (St. 1923, p. 563, § 142(a), amended by St. 1929, p. 545).

California Vehicle Act (St. 1923, p. 563), § 142(a), as amended by St. 1929, p. 545, requires driver of vehicle involved in accident to make report to police department, but declares that such report shall not be admissible in evidence except to prove a compliance with statute.

8. Appeal and error 🔑1046(5), 1060(1).

Error, if any, where court and plaintiff's counsel commented on defendant's absence, *held* harmless, where defendant subsequently appeared and testified, and court instructed jury that defendant, if she so desired, need not appear.

Appeal from Superior Court, Alameda County; J. D. Murphey, Judge.

Action by Claude F. Couchman against Nettie K. Snelling. From a judgment for plaintiff, and an order denying a motion for a new trial, defendant appeals.

Affirmed.

L. R. Weinmann and James R. Agee, both of Oakland for appellant.

Philip M. Carey, W. I. Follett and Marvin B. Sherwin, all of Oakland, for respondent.

TYLER, P. J.

Action for damages for personal injuries sustained by plaintiff in a collision between two automobiles.

The accident occurred on September 15, 1929, between 11 and 12 o'clock in the morning, at the intersection of Genoa and Aileen streets in the city of Oakland. Genoa street runs approximately north and south, and Aileen street approximately east and west, crossing each other at right angles. Plaintiff was driving west on Aileen street, and defendant was driving south on Genoa street. The northeast corner of the intersection was occupied by an apartment house, and the view of plaintiff and defendant as to each other was admittedly obstructed within the meaning of section 113 of the California Vehicle Act (St. 1923, p. 553, as amended by St. 1927, p. 1436). The complaint charged the defendant with the usual general allegation of negligence. The answer denied the alleged negligence, and further pleaded contributory negligence on the part of plaintiff. The cause was tried by the court with the aid of a jury. A verdict was returned in plaintiff's favor in the sum of $5,000, and judgment was rendered accordingly. Motion for a new trial was made and denied.

[1] This is an appeal from the judgment and order. Appellant urges several contentions for a reversal. He claims that plaintiff was guilty of contributory negligence as a matter of law; that the trial court erred in the admission of evidence and committed prejudicial error by making certain remarks in the presence of the jury; that counsel for plaintiff was likewise guilty of prejudicial error by repeatedly attempting to place before the jury the fact that defendant was driving without an operator's license. It appeared in evidence that plaintiff at the time of the accident was traveling at a speed estimated at fifteen miles an hour. According to his testimony, when he was about twenty feet distant from the intersection of the streets, he observed defendant's car approaching said intersection some seventy-five feet away proceeding at a speed of twenty-five miles an hour. Believing he had time to pass the intersection without danger of a collision, he proceeded across the same without again directly looking at defendant's automobile except that he kept it in his side vision; that beyond this he did nothing to avoid a collision. When approximately three-quarters of the way across the intersection, his car was struck on the right rear wheel and overturned by defendant's automobile. Other evidence was to the effect that defendant had applied her brakes, and there was testimony to show that she had stated that she had on high-heeled shoes and would never wear them again because she knew her foot had slipped off the

brake. Further recital of the evidence is unnecessary, as we are of the opinion that it sufficiently appears from what we have said that plaintiff was not guilty of contributory negligence as a matter of law, but the question was one of fact to be determined by the jury.

[2-4] The circumstances under which a court can declare that certain acts constitute contributory negligence as a matter of law are rare. Swartz v. Acme Express & Drayage Co., 102 Cal. App. 615, 283 P. 358. It can seldom happen that the question is so clear from doubt that the court can undertake to say as a matter of law that the jury could not fairly and honestly find for the plaintiff. Schierhold v. N. B. & M. R. Co., 40 Cal. 447, 453. The question is usually one of fact and becomes a question of law only when the evidence is of such a character that it will support no other legitimate inference. Zibbell v. Southern Pacific Co., 160 Cal. 237, 116 P. 513. Contributory negligence being an affirmative defense, the burden of proving it is on the defendant. It is necessary, therefore, for him to show that the acts of plaintiff failed to meet some standard of prudence in order to take the issue from the jury as a question of law alone.

[5, 6] Where a car has actually entered an intersection before the other approaches it, the driver of the first car has the right to assume that he will be given the right of way and be permitted to pass through the intersection without danger of collision. He has a right to assume that the driver of the other car will obey the law, slow down, and yield the right of way, if slowing down be necessary to prevent a collision. Keyes v. Hawley, 100 Cal. App. 53, 60, 279 P. 674. Nor is a plaintiff required to yield the right of way to one a considerable distance away whose duty it is to slow down in crossing an intersection. Whitelaw v. McGilliard, 179 Cal. 349, 176 P. 679. Whether or not, therefore, plaintiff, after observing the approach of defendant's car, its position, and the rate of speed it was traveling, and keeping the same within his side vision, was justified in proceeding upon his rightful way across the intersection in advance of defendant presents a question upon which reasonable minds might differ, and was therefore one for the jury to determine. Johnson v. Southern Pacific Railroad Co., 154 Cal. 285, 295, 97 P. 520; Kienlen v. Holt (Cal. App.) 288 P. 866; Palmer v. Schultz (Cal. App.) 290 P. 79.

[7] Appellant next complains of the action of the trial court in permitting in evidence a report of the accident made to the police department by defendant in violation of the provisions of section 142(a) of the California Vehicle Act, as amended by St. 1929, p. 545. That section provides: "The driver of any vehicle involved in any accident resulting in injuries or death to any person, shall within twenty-four hours forward a report of such accident to the division, except that when such accident occurs within an incorporated city such report shall be made within twenty-four hours to the police department of such city. * * * Such report shall be without prejudice, shall be for the information of the division and the fact that such reports have been so made shall be admissible in evidence solely to prove a compliance with this section, but no such report or any part thereof shall be admissible in evidence for any other purpose in any trial, civil or criminal, arising out of such accident."

During the trial the police officer to whom defendant made her report was called by plaintiff as a witness. He testified over objection that defendant reported that she met with the accident above referred to, and that plaintiff was injured; that she took him to a hospital and left him there for treatment. He further testified that she had stated she was a student driver and had no operator's card. This in substance was the entire testimony given by the witness.

Respondent, in answer to the contention that the admission of this evidence constituted error, claims that the statute barring such evidence is invalid as being violative of section 24, article 4, of the California Constitution, because the subject embraced in said section is not expressed in its title. He further claims that, even if the attempt to alter rules of evidence under the provisions of the Motor Vehicle Act be considered valid, no prejudicial error was committed in the admission of the evidence, for the reason that it was subsequently stricken from the record by the order of the court, and the jury was instructed to disregard it and not to give any consideration or weight whatever to it. We are of a like opinion. Considering the nature of the evidence, the error, if any, was cured by the act of the court, and it affords no valid ground for reversing the judgment. It simply contained evidence of the fact that an accident had occurred and that defendant was a student driver operating without a license. The fact that she was inexperienced and had no license appeared elsewhere in evidence.

[8] Appellant next complains of the action of the attorney for plaintiff and the court in making certain reference to the absence of defendant at the commencement of the trial. Defendant subsequently appeared and testified, so that any impression her absence might have had upon the jury that she was hiding to avoid testifying was dispelled. Moreover, the court instructed the jury that there was no legal duty on the part of the defendant to voluntarily appear in court and present herself, nor was there any legal obligation on her

attorney to produce her in court at the trial of the case. Under these circumstances the error, if any, was harmless.

From what we have said, it follows that the judgment and order should be, and they are hereby, affirmed.

We concur: KNIGHT, J.; CASHIN, J.

In re TROY'S ESTATE.*

Civ. 7559.

District Court of Appeal, Second District, Division 1, California.

Jan. 29, 1931.

Rehearing Denied Feb. 25, 1931. Hearing Granted by Supreme Court March 30, 1931.

Wills ⚷473.

Trust provisions illegally suspending power to alienate trust estate *held* not severable from valid provisions, where omission of illegal provisions would leave trust plan incomplete (Civ. Code, §§ 715, 716, 1317, 1326).

Testator devised residuum of estate in trust with direction to pay income to surviving wife during her lifetime, and trust provisions which were admittedly in violation of law were to effect that trustees, after wife's death, should retain in trust shares not distributed, as provided in another paragraph, and expend so much of net income as trustees in their uncontrolled discretion should deem best for maintenance, support, and education of children or issue of any child of testator then deceased until such child or all of issue of any child of testator then deceased should reach the age of twenty-one, when they should receive shares free from all trusts.

Appeal from Superior Court, Los Angeles County; William Hazlett, Judge.

In the matter of the estate of John James Troy, deceased. David H. Howie and others, executors of the last will and testament of John James Troy, filed final account and report, and Helen Troy, individually and as guardian of the person and estate of James Storrow Troy, a minor, filed exceptions to the account, and to the distribution of the estate as prayed for. From that portion of the judgment ordering estate distributed under the intestacy laws, separate appeals were perfected by Helen Troy and others, as executors, David H. Howie and another, as trustees, and by the Trustees of Dartmouth College, a residuary legatee under the will.

Affirmed.

Lawler & Degnan, of Los Angeles, for appellants executors and trustees.

Seiler & Seiler, of Long Beach, for appellants Trustees of Dartmouth College.

Farrand & Slosson, of Los Angeles, for respondent.

YORK, J.

This is an appeal from that portion of the judgment of the superior court which ordered the estate of said decedent distributed under the intestacy laws of this state. Separate appeals have been perfected by Helen Troy, David H. Howie, and V. H. Rossetti, as executors, David H. Howie and V. H. Rossetti, as trustees, and the Trustees of Dartmouth College.

John James Troy died in the city of Boston on the 17th day of October, 1927. He left surviving him his widow, Helen Troy, and an infant son, James Storrow Troy. In his last will and testament, bearing date of November 6, 1924, he appointed his wife, Helen Troy, David H. Howie, and V. H. Rossetti, as executors. To administer the trusts, provided for in the will, he nominated David H. Howie and V. H. Rossetti as trustees. The Trustees of Dartmouth College were included among the beneficiaries of a testamentary trust.

The will was admitted to probate in Los Angeles county on the 23d day of November, 1927. The executors qualified and fully administered the estate down to the point of distribution. The final account and report of the executors was filed on the 10th day of April, 1929. Prior to the hearing thereon, Helen Troy, individually, and as guardian of James Storrow Troy, a minor, filed exceptions to the account and to the distribution of the estate as prayed for. In excepting to distribution, Helen Troy, individually and as guardian, contended that the trust provisions of the will were void as suspending illegally the power to alien the trust estate.

At the hearing the final account of the executors was settled and confirmed, but exceptions to distribution were allowed, and the estate was directed to be distributed under the intestacy laws of this state.

After the provisions in the will directing payment of his debts and funeral expenses, the testator made two specific legacies which are here in controversy. The residuum of his estate he devised in trust as follows:

"Third: All the rest, residue and remainder of the property of every nature and description which may belong to me at my death I give, devise and bequeath to the trustees hereinafter named, in trust, to have and to hold to them and their successors in trust for the following purposes:

"(a) If my wife survive me, to pay to her, at least as often as semiannually, the entire

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Hearing granted 3 P.2d 930.

net income of the trust fund during her lifetime.

"(b) On the death of my wife, or upon my death, if my said wife shall not survive me, if there are children of mine then living or then deceased leaving issue then living, to divide the trust property into as many equal shares as there are children of mine then living and then deceased leaving issue then living, the issue of any deceased child of mine to stand in the place of such deceased child by right of representation.

"(c) If at that time any child of mine shall have reached the age of twenty-one (21), to pay over to such child one of such shares free from all trusts. If at that time all the issue of a child of mine then deceased shall have reached the age of twenty-one (21), to pay over to such issue in equal shares one of such shares.

"(d) To retain the shares not so distributed in trust, and to expend all or so much of the net income of each of such shares as the trustees in their uncontrolled discretion shall deem best for the comfortable maintenance, support and education of each of such children or the issue of any child of mine then deceased until such child or all of the issue of any child of mine then deceased shall reach the age of twenty-one (21). When and as any child of mine shall reach the age of twenty-one (21), and when and as all of the issue of any child of mine then deceased leaving issue shall have reached the age of twenty-one (21), to pay over to such child or the issue of any child of mine then deceased leaving issue one of such shares free from all trusts.

"(e) If any child of mine surviving both my wife and me shall die before reaching the age of twenty-one (21) leaving issue, the issue of such child shall take the share such child would have taken if such child had reached the age of twenty-one (21). If any child of mine surviving both my wife and me shall die before reaching the age of twenty-one (21) leaving no issue then surviving, the share such child would have taken if he had reached the age of twenty-one (21) shall be distributed in equal shares among the children of mine then living or then deceased leaving issue, such issue to take in equal shares by right of representation.

"(f) Upon the death of my wife or upon my death, if my wife shall not survive me, if there are no children of mine then living or then deceased leaving issue then living, to pay over to David H. Howie, of Cambridge, Massachusetts, if he be then living, two-thirds of the trust property then held by them free from all trusts, and to pay over to the Trustees of Dartmouth College located at Hanover, New Hampshire, the remaining one-third of the trust property, or if said David H. Howie be then not living, all of the trust property then held by them free from all trusts, to be held by said Trustees of Dartmouth College as a separate fund to be known as the 'John J. Troy Fund.' I place no restriction upon the use which the said Trustees shall make of said fund, but it is my wish that if the income or any part of the principal thereof shall not, in the opinion of said Trustees, be required for other and better uses, the income thereof shall be used to aid needy and worthy students in college who may apply therefor or for scholarship aid generally. It is my wish, although I do not express this as a restriction, that the income be used in aid of needy and worthy students without regard to their scholastic standing provided the Trustees believe the applicant is of good moral character and is making a conscientious effort to avail himself of all the privileges and opportunities afforded him by the College."

It is contended by the respondent that the trust provisions contained in said will are not severable, and that they violate the provisions of sections 715 and 716 of the Civil Code, as construed by the Supreme Court of this state in the Estate of Whitney, 176 Cal. 12, 167 P. 399; Estate of Van Wyck, 185 Cal. 49, 196 P. 50; and Estate of Maltman, 195 Cal. 643, 234 P. 898. The appellants admit the illegality of the provisions of subdivision (d) of paragraph third of said will, but seek to avoid present intestacy on the ground that such illegality is merely a contingent illegality, contingent on James Storrow Troy predeceasing his mother, leaving issue. They also contend that the illegal provisions are severable, and that the court can construe the trust in accordance with the remaining provisions thereof, and that the trust thus provided will be in accordance with the law, as construed in the cases hereinabove mentioned, and, in addition thereto, in conformity with sections 1317 and 1326 of the Civil Code; Estate of Cavarly, 119 Cal. 406, 51 P. 629; Estate of Walkerly, 108 Cal. 627, 41 P. 772, 49 Am. St. Rep. 97; Estate of Phelps, 182 Cal. 752, 763, 190 P. 17; Estate of Pichoir, 139 Cal. 682, 686, 73 P. 606; Nellis v. Rickard, 133 Cal. 617, 66 P. 32, 85 Am. St. Rep. 227.

It is the opinion of this court that the said invalid conditions of the trust are not severable from the others, and that, if the said provisions which are admittedly in violation of the laws of this state should be omitted, it would so affect the entire plan of the trust that the trust as contemplated by the testator would be left incomplete. To hold otherwise would be to make by decree a trust not created by the testator.

The entire trust was evidently drawn with the idea that the deceased might live a long time after the execution thereof, and that possibly he would leave several children and grandchildren. As a matter of fact, at the time of the hearing for final distribution, his only child was then of the age of 5 years, and the trust provisions of the will clearly provide that, in case of the death of said child before said child is 21 years old, and before the death of the child's mother, if the child leave issue, the entire estate, except the income thereof, shall be held and cannot be distributed until all of such children shall have reached the age of 21 years. Also it provided in said trust that, in case of the death of said mother and of said son during his minority, leaving issue, the whole estate is to be held in trust and cannot be distributed until the youngest child of such named son shall reach the age of 21 years.

Under the authority of the Code provisions and cases herein cited as being relied upon by respondent and petitioner, we think that the decree is correct.

The said order and decree are affirmed.

We concur: CONREY, P. J.; HOUSER, J.

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111 Cal. App. 582

UNITED SECURITY BANK & TRUST CO. v. HADEN et al.

Civ. 6457.

District Court of Appeal, Second District, Division 2, California.

Feb. 5, 1931.

1. Appeal and error 🔑907(3).

Where appeal was on judgment roll alone, court assumed evidence supported findings and judgment.

2. Mortgages 🔑578.

In action against grantee for deficiency judgment, error, if any, in introduction of trustor's certificate of discharge in bankruptcy, *held* not prejudicial.

There was no prejudicial error, since error, if committed, could not have altered grantee's status.

3. Mortgages 🔑559(4).

Where on purchase of property, grantee agreed with trustor to assume indebtedness, that trustees conveying to grantee had not assumed indebtedness *held* immaterial in action against grantee for deficiency judgment.

Appeal from Superior Court, Los Angeles County; Louis P. Russill, Judge.

Action of the United Security Bank & Trust Company against H. T. Haden, Peters-Rhoades Company, and others. Judgment for plaintiff, and the last-named defendant appeals.

Affirmed.

Tanner, Odell & Taft, of Los Angeles, for appellant.

Everts, Ewing, Wild & Everts and A. W. Carlson, all of Fresno, for respondent.

CRAIG, J.

The defendant Peters-Rhoades Company, a corporation, appeals from a judgment in favor of the plaintiff for a balance alleged to have been due upon a promissory note secured by deed of trust, after foreclosure and sale of the real property, and application of the proceeds toward payment of the indebtedness.

It appears from the complaint that the defendants Haden were in 1919 the owners of certain realty which they deeded in trust to two named trustees as security for the payment of their promissory note to the bank in the sum of $64,000. Said note was dated September 16, 1919, was payable on November 1, 1924, and recited, in part: "* * * And in default of the payment of the interest aforesaid, or any instalment thereof, then the whole note may at the option of the holder, and without notice to the makers, become due and payable, and may be treated as collectible. * * * If this note is not paid at maturity, it is hereby renewed from year to year, at the option of the holder, until paid, and during such year the makers shall not have the right to pay the same unless by consent of holder."

The plaintiff alleged that thereafter the debtors conveyed all of their right, title, and interest in said property to their children, in trust nevertheless, and retaining full dominion and control thereof; that subsequently thereto, and at the special instance and request of the owners and for their benefit, said children deeded the same to the appellant; that in these latter deeds "it was provided that the said grantee * * * should and would assume a personal liability to pay the indebtedness against the property as evidenced by the * * * note * * * and the said grantee Peters-Rhoades Company did accept said instrument of conveyance subject to said obligation, and did thereupon and thereby assume and agree to personally pay the full amount of said indebtedness, both principal and interest."

Further allegations, briefly stated, aver that the Hadens failed and neglected to pay the interest due on November 1, 1924, and the principal due on said date, because of which the plaintiff, owner of the note, made due application to the surviving trustee for a sale of the premises, and caused notices of default to be recorded, all in accordance with the terms of the deed of trust; that thereafter said trustee published in a newspaper of general circulation in the proper town and county, and posted in three public places and on the property, notices of the time and place of sale; that at such time and place the property was offered at public auction to the highest bidder, and was sold to the plaintiff for the sum of $40,000; that, after payment of certain costs and expenses which are specifically enumerated, there remained a balance of $24,040, which was delivered to the payee of the note on account, leaving a balance of $39,060 due and unpaid.

Following the trial, and upon the evidence adduced, the trial court made its findings of fact wherein it was recited that the denials of the defendants upon each of said issues were untrue, and the allegations of the complaint were therein restated, and found to have been true. The court found that the sale of said property was fairly and regularly conducted by the trustee, in the manner provided by law, and in accordance with the provisions of the deed of trust, and that due notice of the sale was properly and legally given by publication and posting. Upon the special defenses interposed by the defendants, it was found that it was not true that the appellant agreed with the Hadens to purchase the property merely subject to the trust indebtedness, but that it agreed to assume and to pay the same; and that the provision therefor in the deeds of conveyance was inserted therein with its knowledge and consent; that the deeds were accepted by appellant, were inspected, and were recorded with its knowledge, consent, and approval; that the indebtedness had not been discharged; that on May 14, 1928, H. T. Haden was duly adjudicated a bankrupt, had been discharged therein; and that said discharge was filed in this action.

[1] Appellant's attack upon the judgment is clothed in technicalities which, when reduced to their last analysis, plainly render them suitable only for the cognizance of a trial court rather than of such character as to present grounds for relief upon appeal. This appeal is upon the judgment roll alone. The first group of asserted errors consists of complaints as to a failure to comply with assumed formalities prior to commencement of this action which the record may have fully refuted. None of the evidence is before us. We must therefore assume that it was sufficient to warrant findings of fact and the judgment as rendered. It nowhere appears, nor does appellant contend, that the payee of the note extended the time for payment "from year to year," that demand upon appellant was requisite to a legal foreclosure of the deed of trust, or that the "notice of default" did not contain all of the elements necessary to such a proceeding; it does not appear that the deed of trust was not in the usual form, empowering either or both of the trustees to enforce it and to dispose of the proceeds of sale as alleged in the complaint; nor does it appear that the deed to the Haden children as trustees was invalid, nor that it was their intent or duty, acting in the capacity of trustees, to assume any indebtedness, or that their trusteeship was of a secret character which could or did prejudice the rights of appellant, their vendee, who assumed the indebtedness. It is argued that the deed of trust was not attached to the complaint, and that appellant does "not know whether it was really a deed of trust or a mortgage or whether it contained power of sale." These and other particulars are assigned as reasons for a mere suspicion that the trustee's sale prior to the institution of this action for a deficiency may have been invalid, because, it is said, the complaint did not contain allegations that the necessities above mentioned did exist and that they had been observed to a technical nicety. But no demurrer was filed, the pleadings were accepted as sufficient, and, "the evidence being completed on said 8th day of May, 1928, and from the evidence introduced, both oral and documentary, the court finds" that said sale was fair and regular as provided by law and in accordance with the provisions of the deed of trust which appellant had assumed to pay and satisfy. That an action may be maintained for an unpaid balance after sale of trust property is unquestioned. The defendants presented the issue as to regularity of the sale by their pleadings, and in this and other respects the trial court found adversely to their contentions upon the evidence before it. It is not denied that the amount of such balance was correctly computed. Hence no error can be said to appear within the purview of this appeal for correction. Herbert Kraft Co. v. Bryan, 140 Cal. 73, 73 P. 745.

[2] Notwithstanding appellant's agreement with Haden to assume and satisfy the indebtedness in controversy, it is objected that a certified copy of the latter's discharge in bankruptcy was erroneously received and made the basis of a finding after the trial was concluded, "and hence there is a conclusion of law that the judgment was not enforceable against him." We are not advised, nor is it apparent to us, that such error, if committed, could have altered appellant's status, since the contractual benefits and obligations of the parties were matters over which the trial court had no control.

[3] Finally, it is contended that the findings do not support the judgment, for the reason that Haden's children as trustees and mesne conveyancers assumed no liability under the deed of trust, and that appellant was not alleged or found to have agreed with Haden so to do. It does appear by direct allegation that said children, acting merely as trustees for and on behalf of Haden, and at his special instance and for his benefit, re-

ceived and conveyed to Peters-Rhoades Company all of the right, title, and interest of the owner and vendor. It further appears by unmistakable terms in the eleventh finding of the trial court that "Peters-Rhoades Company agreed with the defendants Haden [the original owners] in connection with the purchase of said real property to assume and pay the said indebtedness against said property represented by said promissory note." This being true, the allegation or proof of the duties or obligations of the vendors' agents became immaterial. In the absence of reversible error, asserted inequitable factors in personal transactions of the parties do not lie within the curative province of an appellate tribunal, as suggested by the appellant.

The judgment is affirmed.

We concur: WORKS, P. J.; IRA F. THOMPSON, J.

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111 Cal. App. 562

SATURDAY MORNING MUSICAL CLUB v. VIAULT.

Civ. 6361.

District Court of Appeal, Second District, Division 1, California.

Feb. 4, 1931.

Rehearing Denied Feb. 20, 1931. Hearing Denied by Supreme Court April 2, 1931.

Clubs ⚷6.

Subscription to stock in musical club "building fund," naming no payee nor showing purchase of stock in club itself, *held* unenforceable, absent allegations warranting reformation.

> Subscription agreement, as written, was unenforceable by musical club, which was a corporation, since contract, as written, contained no agreement to pay to such club and did not show purchase of shares of stock in such corporation or in any corporation or association; contract calling for "stock in * * * Musical Club Building Fund."

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by the Saturday Morning Musical Club against Max Viault. From a judgment dismissing the action, plaintiff appeals.

Affirmed.

Kingan & Darnell, of Tucson, Ariz., and Young & Young, of Los Angeles, for appellant.

Stick, Moerdyke, Gibson & Untereiner, of Los Angeles, for respondent.

YORK, J.

The plaintiff brought action for judgment on the following subscription agreement:

"Tucson, Arizona, July 12, 1922.

"I agree to pay one thousand Dollars for 200 shares of the stock in the Saturday Morning Musical Club Building Fund at $5.00 per share, to be paid when building is started. First payment $———, the balance to be paid before January 1, 1923.

"Address:
"236 South Scott. Max Viault."

General and special demurrers to the complaint and amended complaint were sustained, and upon motion for judgment on the pleadings made by defendant, the action was dismissed by the court. Plaintiff prosecutes this appeal from such judgment of dismissal.

Defendant's agreement is for stock in the Saturday Morning Musical Club building fund, and not for stock of the Saturday Morning Musical Club, a corporation, the entity seeking to enforce the agreement. Without any pleading alleging the assignment of the interest of the said building fund to the Saturday Morning Musical Club, a corporation, we are of the opinion that the demurrers were properly sustained and said cause properly dismissed. There is no allegation in the pleadings showing whether or not the said building fund was ever incorporated. It may have been incorporated and merged with the plaintiff, but there is no such allegation.

The judgment of dismissal is affirmed.

Concurring Opinion.

CONREY, P. J.

I concur in the judgment. The alleged contract, as signed by the defendant, fails to name any payee to whom the promised money was to be paid. If, in fact, it was the intention of the parties that the payments should be made to the plaintiff, and if the shares of stock purchased were shares of the plaintiff corporation, and if it was the intention of the parties that these terms should be contained in the written agreement, and if by mutual mistake, said terms of agreement were omitted from the writing, the plaintiff by appropriate allegations might have laid a foundation for a decree reforming the contract, so as to make it capable of enforcement. But this was not done. The action is to recover upon the contract as written. Since the contract, as written, contains no agreement to pay to the plaintiff, and does not show a purchase of shares of stock in plaintiff corporation or in any corporation or association, it is not an enforceable contract. Moreover, in relation to these same matters, the complaint was uncertain in several particulars which were covered by the demurrer. I therefore agree that there was no error in the order sustaining the demurrer to the amended complaint, and that plaintiff having failed to further amend within the time allowed by the court, or at all, the judgment should be affirmed.

I concur: HOUSER, J.

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111 Cal. App. 603

SEWARD v. A. C. GAGE CO.

Civ. 7738.

District Court of Appeal, First District, Division 2, California.

Feb. 6, 1931.

Brokers ⚷60.

Although sale was never completed, broker *held* entitled to commission promised by written authorization, and by escrow contract between owner and purchaser.

Appeal from Superior Court, Los Angeles County; Dailey S. Stafford, Judge.

Action by G. H. Seward against the A. C. Gage Company. Judgment for plaintiff, and defendant appeals.

Affirmed.

James W. Bell, of Los Angeles, for appellant.

L. G. Shelton, of Glendora, and O. T. Gilbank, of Los Angeles, for respondent.

SPENCE, J.

This action was brought to recover a real estate broker's commission. From a judgment in favor of plaintiff, defendant appeals.

The court found that defendant had executed a written listing and authorization for the sale of the property and agreed therein to pay a commission to plaintiff; that plaintiff procured a purchaser ready, able, and willing to purchase the property on the terms set forth; that said purchaser and defendant had entered into a binding written escrow contract and thereupon awarded judgment in favor of plaintiff for the amount of the commission agreed upon.

The transaction was somewhat involved. It contemplated the sale of fifty-seven lots for building purposes for the total consideration of $91,280. In payment for the property, the purchaser was to execute in favor of defendant 28 deeds of trust on 28 lots subject to a first mortgage on each lot not exceeding 50 per cent. of the purchase price of the lot, cost of house, and financing. The various details of the transaction were set forth in the escrow instructions signed by defendant and the purchaser, and these details were also outlined in the original listing with plaintiff. This written listing and authorization signed by defendant provided "cash commission to you 5%. Amount $4,560.00 which we agree to pay you." The escrow instructions signed by defendant directed the escrow holder to pay such commission to plaintiff.

Appellant contends that the escrow instructions signed by appellant and the purchaser did not constitute a contract and that the commission did not become due to respondent as the sale was never completed. An examination of the escrow instructions signed by appellant and the purchaser convinces us that these escrow instructions did constitute a contract between the parties and that the respondent is entitled to his commission even though the sale was not completed. White v. Reskin, 90 Cal. App. 512, 265 P. 1016; Tuso v. Green, 194 Cal. 574, 229 P. 327; Thoroman v. David, 199 Cal. 286, 249 P. 513; Wood & Tatum v. Basler, 37 Cal. App. 381, 173 P. 1109; Carrington v. Smithers, 26 Cal. App. 460, 147 P. 225.

Appellant concedes that as a general rule a broker is entitled to his commission when he has produced a purchaser who is ready, able, and willing to purchase the property on the terms prescribed, but further contends that this case falls within an exception to this general rule, citing Houghton v. Keuhnrich, 46 Cal. App. 469, 189 P. 457; Stewart v. Bowie, 43 Cal. App. 751, 185 P. 868, and Lind v. Huene, 205 Cal. 569, 271 P. 1087. These cases do not sustain appellant's position and much that is said in the opinions is more favorable to respondent than to appellant. In the present case the agreement to pay a commission was not found solely in the contract between appellant and the purchaser. The written authorization to respondent previously executed by appellant contained the agreement to pay the commission to respondent as hereinabove set forth.

In our opinion the evidence supported the findings, and the trial court correctly concluded that respondent was entitled to judgment for the agreed amount.

The judgment is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

111 Cal. App. 470

WESTERN LANDS CO. v. HESSE et al.

Civ. 7743.

District Court of Appeal, First District,
Division 2, California.
Feb. 2, 1931.

Appeal and error ⚷1011(1).

Judgment on conflicting evidence may not be disturbed.

Appeal from Superior Court, Los Angeles County; George H. Thompson, Judge.

Action by the Western Lands Company against Arthur T. Hesse and another. Judgment for plaintiff, and defendants appeal. Affirmed.

Hare & Walden, of Los Angeles, for appellants.

Oliver O. Clark, of Los Angeles, and Loris V. Cady, of Santa Monica, for respondent.

STURTEVANT, J.

As the assignee of Oliver O. Clark, the plaintiff commenced an action against the defendants to recover a sum alleged to be due and unpaid for services as an attorney at law. The defendants answered, and a trial was had before the trial court sitting without a jury. The court made findings in favor of the plaintiff, and, from a judgment entered thereon, the defendants have appealed and have brought up typewritten transcripts. The appellants make one point. They claim that there was no evidence that $2,818.77, the amount contained in the judgment, was due, or that any larger sum than $318.77 was due. About the time that Mr. Clark was employed by the defendants, the latter were involved in a large amount of litigation. There were nine or more actions pending. McBryde & Wix had been acting as attorneys for the defendants. Thereafter the defendants asked Mr. Clark to associate himself with McBryde & Wix in conducting the litigation. One of the cases, entitled Hesse v. Mayell, was about to be tried. Mr. Clark proceeded to confer with McBryde & Wix and thereafter to present the defendants' case. On February 28, 1925, Mr. Clark presented to the defendants a bill for fees in the sum of $5,000. At the same time he delivered to the defendants a letter stating that he had arranged to take care of the fees of McBryde & Wix. On April 3, 1925, he rendered another bill in which the charge was stated at $7,500. The defendants earnestly contend that the latter bill was padded at defendants' request, and that it was never the intention of the attorneys nor of the client that it should be enforced as it was padded. Replying to this contention, the plaintiff does not contend to the contrary, but proceeds to show that the bill first mentioned was authentic in all respects, and that, after that bill was rendered, the plaintiff's assignor rendered many other services of great value in the other actions which were pending, and that his entire claim included the charge made in the case of Hesse v. Mayell, and his charge for additional services rendered in the other actions. These respective contentions were placed before the trial court. Mr. Clark was called as a witness and was examined and cross-examined at length. Conceding that there was some evidence to support the contention of the defendants, it must likewise be conceded that there was considerable evidence to support the contention of the plaintiff. The defendants state that they "are not unmindful of the rule of this court in regard to disturbing a judgment based on conflicting evidence, but we maintain that this is not such a case of a conflict of evidence." We think it needs no further comment than to state that the contention of the defendants just recited is not well founded.

The judgment is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

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111 Cal. App. 569

GRIFFIN et ux. v. KENT.

Civ. 7737.

District Court of Appeal, First District,
Division 2, California.
Feb. 5, 1931.

Rehearing Denied March 7, 1931. Hearing Denied by Supreme Court April 6, 1931.

Mines and minerals ⚷79(1).

Lessors electing not to rescind oil lease for failure to drill were entitled to rentals specified therein (Civ. Code, §§ 1636, 1638, 1641).

> The lease provided for payment of monthly sum by lessees in case no well was commenced within six months from date until such time as well should be commenced, and, although it also provided that in no event should commencement be deferred for period of more than two years, there was no clause to effect that under certain circumstances lease was to be null and void, nor that either party was to incur a forfeiture.

Appeal from Superior Court, Los Angeles County; Henry M. Willis, Judge.

Action by C. W. Griffin and wife against A. H. Kent. Judgment for plaintiff, and defendant appeals.

Affirmed.

See, also, 206 Cal. 263, 274 P. 56.

John B. Haas and John D. Howe, both of Los Angeles, for appellant.

Knight & Goddard and P. H. Goddard, all of Long Beach, for respondents.

STURTEVANT, J.

The plaintiffs commenced an action against the defendant to recover moneys alleged to be due on an oil lease. The defendant answered, and, from a judgment in favor of the plaintiff, the defendant has appealed. In their complaint the plaintiffs pleaded the lease in hæc verba, and further alleged that certain rentals had accrued and had not been paid. In their answer the plaintiffs made certain denials, but pleaded no affirmative matter.

By way of introduction, the plaintiffs call to our attention certain rules governing the construction of written instruments by the court. Civ. Code, §§ 1636, 1638, and 1641. The plaintiffs do not contend that the rules referred to are not sound, but they do contend that in the instant case they have no application. The defendant also contends that the provisions of the contract favorable to one of the parties should be considered as having been inserted and worded by him, and that, in the event any one of such provisions is ambiguous, it should be construed against him. 13 Cor. Jur. 546. In reply, the plaintiffs call to our attention the testimony of the defendant, which was to the effect that he and his associate, Mr. Wall, drew the instrument. The lease, among other things, contained the following provisions:

"Witnesseth: That the said lessors * * * do * * * grant, convey, lease, demise and let unto the said lessee, for the sole and only purpose of mining and operating for oil and gas, and the laying of pipe-lines and building tanks, stations and structures thereon to produce, save and take care of said products, all that tract of land. * * *

"It is Agreed that this lease shall remain in force for a term of five years from date, and as long thereafter as oil and gas, or either of them, is produced upon said land in paying quantities, by said lessee or his assigns. In consideration of the premises the said lessee covenants and agrees as follows:

"1. To deliver to the credit of the lessors (a royalty of ⅛) * * *

"2. If no well be commenced upon the above described land within six months from this date lessee agrees to pay the sum of One Hundred Dollars ($100.00) per month until said well shall be commenced, at which time the $100.00 per month payment ceases, provided the operations are continued faithfully and diligently until well has been drilled to a depth of 3000 feet unless oil or gas is found at a lesser depth, in paying quantities, but in no event shall the commencement be deferred for a period of more than two years."

It does not in any place contain a clause to the effect that, under certain circumstances, it is to be null and void, nor that under certain circumstances either party is to incur a forfeiture, nor does it contain the word "condition" or synonym of that word. The lease was dated May 23, 1921. No drilling whatever was done or attempted. It was not disputed that, commencing November 23, 1921, and continuously thereafter, the defendant paid the stipulated rental each month until February 24, 1924. Neither was it disputed that from that date until May 24, 1926, the defendant had paid no rental. The plaintiffs never attempted to rescind. The trial court awarded judgment for that unpaid rental and interest. The defendant claims that, under the terms of the lease, he had already paid more rental than he was bound to pay, and that no judgment should have been rendered against him. This conclusion is based on the following reasoning: The defendant says it is plain that he obligated himself to drill a well in six months. If he did not do so, then he was bound to pay $100 per month until he commenced drilling. However, he asserts that it was provided in the lease that "in no event shall the commencement (of drilling) be deferred for a period of more than two years." He says the quoted lease was a prohibition against his entry to drill. He further says that the prohibition ipso facto terminated the lease at the end of the period of two years, and he concludes with the statement that, the lease being ended, no obligation rested on him to pay a rental during the remainder of the term. He cites no authority to sustain this contention. In argument, he claims that leases of doubtful duration will be construed favorably to the tenant. 35 Cor. Jur. 974. But here there is no doubt. He claims that, whatever the term, it may be subject to a condition. Elliott on Contracts, vol. 5, p. 651; Thornton, Oil and Gas, vol. 1, p. 171. But, as we have shown above, the lease between the parties contained no condition. It might be added that, if doubtful language was contained in the lease, such doubtful language would be construed as a covenant and not as a condition. Cullen v. Sprigg, 83 Cal. 56, 64, 23 P. 222. Plaintiffs cite and rely on Allen v. Narver, 178 Cal. 202, 172 P. 980, 981. While that case is not parallel in all of its facts with the case at bar, we think it is controlling. In that case a similar contention was made. The court said: "As said by the court in discussing a like contention in Woodland Oil Co. v. Crawford, 55 Ohio St. 161, 44 N. E. 1093, 34 L. R. A. 62, where a great number of cases in support of the proposition are cited: 'A promise to drill a well cannot be satisfied by a failure to drill such well. The proper construction to be placed upon such an agreement is, that upon failure of the lessee to drill a well, or pay the rental, * * * the lessor may elect to put an end to the lease, * * * or he may elect to have the lease continue in force to the end of the term, and enforce * * * the payment of rentals, as provided in the lease.'" In the instant case the plaintiffs did not rescind, but they kept the contract alive and sued thereon.

We find no error in the record. The judgment is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

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111 Cal. App. 515

SHARP v. PAULSON et al.

Civ. 4009.

District Court of Appeal, Third District, California.

Feb. 3, 1931.

1. Judgment ⚷153(5).

Refusal to open default judgment *held* not abuse of discretion, where defendants took no action for over fifty-two days after learning of execution levied thereon (Code Civ. Proc. § 473).

Though record showed there was some attempt to make settlement, and that delay was in part due to that fact, record further disclosed that defendants' counsel was twice advised by plaintiff's counsel of intention to take default judgment, and that defendants made no real attempt to file answer, and, according to their own testimony, defendants knew of entry of default judgment when execution was levied, but even then took no action whatever, and waited for practically fifty-two or fifty-three days before their affidavit to open default was made.

2. Judgment ⚷145(2).

Though courts are liberal in opening defaults, there must be real showing of merit to have default set aside (Code Civ. Proc. § 473).

Appeal from Superior Court, Lassen County; H. D. Burroughs, Judge.

Action by W. W. Sharp against Owen E. Paulson and another. From an order denying defendants' motion to set aside default judgment, defendants appeal.

Affirmed.

J. T. Sharp, of Alturas, for appellants.

Hardin Barry, of Susanville, for respondent.

Mr. Justice PLUMMER delivered the opinion of the court.

This is an appeal from an order denying the defendants' motion to set aside a default judgment.

[1] The transcript in this cause, among other things, sets forth a copy of the opinion of the trial court, stating the reasons why the appellants' motion was and should be denied. An examination of the record discloses that everything contained in the opinion of the trial court is amply supported and that no other conclusion could be reasonably drawn from the facts presented for our consideration. For this reason we have adopted the opinion of the trial court as our own opinion, as follows:

"This cause is before the court upon defendants' motion to vacate and set aside a default judgment herein. The motion is made under the provisions of section 473 of the Code of Civil Procedure upon the ground of inadvertence, surprise and excusable neglect. The matter was submitted to the court upon the affidavit of merits of Owen E. Paulson, the proposed answer of the defendants, the records and files in the case, and oral and documentary evidence.

"The record shows that the action was commenced on June 14, 1928; that the demurrer of the defendants was filed June 22, 1928. Upon stipulation of counsel to that effect, the court, on June 17, 1928, overruled said demurrer, and allowed the defendants twenty days to answer. The default of the defendants for failure to appear and answer was entered October 9, 1928. On October 26, 1928, upon evidence submitted by the plaintiff, a judgment against said defendants was entered. Notice of entry of this judgment was served on counsel for defendants October 30, 1928. Execution was issued and levied on property belonging to the defendants on November 30, 1928. The property was sold, and return of sale made by the sheriff December 12, 1928. Defendants' application to open the default was dated January 29, 1929. The affidavit of merits by Owen Paulson was executed January 22, 1929.

"It appears from the oral testimony that a settlement was being negotiated between the parties, but was ineffectual. On August 29, 1928, counsel for defendants notified them that he was unable to settle the case except upon certain conditions, and that he must have a reply from them by Friday morning, or one of them must be in Susanville at that time.

"It appears that on Friday morning, the time stated, counsel for defendants was in San Francisco, but he left a notice on his door for the defendants to call at the office of Mr. B. V. Curler, an attorney with offices located in the same building as the offices of counsel for the defendants. At that time one of the defendants appeared and met Mr.

Curler, and Mr. Curler at that time advised them of Mr. Julian's absence from town, and further advised them that the time had run by to answer, and that Mr. Julian had advised that they settle the case. The defendant left the office of Mr. Curler, and shortly thereafter again came to the office of Mr. Julian, at which time Mr. Julian informed them that he was being pressed for an answer, and that the time had run by, but that certain figures could be obtained from a Mrs. Hall relative to the basis of the settlement proposed by Sharp. Neither of the defendants made any further appearance in the matter.

"On October 2, 1928, counsel for defendants wrote a letter to them at Standish, Lassen county, inclosing a statement from Mr. Sharp relative to the credits he allowed them. He further said in the letter that he wanted the defendants to come to Susanville as soon as possible, and that, if they were to get out without a judgment against them on the one hand or a trial on the other hand, it would be necessary to get an answer at once.

"It is claimed by the Paulsons that they did not receive this letter. However, the letter was inclosed in an envelope with Mr. Julian's return marks upon it, and it never came back to him. But, waiving the question of whether or not they received this letter, it appears that they were informed that the time was up for an answer, and they failed to make any further appearance. It also appears that, according to their own testimony, they knew of the entry of this judgment on November 30, 1928, when the execution was levied, but even then they took no action whatever, and waited for a period of practically fifty-two or fifty-three days before their affidavit to open the default was made.

[2] "It is true that courts are liberal in opening defaults, but at the same time it has been strictly held that there must be a real showing of merit to entitle a party to have a default set aside. In this case the Paulsons had counsel. They had been informed their time to answer had expired, and, even after their own statement of knowledge, they made no effort to have the default set aside until January 23d, when the affidavit of merits was made.

"There must be some finality to judgments, and they cannot be set aside except upon a meritorious showing."

In addition to what is stated by the trial court, we may add that the record discloses that the defendants' counsel was twice advised by the plaintiff's counsel of the intention to take judgment by default; also that the record shows no real attempt whatever by the appellants to file an answer herein. The argument of appellants' counsel really discloses the whole intent or purpose of the appellants was to secure delay, as upon the hearing of the motion to vacate the judgment by default it appears that the appellants, as a part of their case, presented what took place at an interview with their attorney, in which "they were advised by him that the proper thing to do at that time was to file a demurrer; that oftentimes a demurrer would hold a case in court for a year or two."

While the record shows that there was some attempt made at settlement, it absolutely fails to show that the respondents made any representations whatever which misled the appellants, to their disadvantage.

There being nothing in the record to indicate that the trial court abused its discretion, it follows that the order appealed from should be, and the same is hereby, affirmed.

111 Cal. App. 651

ELLINGTON v. FREER.

Civ. 6508.

District Court of Appeal, Second District,
Division 2, California.
Feb. 10, 1931.

1. **Bills and notes** 🔑**499.**

Possession of note by payee raised presumption of nonpayment.

2. **Bills and notes** 🔑**516.**

Payee, by introducing note, established prima facie case against maker.

3. **Bills and notes** 🔑**493(1).**

In payee's action against maker on note, note itself raised presumption of consideration.

4. **Bills and notes** 🔑**518(1).**

In payee's action against maker on note, finding that note was based on consideration *held* supported by evidence.

5. **Appeal and error** 🔑**1011(1).**

Findings of trial court based on conflicting evidence will not be disturbed on appeal.

Appeal from Superior Court, Los Angeles County; James H. Pope, Judge.

Action by A. W. Ellington against L. Raymond Freer. Judgment for plaintiff, and defendant appeals.

Affirmed.

Marcus C. Clark, of Los Angeles, for appellant.

H. P. Babson, of Los Angeles, for respondent.

ARCHBALD, Justice pro tem.

Plaintiff brought suit against the defendant on a promissory note for $10,000, dated May 28, 1925, and, from a judgment thereon against him, defendant appeals.

[1] The answer of defendant admitted the execution of the note by defendant to plaintiff, but denied the other allegations of the complaint, and also alleged as a separate defense that there was no consideration for the note as well as a total failure of consideration therefor. A further separate defense alleged on information and belief that a partnership existed between plaintiff and one Hallward, and that said Hallward, with the knowledge and consent of plaintiff, induced defendant, by certain alleged false and fraudulent statements, to execute and deliver his note for $10,000, dated August 24, 1924, to said Hallward for an assignment by Hallward to defendant of a one-third interest in a sales agreement theretofore made between Hallward and plaintiff and certain associates; that such agreement was not made in good faith and that all representations concerning the same, as well as said assignment, were made with the knowledge and consent of plaintiff; that said note was hypothecated to a certain bank by the aid of plaintiff and was afterwards surrendered and the note in question here executed as a renewal thereof; that said Hallward and plaintiff received the proceeds of said original note, applied the same to their own use, and that plaintiff took $4,000 of such proceeds for his own use and benefit; that defendant received nothing of value and did not discover the falsity of said representations until after the execution and delivery of the note sued on. At the trial plaintiff proved the execution and delivery of the note sued on, its negotiation to the bank, and the payment to the bank by plaintiff of principal and interest when the same became due. The answer does not deny the allegation of the complaint that no part of said note had been paid to plaintiff, but does deny "that this defendant is indebted to plaintiff in any sum of money whatsoever." The possession of the note by plaintiff, however, raised the presumption of nonpayment (Sarraille v. Calmon, 142 Cal. 651, 76 P. 497), although plaintiff did not introduce any other proof of nonpayment, all of which made a prima facie case for him. Plaintiff then rested, and defendant offered evidence in support of his affirmative defenses, after which rebuttal evidence was offered. The court found, among other things, that it is not true that the note was given without consideration or that there was a total or any failure of consideration, and found affirmatively that defendant received a valuable consideration therefor. The court also found that the original note was based on a valuable consideration, viz. the assignment to defendant by said Hallward of a one-third interest in the sales contract. It is appellant's contention that the evidence is insufficient to support such findings; that the sales contract was of no value and so known to be by plaintiff at the time he took the note.

[2-4] Plaintiff in proving his prima facie case offered in evidence the promissory note sued on. There was a presumption of consideration arising from the writing itself, which is evidence, and which raised a conflict sufficient to support the finding questioned, notwithstanding evidence produced by defendant was contrary thereto. **Moore v. Gould**, 151 Cal. 723, 91 P. 616.

The court further found that it is not true that Hallward made the representations alleged to have been made by him to defendant; that the sales contract was a valuable contract; that plaintiff was not a partner of Hallward and knew nothing about the sale of the interest in the Hallward contract to defendant until the deal was completed and Hallward went to plaintiff (as the evidence shows, after defendant and Hallward had themselves been unsuccessful in negotiating the $10,000 note given Hallward) to induce plaintiff to aid them in negotiating said note; that plaintiff indorsed the Hallward note and the same was then negotiated at the Security Trust & Savings Bank. The court found further that, at the time the note set out in plaintiff's complaint was executed and delivered to plaintiff (which was about nine months after the Hallward note was negotiated, and which note was a second renewal of the Hallward note), "defendant was in possession of all the facts regarding said sales agreement and all transactions and matters connected therewith which were known to any of the parties thereto, and particularly all the facts which were known to the said Hallward and to the said plaintiff." None of such findings is questioned by defendant, and it is sufficient to say that there is evidence in the record which supports them all.

The evidence further shows that Hallward and defendant "were pretty close old friends," and that Hallward was discussing the financing of his sales contract with defendant, who said "he thought there was a man in Pasadena * * * who resided quite close to his place, who would buy a one-third interest for $7,500"; that defendant was not successful in closing the deal with his friend and told Hallward that he (Freer) "would like to take it." It was then agreed between defendant and Hallward "to put the negotiation through on the basis of a note from him (Freer) to me (Hallward) for $7,500." As to how the note came to be made for $10,000, Hallward testified as follows:

"Q. By Mr. Babson: 'Tell what was said regarding the purchase price; the amount of the note.' A. Well, it was suggested—

"Q. Who suggested? A. By Mr. Freer, that we should make it a larger sum than $7,500, because he needed some money, and if the note was discounted he should get a portion of that money."

The evidence further shows, and the court found, that the defendant actually received about $2,000 of the proceeds of the note.

[5] There seems to be evidence to support not only the findings complained of but all the other findings which are contrary to the allegations contained in defendant's separate defenses; and, while there is evidence to the contrary, yet, the trial court having decided the facts on conflicting testimony, its determination will not be disturbed on appeal. King v. Cave, 182 Cal. 523, 188 P. 986.

Judgment affirmed.

We concur: CRAIG, Acting P. J.; IRA F. THOMPSON, J.

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111 Cal. App. 475

FRANK GRAVES SASH, DOOR & MILL CO. v. ORANGE COUNTY BOND & MORTGAGE CORPORATION.

Civ. 6465.

District Court of Appeal, Second District, Division 2, California.

Feb. 2, 1931.

1. Guaranty 🔑43.

Materialman *held* entitled to agreed price of materials from guarantor, where building was completed within six months, notwithstanding contractor subsequently removed some of closet beds.

> Defendant mortgage company by indenture separate from building contract agreed, in consideration of materialman furnishing materials to owner for construction of building, that, "conditioned upon the completion of the building on or before six months from date," defendant would "irrevocably guarantee payment of materials purchased from you for said purpose." All materials were delivered and work was completed within time specified, but thereafter building contractor ordered removal of closet beds, and trial court found that such removal was in bad faith and that materialman was not involved in such bad faith and had no knowledge thereof.

2. Appeal and error 🔑768.

Statement of facts in appellant's brief was accepted as correct by appellate court, where respondent filed no brief.

Appeal from Superior Court, Los Angeles County; William Hazlett, Judge.

Action by the Frank Graves Sash, Door & Mill Company against the Orange County Bond & Mortgage Corporation. Judgment for defendant, and plaintiff appeals.

Reversed and rendered.

Glen Behymer, of Los Angeles, for appellant.

CRAIG, J.

In accordance with the terms and provisions of a contract in writing between the parties hereto, the plaintiff in this action furnished materials for the construction of certain apartment houses. In an action for the agreed price of the materials plaintiff was denied judgment upon the ground that forty-eight closet beds were thereafter removed from the premises by third parties.

[1] The facts material to this appeal are undisputed. Certain contractors known as Yale Brothers entered into an agreement with Paul R. Machtolff and Masie G. Machtolff to "well and truly erect and construct" two three-story apartment houses, and to "find and provide such good, proper and sufficient materials of all kinds whatsoever as shall be proper and sufficient for completing and finishing" the same. The respondent by separate and independent indentures in writing agreed with appellant, in consideration of the latter furnishing to the owners and to the contractors materials for said structures, that "conditioned upon the completion of the building on or before six months from date," it would "irrevocably guarantee payment of material purchased from you for said purpose." All of the materials were delivered and the work was completed within the time specified. A. M. Yale, one of the contractors, testified that thereafter he gave the order for removal of the beds; "in one instance the owner requested me, and in the other instance I was becoming the owner. I was negotiating a purchase; I was the owner to all intents and purposes. * * * Mr. Machtolff requested me to take the beds out of his job, * * * around the latter part of June." The findings of the trial court in this respect recite that "said closet beds were furnished and installed in said premises as required by the plans and specifications for said building, within said six months period, but that said installation thereof was not in good faith, but that in bad faith said Yale Brothers installed said closet beds within said six months period, but shortly thereaft-

er and before the expiration of said period, * * * the said Yale Brothers in bad faith removed said closet beds from said premises, and that the same have never been replaced therein; that the plaintiff, Frank Graves Sash, Door & Mill Company, had no part in the removal of said beds or in said bad faith on the part of Yale Brothers, no knowledge of the removal thereof, and did not in any way participate in the bad faith of said Yale Brothers; that said beds were among the items of merchandise furnished by said Frank Graves Sash, Door & Mill Company and were by them furnished and were caused to be furnished and installed in good faith, but that by reason of the bad faith of the said Yale Brothers with respect to the removal of said beds from said premises almost immediately after the installation thereof, as aforesaid, the court finds that said building was not in good faith completed within six months."

[2] The evidence and findings bear strong witness to the fact that appellant fulfilled and performed all conditions precedent to its right to compensation for the specified equipment. Respondent has filed no brief, and we therefore accept the statement of facts contained in appellant's brief as correct. This is related above, and contains no evidence whatever of bad faith of either the plaintiff or the defendant. Since the judgment rendered was based solely upon the quoted finding of bad faith, plaintiff's case is clear, and it follows that the judgment must be reversed.

It is ordered that the judgment be reversed, and that judgment be entered in favor of the plaintiff and appellant.

We concur: WORKS, P. J.; IRA F. THOMPSON, J.

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111 Cal. App. 472

BAILAR v. YEWELL et al.

Civ. 7740.

District Court of Appeal, First District, Division 2, California.
Feb. 2, 1931.

1. Appeal and error ⇨1010(1).

If plaintiff's contention is sustainable by evidence in record in support of judgment, appellate court is bound to adopt contention.

2. Trusts ⇨89(2).

In action to impress trust on lot allegedly purchased with plaintiff's moneys, evidence *held* to support finding plaintiff's moneys were used in purchase of entire lot, not only part thereof.

3. Evidence ⇨60.

Law presumes person committed no crime.

Appeal from Superior Court, Los Angeles County; James A. Allen, Judge.

Action by Melissa Bailer against A. E. Yewell, Alice K. Yewell, and A. O'Connell. From a judgment in favor of plaintiff, defendants first and second named appeal.

Affirmed.

Hoye & Boehler, of Los Angeles, for appellants.

John A. Rush, of Los Angeles, for respondent.

STURTEVANT, J.

The plaintiff commenced an action against the defendants to impress a trust on a lot in Los Angeles county. The defendants A. E. Yewell and Alice K. Yewell answered. The defendant A. O'Connell did not answer, and her default was entered. The trial court made findings in favor of the plaintiff, and, from a judgment entered thereon, the defendants have appealed. The defendants make several attacks on the findings, but all of those attacks are but different methods of presenting their contention that plaintiff's money did not go into that portion of the land called by the defendants the key lot. The record discloses that the plaintiff and the defendants had been friends for several decades. The plaintiff resided in the East. The defendant A. E. Yewell resides at Southgate in Los Angeles county, and is engaged in the real estate business. In July, 1924, the plaintiff sent her draft in the sum of $900 to Mr. Yewell, with directions to invest the same in real estate. Thereafter he made two executory purchases. Under one contract he undertook the purchase of the south 115 feet of the lands described in the complaint, and in the other contract he undertook the purchase of what he calls the key lot, the north 40 feet of said lands. He made his contracts with Clark and Wagner. They held an executory contract to purchase both lots, described as one, from Bessie Spring, who was the owner. At the trial it was admitted by the defendants that the plaintiff's money was received and was used in making payments under the first contract. However, it was the contention of the plaintiff that said moneys were used in making both purchases.

[1-3] The plaintiff contends that the total payments made aggregated exactly $900 and no more. The defendants claim that the payments aggregated $1,242.64. If the contention of the plaintiff can be sustained by the

evidence contained in the record, in support of the judgment of the trial court, we are bound to adopt her contention. The plaintiff called the defendant, and, under a searching examination the witness produced three checks which represented moneys paid out on the purchase of the lots. On the first contract he claimed that he paid down $50. On the second contract he claimed that he paid down $150. The latter sum was also evidenced by one of the checks just mentioned. He testified that he had no checks or receipts showing the disbursement of the $900, except payments indorsed on the back of the contracts, and the checks introduced in evidence. He testified that the most of the payments made by him were paid in cash, and were indorsed on the executory contracts as the payments were made. His two executory contracts hereinabove mentioned were both introduced in evidence. The executory contract from Bessie Spring to Clark and Wagner was also introduced in evidence. The latter contract shows that $900 was paid on that contract as for principal. It also shows that, before the defendant entered into his executory contracts, his vendors had paid $200. In passing, it may be noted that $200 is also the sum of the two down payments which the defendant Yewell paid his vendors. After the defendant entered into his executory contracts, he paid many of his payments to the owner as distinguished from his vendors. Defendants' first contract of purchase shows a down payment August 12, 1924, of $50 and January 8, 1925, a further payment of $125, or a total of $175. The second one shows a down payment August 23, 1924, of $150, a cash payment of $20, and there is a check payment on this contract of $75 which was paid to Wagner, or a total of $245. The owner indorsed her contract January 1, 1925, showing taxes and interest paid to date, and thereafter the defendant paid her, or her assigns, $480, being twenty payments each of $20 in cash and a balance of $80 by check. The grand total is $900, and no more. The summary, made by the defendant, $1,242.64, contains many patent duplications, and is clearly inaccurate.

That the defendant invested the plaintiff's money in lands in the particular block of land was an admitted fact. Whether such moneys were invested in the entire lot described in the complaint or only in the southerly 115 feet thereof was the sole issue. The plaintiff's proof showed a set of facts from which the trial court could infer that plaintiff's moneys were used in the purchase of the entire lot, not a part only thereof. We cannot, on this record, say it erred.

The summary of the defendants leads nowhere. It includes: (1) Moneys paid to the vendors of the defendants, and (2) moneys paid to the owner. Some of these moneys went into the lot—not necessarily all. As stated above, it was stipulated that plaintiff's money went into at least a part of the land described in the complaint. The defendants' summary shows $50, the down payment, went into the southerly end of the lot; that is, was paid on the first contract. Then it shows that a check for $80 and cash payments $520 went into the purchase of the entire lot. How much went into the north end and how much went into the south end does not appear. Nor does it show what was done with the balance of plaintiff's money. Such facts do not dispute the stipulated fact, but are in accord therewith.

We have shown no more than $900 was paid by defendant in the purchase of the entire lot as described in the complaint. He made no claim that he used the plaintiff's moneys for any other purchase. To assume that he did is to impute to him the commission of a crime. But the law presumes that he committed no crime. It is therefore clear that the findings are supported by the evidence.

The judgment is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

PEOPLE v. ARGUERO.*

Cr. 1148.

District Court of Appeal, Third District, California.
Feb. 2, 1931.

Rehearing Granted Feb. 16, 1931.

Robbery ⚷28.

Verdict of guilty of attempt to commit robbery, without specifying whether first or second degree thereof, is erroneous.

Appeal from Superior Court, Sacramento County; John F. Pullen, Judge.

Jose Arguero was convicted of attempt to commit robbery, and he appeals.

Reversed.

Archibald M. Mull, Jr., of Sacramento, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

PER CURIAM.

It satisfactorily appearing from the record that the verdict of the jury finding the defendant herein guilty of attempt to commit

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Rehearing granted 298 P. 520.

robbery failed to find whether the attempt was to commit robbery in the first or second degree, and therefore no basis was given upon which to enter a judgment in this case, and no data furnished which would enable the board of prison directors to fix the defendant's punishment, the order denying the appellant's motion for new trial and the judgment are therefore reversed.

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111 Cal. App. 579

PEOPLE v. SMITH.

Cr. 1605.

District Court of Appeal, First District, Division 2, California.

Feb. 5, 1931.

1. Rape ⚷53(2).

Evidence *held* sufficient to support conviction of assault with intent to commit rape.

2. Criminal law ⚷407(2).

Objection that evidence defendant made no statement that he was innocent when complaining witness pointed defendant out to policeman as person who had assaulted witness was inadmissible, because defendant was not called on to make statement, went to weight, and not admissibility, of evidence.

3. Criminal law ⚷741(1).

In criminal case, weight of evidence rests with jury.

4. Larceny ⚷65.

Evidence *held* sufficient to support conviction for grand theft.

Appeal from Superior Court, Alameda County; Stanley Murray, Judge.

Alvin Smith was convicted of assault with intent to commit rape and grand theft, and he appeals.

Affirmed.

Leo. A. Sullivan, of Oakland, for appellant.

U. S. Webb, Atty. Gen., and W. R. Augustine, Deputy Atty. Gen., for the People.

STURTEVANT, J.

The district attorney filed an information against the defendant charging him with having committed three felonies: (1) An assault with intent to commit rape; (2) an assault with intent to commit the crime of kidnapping; and (3) a charge of grand theft. The defendant appeared and pleaded not guilty. A trial was had before the trial court sitting with a jury. During the trial, the second count was, on motion of the district attorney dismissed. From a judgment entered on that verdict, the defendant has appealed, and has brought up typewritten transcripts.

[1] The defendant claims that the evidence is insufficient to support the verdict and that the verdict was the result of prejudice. In so far as he claims prejudice, he bases it on the statement that the complaining witness was a beautiful young girl, and that the defendant is not prepossessing in appearance. The record before us does not disclose the appearance of the complaining witness nor the appearance of the defendant. As to whether the evidence is sufficient or insufficient rests on the fact that there were no other witnesses than the complaining witness who saw the acts done which the complaining witness charged against the defendant. However, she took the stand and testified as to a set of facts which, if believed by the jury, entirely supported the verdict. There were some elements in the evidence on which counsel could have and doubtless did rely when arguing the case to the jury that the evidence was insufficent. But this court is quite unable to say that there was not evidence sufficient to support the verdict. We think the record brings the case well within the rule in the case of People v. Tom Woo, 181 Cal. 315, 326, 184 P. 389.

[2, 3] The acts complained of occurred on the streets in Oakland. Some of the acts occurred where the street lights were bright and the view of the complaining witness was entirely clear. The defendant's offense was committed on the 1st day of June, 1930. About one week later the defendant entered the theater in which the complaining witness was employed as an usherette. He was conducted to a seat, and thereupon the complaining witness reported the fact of the defendant's presence to her employer. Her employer called a policeman. The policeman and the complaining witness approached within four or five feet of the defendant, and in an audible voice the policeman asked the complaining witness if the person who had assaulted her was in the room, and, if so, to go and put her hand on him. She turned and walked up and put her hand on the defendant. The defendant made no statement to the effect that he was innocent. These facts were introduced in evidence. The defendant contends that they were inadmissible because the police officer was speaking directly to the complaining witness, and she in turn was speaking directly to the police officer, and the defendant was not called upon to interrupt and make any statement. These matters were properly gone into. The objection goes to the weight, not the admissibility, of the evidence. But the power to weigh the evi-

dence rested with the jury. People v. Ong Mon Foo, 182 Cal. 697, 703, 189 P. 690.

When instructing the jury, the trial court gave, among others, an instruction on the subject of the evidence just adverted to. The defendant complains of said instruction for the same reasons that he complains of the admission of the evidence. For the reasons which we have just stated, we think there was no error in giving the instruction. In other words, if the evidence was admissible, the instruction was proper. That the evidence was admissible we think is beyond dispute.

[4] The defendant claims that under no circumstances should he have been convicted of grand theft. We are unable to agree with him. At one time when the defendant approached the complaining witness during the evening of June 1, 1930, he took from her possession a purse containing $8. She testified that he did so without her consent. That purse was never returned to her. After the submission of the case, the statements of the complaining witness, the presumptions of law, and the proper inferences to be drawn from the facts legally proved were all before the jury. It is quite clear that it may not be said as a matter of law that a prima facie case of grand theft was not made out. The defendant took the stand in his own behalf, and attempted to prove an alibi. The evidence introduced in his defense was not at all convincing.

The judgment is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

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111 Cal. App. 548

BLACKHURST et al. v. WESTERFELD et al.

Civ. 7652.

District Court of Appeal, First District,
Division 1, California.
Feb. 4, 1931.

1. Judgment ⚿670.

Judgment on finding that neither of defendants, individually or as trustees, had interest in mortgages, *held* conclusive on parties in subsequent action.

2. Trusts ⚿372(3).

Plaintiffs suing to enforce trust had burden of proving by preponderance of evidence that realty devised by trustee belonged to trust estate, not trustee individually.

3. Trusts ⚿372(1).

Presumption is that moneys withdrawn by trustee from fund in which trust and individual moneys are mingled were trustee's moneys.

4. Appeal and error ⚿1008(1).

Whether purchase money for realty devised by trustee came from trust fund or from trustee's individual fund *held* for trial court.

Appeal from Superior Court, Los Angeles County; Thomas L. Ambrose, Judge.

Action by Frank Blackhurst and another, individually and as trustees, and others, against J. M. Westerfeld, administrator de bonis non with the will annexed of the estate of Jabez Blackhurst, deceased, and another. From an adverse judgment, plaintiffs appeal.

Affirmed.

H. A. Massey and Peyton H. Moore, both of Los Angeles, for appellants.

Walter M. Campbell, of Los Angeles, for respondents.

PER CURIAM.

The above action was brought by Frank Blackhurst and Harry Blackhurst, individually and as trustees, and by Sarah Jackson and Allen Hemstreet, against the administrator of the estate of Jabez Blackhurst, deceased, and Kate Blackhurst Wilber, to enforce a trust upon a parcel of land in the city of Santa Monica described as lot Y in block 120 according to certain maps recorded in Book 3 at pages 80 and 81, and in Book 39 at page 35 of Miscellaneous Records of Los Angeles County, and other property. All the parties except the administrator are the children of decedent and Sarah Blackhurst, his wife.

On August 14, 1899, said decedent, Frank Blackhurst, and Harry Blackhurst, all of whom were then residing in Minnesota, received as trustees under the provisions of the will of William Knapper of Staffordshire, England, the sum of approximately $11,000. This fund was to be held in trust during the life of said Sarah Blackhurst, the income thereof to be paid to her during her lifetime, and upon her death to be divided between her children then living.

The plaintiffs alleged that, at the time the trust fund was received, decedent had no property of his own; that his cotrustees permitted him to manage and control the fund, invest the same in his own name and apply the income to the use and benefit of said Sarah Blackhurst during her lifetime; that between 1899 and 1902 the trust funds in various amounts were invested in Minnesota, these investments consisting of the purchase of mortgages, building and loan stock, and the loan of a portion of the fund on mortgage security; that in November, 1904, decedent,

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⚿For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

with his family, came to Santa Monica, and brought with him $1,500 of the trust fund, leaving the balance invested in Minnesota; that thereafter he collected the latter sum and reinvested the same in California, among these investments being the purchase of the lot above described, for which was paid a total of $2,100; and that all the investments in California were, with the knowledge and consent of his cotrustees, made from the trust fund.

The answer of defendant Kate Blackhurst Wilber—who will hereinafter be referred to as the respondent—denied that decedent was without funds of his own, and alleged that, when decedent removed to California, he owned property in his own right of the value of $15,000. The answer also denied that the several mortgages and the stock described in the complaint were acquired by means of the trust funds, and made the same denial respecting the acquisition of the lot in question.

As special defenses it was alleged that in 1899 plaintiffs relinquished all their interest in the trust property to the decedent; that since September, 1899, and until his death decedent held the same adversely, and that by reason of their conduct plaintiffs were estopped as against respondent to claim any part of the above real property. In addition it was alleged that plaintiffs' claims were barred by the statute of limitations.

The court found against the material allegations of the complaint and in favor of the respondent on her special defenses thereto.

The plaintiffs have appealed from the judgment entered thereon upon the grounds that the findings and conclusions of the trial court are unsupported. Plaintiffs state in their brief that, "in view of the fact that all of the property involved in this action, except the property designated as the Santa Monica property, namely, lot Y, block 120, would be distributed equally among the plaintiffs and defendant Kate Wilber in the event of a distribution by the court in the matter of the estate, as well as in the distribution of the trust estate among the remaindermen, we will devote our attention in the matter of this appeal solely to the questions involving the title and interests of the plaintiffs in the Santa Monica property."

The evidence shows that decedent died testate on January 8, 1914. By his will, which was executed on October 1, 1912, Sarah Blackhurst was given a life estate in all his property; and the remainder, with the exception of the property in dispute and a legacy to respondent, was bequeathed to his children in equal shares. As regards the portion given respondent, the provisions of the will, so far as material, were as follows: "Recognizing the loving care and companionship rendered unto her parents for all of the years she has remained with us without adequate remuneration, and because she is unmarried and unsettled in life at the date of making this will, I do hereby bequeath unto my daughter, Kate Blackhurst, the sum of $2,000, the same to be paid to her from said residue estate within three months after the death of my said wife; and I do also hereby give unto my said daughter the house and lot, lot Y, block 120, 418 Nevada avenue at Santa Monica, Los Angeles county, California, California, with all the household furniture contained in said house; to have and to hold the same to her, her heirs, and provided that my said daughter, Kate Blackhurst, shall not at the death of my said wife have been married; but if she shall have been then at any time married, then and in such case said house and lot * * * with all the contents of the house * * * shall be and remain a part of my said residue estate, and distributed as part thereof as hereinafter provided, my daughter, Kate Blackhurst, only receiving the $2,000. * * *" The will further provided that, subject to the life estate of Sarah Blackhurst and the bequest to Kate Blackhurst, the whole of the estate should be equally divided between decedent's children.

The appraised value of the estate was $21,551, and of the house and lot in dispute $2,000. After administration thereon, the whole estate was on June 25, 1915, distributed to Sarah Blackhurst for her natural life, no disposition of the remainder, however, being made by the decree. Respondent remained single until after the death of Sarah Blackhurst on March 19, 1924, and the present action was filed on February 3, 1926.

[1] The evidence shows that decedent with his wife and all his children, except a daughter now deceased, came to Minnesota from England in 1886. He had acted as one of the executors and trustees of the estate of William Knapper while residing in England. In 1899 this estate was divided, and the portion thereof held in trust for Sarah Blackhurst transferred to decedent and his cotrustees as above mentioned. It was also testified that decedent when he arrived in Minnesota had little, if any, estate. In 1887 he became a Methodist clergyman, and acted as such both in Minnesota and in California, receiving as compensation from the church a salary which varied from $600 to $800 per annum, with the free use of a dwelling. It was shown that decedent and his wife in 1897 and 1898 subscribed for a total of forty shares of stock in the Winnebago Building & Loan Society, upon which they paid monthly the sum of $20; that in 1906 they were repaid by the association on that account the sum of $1,693.69, and in 1909 the further sum of $1,922.15. It also appears that in 1899 decedent purchased from M. S. Bannister three mortgages aggregating $9,650, which were liens upon lands in Faribault county, Minn. Two of the mortgages were ex-

ecuted by Sarah J. Doude; one being for $4,000 and the other for $2,150. Both were assigned by Bannister, the mortgagee, "to the trustees of the estate of William Knapper, deceased." On January 29, 1902, new assignments of these mortgages were executed and recorded, reciting that the same were to correct the original assignments; that the mortgages described were sold to Jabez Blackhurst individually; that he paid the consideration therefor and that neither Harry nor Frank Blackhurst individually or as trustees has any interest therein. These mortgages were subsequently foreclosed by decedent, who purchased the mortgaged property in his own name. Both Harry and Frank Blackhurst were joined as defendants in the action, and both were served with summons and defaulted. The complaints alleged and the court found as to each mortgage the facts as stated in the assignments last mentioned, and that neither Harry nor Frank Blackhurst, individually nor as trustees of the Knapper estate, had any interest in the mortgages.

The parties last named were individually concluded by the judgment (Koehler v. Holt Manufacturing Co., 146 Cal. 335, 80 P. 73; Maddux v. County Bank, etc., 129 Cal. 665, 62 P. 264, 79 Am. St. Rep. 143; Freeman on Judgments [5th Ed.] § 662), and the facts shown were circumstantially relevant on the question whether decedent owned property separate from that of the trust estate.

This property was sold by decedent for $8,416.50, payable in installments, and the amount collected by him.

The third mortgage was executed by the Delevan Lodge of Odd Fellows. This was for $3,000, and like the others, was assigned "to the trustees of the estate of William Knapper, deceased." As in the other instance, however, there was executed and recorded a subsequent assignment, reciting that its purpose was to correct a mistake in the first, namely, a purported assignment of the mortgage to the trustees mentioned. On May 23, 1904, this mortgage was paid to decedent. Plaintiffs alleged that the purchase price thereof came from the trust fund, and that of the amount paid by the mortgagors there was used by decedent the sum of $1,000 to pay the first installment of the purchase price of the Santa Monica property.

As stated, the trial court found against these allegations, and also against the allegations that, when the Santa Monica property was purchased decedent had no money or other property except belonging to the trust fund.

Plaintiffs claim that, notwithstanding the above findings, the evidence shows the allegations to be true.

It appears that, from the period previous to the receipt of the trust fund by decedent and his cotrustees the income therefrom had been remitted to Sarah Blackhurst. These amounts were not shown, but it was testified that they exceeded the income from the fund since its transfer. Nor does it appear how much thereof was used for the support of the beneficiary and her family. There was also introduced in evidence a copy of decedent's individual account with the First National Bank of Winnebago, Minn., which account was opened on July 24, 1903, and closed April 11, 1914. The account showed deposits and withdrawals on dates and in amounts corresponding approximately with the payments made and received in the mortgage transactions mentioned above; also letters passed between decedent and the bank, indicating that the first payment on the Santa Monica property was drawn from this account. It was testified by plaintiff Hemstreet that she was told by decedent that this payment came from the trust fund. She also testified that, when she was living with her parents in 1892, decedent had no property. Plaintiff Frank Blackhurst testified to the same effect; but it appears that he left home at about the same time as Mrs. Hemstreet; and it is a fair conclusion from the testimony of both that thereafter they had but slight personal knowledge of their father's financial condition.

The evidence tends to show that decedent, following an understanding with his cotrustees, administered the trust in his own name, and apparently mingled trust and individual funds in the same account. The court also found that, after the death of her husband and the admission of his will to probate, Sarah Blackhurst took possession of the property in dispute, claiming a life estate therein, not under the trust agreement or any other instrument creating a trust, but under the terms of the will and the decree of distribution entered in the matter of his estate. The fact that she was one of the executrices of the will, procured the entry of the decree, and other circumstances shown, support the latter finding.

[2, 3] The burden of proving by a preponderance of the evidence that the property in question was a part of the trust estate rested upon plaintiffs (Plass v. Plass, 122 Cal. 3, 54 P. 372; Parshall v. Parshall, 56 Cal. App. 548, 205 P. 1081); and it has been held, where a trustee after a mingling of funds has withdrawn sums therefrom from time to time it will be presumed that the moneys so withdrawn were from his own portion rather than from moneys held by him in trust (Elizalde v. Elizalde, 137 Cal. 634, 66 P. 369, 70 P. 861).

[4] The evidence shows that decedent, in addition to his clerical duties, was an active business man; and the evidence reasonably supports the conclusion that, during the long

period between his arrival in this country and the payments for the Santa Monica property, he had accumulated on his own account sums more than equal to its purchase price. While the court might have inferred from the testimony that the purchase money came from the trust fund, yet the evidence was not of a character which would exclude any other finding thereon. The credibility of the witnesses who were not disinterested, as well as the inferences to be drawn from the circumstantial evidence in the case, were questions for the trial court (Code Civ. Proc., § 1847; Fanning v. Green, 156 Cal. 279, 104 P. 308; MacDermot v. Hayes, 175 Cal. 95, 170 P. 616); as was likewise the determination that the property was not subject to the trust if there was any evidence consistent with that conclusion (Noble v. Learned, 153 Cal. 245, 94 P. 1047); and we cannot say that the finding that the lot was not acquired with the trust funds is unsupported.

As stated, the court also found that since 1899 decedent held the property adversely; that plaintiffs relinquished their interests therein, were estopped by their conduct from claiming the same, and that the action was barred by the statute of limitations. These findings are also attacked; but, in view of our conclusion with respect to the findings above discussed, it will be unnecessary to consider the other questions presented upon the appeal.

The judgment is affirmed.

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111 Cal. App. 564

SANTA BARBARA COUNTY v. HOLLISTER ESTATE CO. et al.

Civ. 7232.

District Court of Appeal, Second District, Division 1, California.

Feb. 4, 1931.

Eminent domain ⚷262(4).

Where there was in record sufficient evidence to sustain awards of jury in condemnation suit, appellate court could not weigh evidence.

Appeal from Superior Court, Santa Barbara County; William D. Dehy, Judge.

Action by the County of Santa Barbara against the Hollister Estate Company and others. From the judgment, plaintiff appeals.

Affirmed.

Clarence C. Ward, Dist. Atty., of Santa Barbara, and A. G. Balaam, Deputy Dist. Atty., of Lompoc, for appellant.

Heaney, Price & Postel and Percy C. Heckendorf, all of Santa Barbara, for respondents.

YORK, J.

This is an appeal from a judgment awarding damages in a condemnation suit brought for the condemnation of a street for a public road. Almost all of both of appellant's briefs consist of comparison or weighing of the evidence of values given, as to the values of the lands to be taken, and the damage to the defendants, by reason of severance.

The only assignments of error made in appellant's opening brief are: First, that the evidence does not sustain the verdict; and second, that the compensation awarded respondent is excessive.

If there is any evidence to sustain the awards, we cannot weigh the evidence. There is in the record sufficient evidence to sustain the awards of the jury in this case.

The judgment is affirmed.

We concur: CONREY, P. J.; HOUSER, J.

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111 Cal. App. 415

EGAN v. PARKS.

Civ. 7722.

District Court of Appeal, First District, Division 2, California.

Jan. 28, 1931.

1. **Contracts** ⚷266(1).

Party rescinding contract need not restore property until other party returns consideration (Civ. Code, §§ 1688, 1691, subd. 2).

2. **Sales** ⚷113.

To rescind contract, purchaser need not pay installments after notice of rescission (Civ. Code, §§ 1688, 1691, subd. 2).

3. **Lis pendens** ⚷24(1).

Where purchaser of personalty gave notice of rescission, seller had not title to property sufficient to convey to third person, except subject to final judgment in rescission action (Civ. Code, §§ 1688, 1691, subd. 2).

Purchaser of furniture served notice of rescission of contract on seller, and brought action to enforce rescission. During pendency of such action, seller sold furniture to third person, but did not have furniture in her possession. Third person then commenced action in claim and delivery against original purchaser to recover furniture.

4. Replevin ⚷103(4).

Where plaintiff, in action for claim and delivery, secured possession, sold personalty, and was unable to locate property, alternative judgment was unnecessary.

5. Sales ⚷124.

Assignee of note and mortgage for personalty not canceled in purchaser's action to rescind was not entitled to possession of personalty against original purchaser not restored consideration.

6. Sales ⚷130(4).

Purchaser recovering judgment in rescission could recover value of property plus damages for withholding same, against plaintiff in claim and delivery action making redelivery impossible.

7. Appeal and error ⚷1071(2).

Error in using word "unlawful" instead of "lawful" in finding was one of law, and, not being responsive to any issue, was not prejudicial.

8. Replevin ⚷93.

Finding that purchaser was in possession of furniture wrongfully taken from him in claim and delivery action was sufficient finding that purchaser was entitled to possession.

9. Sales ⚷124.

Purchaser was entitled to use property pending action to rescind, and was entitled to damages for withholding property taken in claim and delivery action.

Appeal from Superior Court, Los Angeles County; John L. Fleming, Judge.

Action by Gerald Egan against Lyman B. Parks, administrator of the estate of C. A. Sutton-Watts, deceased. Judgment for defendant, and plaintiff appeals.

Affirmed.

Law & Overholt and R. E. Hobbs, all of Los Angeles, for appellant.

Harry Lyons, of Los Angeles, for respondent.

BURROUGHS, Justice pro tem.

This case is before the court upon an appeal by the plaintiff from a judgment in favor of the defendant. It appears from the record that pending the appeal the defendant C. A. Sutton-Watts has died; that Lyman B. Parks, the administrator of the estate of said deceased, has been substituted as the defendant in this action.

It appears from the evidence that on or about August 22, 1921, the defendant C. A. Sutton-Watts purchased from one Barbara Sarnow a lease and certain furniture; that she made a cash payment thereon, and executed and delivered to the said Barbara Sarnow a promissory note for the unpaid balance. Said note was secured by a chattel mortgage on the lease and furniture above referred to, and Sutton-Watts thereupon took possession of said property. That on December 31, 1921, Sutton-Watts served on Barbara Sarnow a written notice of rescission of the purchase made as aforesaid, and tendered a return of everything of value she had received by virtue of said purchase. The rescission was made because of a failure of title to the lease. Sarnow refused to comply with the rescission. An action was then commenced by Sutton-Watts against Sarnow based upon the rescission aforesaid. A judgment was entered in said action in favor of the plaintiff Sutton-Watts, and the defendant Sarnow appealed. During the pendency of the said appeal, and on February 26, 1923, Sarnow, the appellant therein, assigned the note and mortgage to Gerald Egan, who is the plaintiff in the case at bar. On March 1, 1923, this action was commenced by said Egan against said Sutton-Watts to recover the possession of all of said personal property based upon the assignment above mentioned. Sutton-Watts denied plaintiff's alleged right to possession of said furniture, and alleged that she was entitled to the possession thereof. However, the plaintiff Egan took the necessary steps, and obtained possession of the property through summary proceedings. This cause came on for trial January 18, 1926. The plaintiff Egan introduced in evidence the note and mortgage and the assignment of both by Mrs. Sarnow, the defendant in the action of rescission above referred to. He also obtained an admission from the defendant that no installments on the note had been paid since January, 1922. This constituted the plaintiff's evidence.

It was stipulated that the further trial of the action should be continued until the final decision of the action for rescission. In accordance therewith the court ordered the cause continued. The case referred to was decided December 1, 1926, Sutton-Watts v. Sarnow, 80 Cal. App. 91, 251 P. 654, and it had long since become final when on October 7, 1927, the trial of the instant case was resumed. There was received in evidence a bill of sale made by Barbara Sarnow, the defendant in the former action, to Gerald Egan, the plaintiff herein, purporting to convey to him all of the furniture which she had previously conveyed to the defendant herein, Sutton-Watts. After such sale, and pending the appeal in the former action, all of the furniture above referred to was conveyed by Egan to Annie E. Edwards, and, upon obtaining possession thereof by means of this action as aforesaid, Egan delivered it to said Annie E. Edwards. It also appears from the evidence that W. R. Law, the attorney for the plaintiff Egan, was also the attorney for Mrs. Sarnow in the action of replevin herein above referred to, and was also the attorney for Annie Edwards, who purchased the furniture from Egan; that the latter was an employee in the office of attorney Law, and the consideration for the transfer from Sarnow to Egan was an attorney fee due Law. Further evidence will be hereinafter referred to as the several points advanced for a reversal of the judgment are discussed.

Counsel for appellant says that: "The principal question before the court is whether or not during the pendency of her appeal from a judgment for the rescission of a contract for the purchase of personal property and the cancellation of a note and chattel mortgage thereon, Sarnow had such a title to the furniture that she could transfer the same to plaintiff herein." In support of his theory that such title does exist, counsel for appellant cites Sutton-Watts v. Sarnow, supra, but does not point out its applicability to the question involved. That case affirms the judgment of rescission of the contract, but modifies the same by ordering a definite provision for the return of the property to the defendant in that action before the rescission could become effective. Appellant's principal reliance for the above contention is based upon section 1688 of the Civil Code, which reads as follows: "A contract is extinguished by its rescission." It is claimed by appellant that when, on December 31, 1921, the plaintiff in Sutton-Watts v. Sarnow, supra, served notice of the rescission of the contract of purchase upon the defendant Sarnow, the contract was immediately extinguished, and the defendant thereupon became revested with full title to the property offered to be returned. He cites in support of his contention Wilcox v. Lattin, 93 Cal. 588, 595, 29 P. 226; Hayt v. Bentel (Cal. App.) 126 P. 370; Spicer v. Hurley, 161 Cal. 1, 7, 118 P. 249, 251. In Spicer v. Hurley, supra, it is said: "Neither is it of any moment to say that subsequent to the rescission and the bringing of this action to enforce rescission a patent for the wrench was actually granted to defendant. The rights of the parties are governed by the conditions which existed when the rescission was made and were fixed by the rescission, for the rescission, if legally made, * * * 'extinguished' the contract." The other cases above cited are to the same effect. However, the precise point raised here was not before the court in any of those cases. The question here involved is this: The defendant in this action, being the plaintiff in Sutton-Watts v. Sarnow, supra, served in that action proper notice of the rescission of the contract; and was compelled to commence an action to enforce the rescission. While the action to enforce that rescission was pending, the defendant Sarnow, the other party to the contract and the defendant in that action, sold the furniture which she had previously sold to the plaintiff to a third party, but the furniture was not in her possession. The third party, Egan, then commenced this action in claim and delivery to recover this furniture. Under such state of facts, did the defendant Sarnow by virtue of the rescission become revested with title without fulfilling the terms of the rescission? In support of such claim, appellant, Egan, relies upon section 1688 of the Civil Code and the decisions above cited. But section 1691, subd. 2, of the Civil Code, provides that the party rescinding "must restore to the other party everything of value which he has received from him under the contract; or must offer to restore the same, upon condition that such party shall do likewise, unless the latter is unable or positively refuses to do so."

[1-3] In the instant case the notice of rescission was given; the rescinding party offered to restore everything she had received from the other party upon condition that such party should do likewise; this the latter positively refused to do. Therefore the rescinding party was not compelled to restore the property until the other party returned the consideration. In Kelley v. Owens, 120 Cal. 502, 510, 47 P. 369, 52 P. 797, it is held that the very object of a rescission is to place the parties in statu quo. The foregoing rule is so well established that further citation of authority is unnecessary. It is claimed by appellant that under the modified judgment in the case of Sutton-Watts v. Sarnow, supra, that as a condition precedent to the collection of the money theretofore paid on the contract the plaintiff therein must return to the defendant Sarnow the furniture. Having failed to return it, and also having defaulted in the payment of the installments due on the note, she was not in any event entitled to the furniture. We think these claims are answered by the fact that the decree in the rescission action merely follows the rule laid down in subdivision 2 of section 1691 of the Civil Code. Further, Mrs. Sarnow, the defendant in the replevin action, having sold the furniture to this plaintiff Egan, and he having disposed of the furniture, has thus placed it beyond the power of the plaintiff in that action to comply with the judgment, and therefore he has no just cause of complaint, and he was only entitled to it when she complied with the offer of rescission. If such is not the proper construction, then by a transfer of the property involved the action to rescind a contract becomes ineffective at the option of the wrongdoer. So far as the failure

of the defendant to pay installments after the notice of rescission, such a requirement is not contemplated by the provisions of the law relating to rescission. In fact, such a ruling would be directly contrary to the claim made by appellant that the rescission was completed by the service of the notice thereof. It is claimed by the defendant herein that, under the authority of Montgomery v. Meyerstein, 186 Cal. 459, 199 P. 800, the plaintiff in the former action of Sutton-Watts v. Sarnow, had a lien upon the furniture for the repayment to her of the sums of money she had previously paid under the contract. However, in the cited case the judgment gave a lien for the purchase money and expenditures. Such is not the case here. We are of the opinion that when, in the action of Sutton-Watts v. Sarnow, supra, plaintiff rescinded the contract, the party against whom the rescission was made had no right or title to the property sufficient to convey the same to a third party except it were made subject to the final judgment in that action. There is no question here of the rights of innocent purchasers.

The second point advanced for a reversal of the judgment is that the finding of the trial court that it is not true that plaintiff was or is entitled to the possession of the personal property is without foundation in the evidence. We think that what has been heretofore said negatives this contention.

[4] By the third point it is claimed the finding that the plaintiff herein transferred the possession of the property to a third party, and by reason thereof a return or redelivery thereof cannot be had or made to the defendant, is without support in the evidence. There is no dispute in the evidence that the property involved was sold and delivered to a Mrs. Edwards by the plaintiff in this action. The testimony of Mr. Law, counsel for the plaintiff, the person vitally interested in the transaction, was that he knew nothing of the location of the furniture. It also appears from the same source that the plaintiff Egan had been an employee in the office of Mr. Law several years previous to the trial, and that he never had any interest in the subject-matter. There was no further evidence upon this subject. Under the authorities, an alternative judgment is unnecessary where the evidence shows, as in this case, it would be ineffective. Burke v. Koch, 75 Cal. 356, 17 P. 228; Erreca v. Meyer, 142 Cal. 308, 75 P. 826; De Thomas v. Witherby, 61 Cal. 92, 44 Am. Rep. 542.

[5] By the fourth point it is claimed that the evidence fails to disclose that the defendant was entitled to the possession of the furniture involved. It is claimed that during the pendency of the appeal in Sutton-Watts v. Sarnow, supra, the note and mortgage given by the plaintiff in that action to the defendant therein was never canceled; therefore the defendant in that action had a right to assign them to Egan, the plaintiff in this action. Therefore Egan had a right to collect the unpaid installments thereon, and, the same not having been paid, he (Egan) was entitled to the possession of the property. We think this point is also answered by what has been said upon the first point.

[6] The fifth point urged by the appellant is to the effect that a party who rescinds a contract cannot keep the property and at the same time have a judgment for the return of the consideration. As heretofore stated such judgments are made in the alternative, except when a return of the property cannot be had. The defendant in this action was not seeking in that action to collect the judgment and keep the property. She was asking for the relief granted, a judgment of rescission, that is, she asked to be placed in statu quo. Her right to that relief was circumvented by this plaintiff, who, with full knowledge of all the facts, obtained possession of the furniture, and now seeks to deprive the defendant herein of the fruits of the former judgment by purchasing the furniture from the defendant in that action, and by selling it to a third party, thus placing it beyond his power to return it to the defendant. The judgment in this action is for the sum of $2,500, the value of the property, and $1,500 for the taking and withholding the same.

[7] The sixth point of error is to the effect that the court's finding No. 1 to the effect that the plaintiff was never entitled to the possession of the furniture is in conflict with finding No. 3, which holds that it is not true that the plaintiff has ever been, or now is, in the unlawful possession of said property. It is quite clear from the record that finding No. 3 contains an error by using the word "unlawful" instead of "lawful." The error is one of law and not of fact. Neither word adds to nor detracts from the rest of the findings. The error is not prejudicial in any material degree, nor is it responsive to any issue raised by the pleadings.

[8] The seventh alleged error is that there is no finding of fact by the trial court that the defendant is or ever was entitled to the possession of the furniture. The findings do show that the defendant was in the possession of said furniture, and that through this action the plaintiff wrongfully took the furniture from defendant's possession. We think this showing is sufficient to meet the objection.

[9] One other objection of the appellant, incidental to the main points argued by him, requires consideration. It is claimed that the sum of $1,500 awarded to the defendant as damages has no basis either in law or in fact. This is based upon the claim that Sutton-Watts had no right to use the furniture pending the appeal in the action of Sutton-Watts v. Sarnow, supra. We have already held that

the title remained in Sutton-Watts until the completion of the rescission by the parties. For that reason Sutton-Watts was entitled to use the same. It is not pointed out wherein the evidence is insufficient. We have examined the evidence, however, and find it amply sufficient.

We are satisfied that the judgment of the trial court is right. The judgment is therefore affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

LONG v. HARRISON et al.*

Civ. 4249.

District Court of Appeal, Third District, California.

Feb. 5, 1931.

Rehearing Granted March 6, 1931.

1. Money received ⚷8.

Action for money had and received lies to recover money obtained by false and fraudulent representations.

2. Money received ⚷17(3).

In action for money had and received, fraud may be proved without specially pleading facts constituting fraud.

3. Work and labor ⚷28(1).

In action for work, labor and services finding that plaintiff worked for defendants upon mining claim for period of 179 days *held* not supported by evidence.

4. Work and labor ⚷28(1).

Finding that defendants agreed to pay plaintiff reasonable sum per mile for use of his automobile and for his services in operating it *held* not supported by evidence.

Appeal from Superior Court, Los Angeles County; Thomas H. Selvage, Judge.

Action by Harry A. Long against Henry Harrison and others. From the judgment, defendant W. H. Schechert appeals.

Reversed.

Miller & Casady, of Los Angeles, for appellant.

John B. Haas and John D. Home, both of Los Angeles, for respondent.

Mr. Justice pro tem. JAMISON delivered the opinion of the court.

The complaint in this action consisted of two counts; the first of which was for money had and received, the second being for work, labor, and service done and material furnished. During the trial the case was dismissed as to defendant Jessie Calzasia, and judgment was rendered against the remaining defendants for the amounts set forth in the complaint. Defendant W. H. Schechert alone appeals.

The evidence produced by respondent in support of the first count of the complaint was to the effect that $250 of the $1,250 therein named was assigned to him by Thomas C. Knight, and that the interest of his wife, Matilda E. Long, in the remaining sum of $1,000 was also assigned to him; that respondent and his wife were induced to place in the hands of defendants Harrison and Schechert the said sum of $1,000 by reason of representations made by them that they had a lease upon certain mining claims and that the said money would be placed in escrow and not used until a corporation was organized to develop the said mining claims and that after said corporation was formed said money would be used in the development of said claims; that said defendants did not have any lease upon said claims, nor did they at any time organize a corporation; that, instead of carrying out the purposes for which said money was placed in their hands, said defendants converted it to their own use and failed and refused to repay the same to respondent and his wife.

The court found these facts to be true, and also found that the same false representations were made by said defendants to plaintiff's assignor, Knight. This last finding is not supported by the evidence. There is no evidence that said defendants represented to Knight that they had a lease on any mining claims, or that the money would be placed in escrow and not used until a corporation was organized to develop mining claims, or that, after said corporation was formed, the money would be used for the purpose of developing mining claims, or that said defendants appropriated said money to their own use.

Appellant contends that there was a contract between respondent and his assignors and said defendants under which the money named in the first count of the complaint was paid to them, and, there having been no rescission of the contract, an action for money had and received will not lie.

[1, 2] This contention is without merit, where the money, as appears from the testimony in this case, is obtained by false and fraudulent representations. Cal. Jur. 616; Firpo v. Pac. Mut. Life Ins. Co., 80 Cal. App. 122, 251 P. 657, 658; McElhaney v. W. E. Moyer & Co., 101 Cal. App. 53, 281 P. 87. In the case of Firpo v. Pac. Mut. Life Ins. Co., supra, the court said: "The rule has stood without contest that the common-law

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Rehearing granted 298 P. 148.

action for money had and received will lie to recover money obtained by fraud, misrepresentation, duress, undue influence, and mistake of fact." In an action for money had and received, fraud may be proved without specially pleading the facts constituting the fraud. Fallon v. Sockolov, 55 Cal. App. 33, 202 P. 909.

[3] There is substantial evidence to support the finding that respondent was hired by said defendants to work upon the said mining claims at a wage of $6 per day, and that for a period of 100 days he engaged in such work. The court found that respondent commenced work on said claims on August 16, 1925, and that he continued to work until February 10, 1926, and that during that period he worked every day. The only evidence bearing upon this matter was the testimony of respondent, who testified that he did not know the number of days he worked, but that there were more than 100. This finding of the court that respondent worked every day from August 16, 1925, to February 10, 1926, a period of 179 days, is not supported by the evidence.

[4] The finding of the court that said defendants agreed to pay respondent a reasonable sum per mile for the use of the automobile belonging to him and for his services in operating it, and that from August 16, 1925, to February 10, 1926, he operated his said automobile for their use to the extent of 2,550 miles, and that 25 cents per mile was a reasonable charge for such use, resulting in an indebtedness on account of this use of $837.50, is not supported by the evidence. In the first place, there was an error made in computing the amount of said use, which, according to the finding, should be $637.50 instead of $837.50. Then again, the evidence is to the effect that respondent would be paid for the wear and tear of his car and for the oil and gas used, but there is no evidence that he was to be paid for his services in operating the car.

Judgment reversed.

111 Cal. App. 555

BALLARD v. KRUG.

Civ. 7749.

District Court of Appeal, First District,
Division 2, California.
Feb. 4, 1931.

Rehearing Denied March 6, 1931. Hearing Denied by Supreme Court April 2, 1931.

1. Action ⇨7.

If plaintiff acted within her rights in filing complaint for slander, bad motive, if any, *held* immaterial.

2. Appeal and error ⇨930(4).

Appellate court assumed, in support of judgment for plaintiff, that jury considered every thing defendant presented regarding plaintiff's motives in instituting slander action, in so far as they threw light on truth of charges.

3. Libel and slander ⇨121(1).

$30,000 damages for alleged slanderous statements charging plaintiff with crime and imputing want of chastity *held* not excessive.

4. Trial ⇨234(8).

Instruction on plaintiff's failure to call available witness *held* properly refused as improper law.

> Requested instruction was to the effect that the failure to call an available witness possessing peculiar knowledge concerning facts essential to the party's cause, especially if the witness be naturally favorable to the party's contention, relying instead on evidence of witnesses less familiar with the matter, gives rise to an inference that the testimony of such uninterrogated witness would not sustain the contentions of such party in suit.

5. Appeal and error ⇨1064(1).

Instruction in slander action *held* not prejudicial as inferring that statements alleged to have been made were slanderous per se.

> Such instruction was not prejudicial, since it was susceptible of being limited to some of alleged statements, and other instructions covering the entire matter were entirely unobjectionable.

6. Appeal and error ⇨207.

Objection to conduct of plaintiff's counsel *held* not available on appeal, where defendant made no objection to counsel's conduct nor assigned anything as misconduct, nor asked trial court to rebuke counsel.

7. Libel and slander ⇨103.

Rejecting evidence that plaintiff's counsel made offer to one not shown to have authority to act for defendant to dismiss slander action, if defendant would purchase certain property from plaintiff, *held* proper.

Appeal from Superior Court, Los Angeles County; Walton J. Wood, Judge.

Action by Mabel A. Ballard against Olive Krug. Judgment for plaintiff, and defendant appeals.

Affirmed.

Hearing denied by Supreme Court; SHENK and RICHARDS, JJ., dissenting.

Newman, Haas & Schwartz, of Los Angeles (Samuel W. Newman, of Los Angeles, of counsel), for appellant.

Paul Barksdale D'Orr, Joseph N. Beardslee, and Thomas A. Reynolds, all of Los Angeles, for respondent.

STURTEVANT, J.

The plaintiff commenced an action against the defendant to recover damages alleged to have been incurred by reason of slander. The defendant answered, and a trial was had before the trial court sitting with a jury. The jury returned a verdict in favor of the plaintiff, and from the judgment entered thereon the defendant has appealed and has brought up typewritten transcripts.

[1, 2] In her first point the defendant devotes a large amount of space to the motive which prompted the plaintiff to commence this action. If in filing her complaint the plaintiff acted within her legal rights, her action in that respect is not converted by a bad motive into an unlawful act. Furthermore, in so far as the plaintiff's motives threw any light on the truth of the charges made by her, in support of the judgment, we must assume that the jury gave due weight to everything the defendant presented regarding the motive of the plaintiff. Under this heading the defendant calls to our attention many items of evidence which she claims to be inconsistent or improbable. Of course, all of these matters were for the consideration of the jury and not of a court of review.

[3] The jury returned a verdict in the sum of $30,000. The defendant claims the verdict was excessive. The point has no merit whatsoever in the instant case. The specifications of the slanderous words were such that, if the jury believed the alleged words had been spoken, and that they were not true, it is then quite clear that the slander was so atrocious that there is no room for claiming that the verdict was excessive.

[4] It is asserted that the court erred in refusing to give an instruction worded as follows: "The Court instructs the jury that the failure to call an available witness possessing peculiar knowledge concerning facts essential to the party's cause, direct or rebutting, or to examine such witness as to the facts covered by his special knowledge, especially if the witness be naturally favorable to the party's contention, relying instead upon the evidence of witnesses less familiar with the matter, gives rise to an inference, sometimes denominated a 'strong presumption of law', that the testimony of such uninterrogated witness would not sustain the contentions of such party in suit." A most cursory reading of the proposed instruction shows that it is not sound law. Nor was it applicable to any evidence in the case. One Casey Jones was residing at the time of the trial at a place apparently within the jurisdiction of the trial court. He was not called as a witness by the plaintiff. The record discloses no reason why the plaintiff should have called him. Furthermore, it discloses no reason why the defendant did not call him if the defendant so desired.

[5] The trial court instructed the jury as follows: "If you believe from the evidence in this case that the defendant made the statements alleged in the complaint, then such statements would be slanderous per se as charging the plaintiff with a crime and imputing her a want of chastity." The defendant asserts that the meaning of the instruction was to the effect that all alleged statements of the defendant were slanderous per se. Thereupon she is at pains to attempt to show that some of them were not. In the first place, the instruction is susceptible of being limited to some of the alleged slanderous statements. In the second place, the court gave another instruction which covered the entire subject-matter, and which was entirely unobjectionable. Reading those instructions together, it is perfectly clear that the defendant was not injured. Furthermore, it is not at all clear that every single statement alleged in the complaint was not slanderous per se. However, we do not feel called upon to enter into an examination of the subject nor to express an opinion thereon.

[6] In her fourth point, the defendant asserts that the conduct of counsel for the plaintiff was improper during the trial of the action, to the prejudice of the defendant. Thirty pages of her printed brief are devoted thereto. The record shows that the defendant did not at any time object to the conduct of plaintiff's attorney, she did not at any time ask the trial court to rebuke him, nor did she at any time assign anything as misconduct. She has made extended quotations from the record. We have examined those quotations, and we have examined the record itself, and we find no trace of error.

[7] Finally, the defendant makes the point that the trial court erred in refusing to admit certain testimony. The record discloses that Mr. Beardslee was one of the attorneys for the plaintiff, and that Mr. Roy Fish was an officer of the American Mortgage Company. It also shows that Mr. Fish transacted some business with the defendant. The record does not disclose any other authority resting in either. The complaint was filed September 1, 1927. The defendant called Mr. Fish, as a witness, and he stated that he had a conversation with Mr. Beardslee in 1928. Later the defendant offered to prove by Mr. Fish that in that conversation Mr. Beardslee stated that, if Mrs. Krug would buy a certain mine from the plaintiff and her son, all pending litigation would be dismissed. The court refused to receive the evidence. It needs no

citation of authority to show that the ruling of the trial court was not error.

The judgment is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

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111 Cal. App. 595

KRAMER et al. v. ASSOCIATED ALMOND GROWERS OF PASO ROBLES.

Civ. 341.

District Court of Appeal, Fourth District, California.

Feb. 5, 1931.

1. Fraud 🔑49.

One misrepresentation of material fact on which purchasers rely will support cause of action for fraudulent representations, although several misrepresentations are alleged.

2. Fraud 🔑27.

Vendor's misrepresentation that 72 acres of land were planted to certain varieties of almonds in certain specified proportions *held* actionable.

3. Fraud 🔑58(4).

Evidence *held* to establish that purchasers relied on vendor's misrepresentation that 72 acres of land were planted to certain varieties of almonds in certain specified proportions.

4. Appeal and error 🔑882(19).

Vendor could not complain on appeal that court failed to consider vendor's care of orchard, replanting trees, and payment of taxes in mitigation of damages in purchasers' action for misrepresentations, not having offered independent evidence of value thereof.

5. Appeal and error 🔑882(19).

In purchasers' action for misrepresentations, vendor could not complain on appeal of court's failure to consider vendor's payment of commission to purchaser, where no claim for recoupment was alleged in answer.

6. Set-off and counterclaim 🔑15.

Vendor's claim for set-off or recoupment for commission paid purchaser could not be maintained in purchasers' action for misrepresentations.

7. Election of remedies 🔑9.

Institution of purchasers' action for rescission, dismissed without prejudice, did not estop purchasers from maintaining action for misrepresentations.

8. Appeal and error 🔑1008(1).

Question of laches is for determination of trial court.

9. Appeal and error 🔑1010(1).

Trial court's conclusion on question of laches will not be disturbed on appeal, if findings are reasonably supported by evidence.

10. Equity 🔑72(1).

To bar remedy because of laches, there must appear, in addition to mere lapse of time, some prejudicial circumstance.

11. Fraud 🔑38.

Where sale was made on January 24, 1920, purchasers' action for misrepresentation, instituted March 5, 1923, *held* not barred by laches.

Facts disclosed that the vendor had not been prejudiced, even if purchasers discovered facts concerning the misrepresentation on April 25, 1922.

Appeal from Superior Court, San Luis Obispo County; T. A. Norton, Judge.

Action by Herman B. Kramer and others against the Associated Almond Growers of Paso Robles. Judgment for plaintiffs, and the defendant appeals.

Affirmed.

Griffith & Thornburgh, of Santa Barbara, for appellant.

Edward M. Leonard, of San Francisco, John H. Leonard, of Santa Cruz, and Webster & Lyon, of Paso Robles, for respondents.

JENNINGS, J.

This is an action instituted by respondents to recover damages alleged to have been sustained by them by reason of certain false and fraudulent representations made by appellant which induced the respondents to enter into a contract for the purchase of an 84-acre tract of land, 72 acres of which were planted to three year old almond trees and to make payments in compliance with the terms of the contract, which amounted to a total of $15,400.

It appears that during the years 1919 and 1920 three of the respondents resided in the state of Iowa, and that the fourth was a resident of Omaha, Neb. During the latter part of the year 1919 the respondent H. B. Kramer had his attention directed to a certain booklet entitled: "A Life Income Plus California." This booklet was published by the appellant, and described in the most glowing terms the financial profit to be derived from investments in land near San Luis Obispo, Cal., owned by appellant to be planted to almond trees. The interest of respondents was so aroused by the contents of the booklet that three of them came to California for the purpose of investigating the proposition. During their stay in San Luis Obispo, they met the president and certain agents of the appellant corporation, and were by these persons shown a number of tracts of land owned by the corporation, some of which were planted to almond trees. Among the tracts thus exhibited was one of about 84 acres, of which 72 acres were planted to three year old almond trees. A contract was entered into on January 24, 1920, by the respondents for the purchase of this tract for the sum of $44,000. It is this contract which respondents in their complaint allege they were induced to execute because of the false and fraudulent representations made by appellant's officers and agents.

Upon the trial of the issues presented by the pleadings, judgment was given in favor of the respondents in the amount of $28,600, which is the balance due on the purchase price of the land, and the appellant was ordered to execute its deed to the property in favor of respondents without the payment of any further installments of money provided for in the contract of January 24, 1920; the said amount of $28,600 being credited against the balance of $28,600 due on the contract.

Certain findings of the trial court are attacked as not being supported by the evidence. In particular, the court found that the respondents were defrauded by the following representations:

"(a) That said lands were of the finest almond land in the world;

"(b) That 72 acres of said lands were planted to almonds of varieties known as Nonpareil, Drakes and Texas, in the proportions as follows: Nonpareil two-thirds; Drakes one-sixth; Texas one-sixth;

"(c) That there was no danger of frost ever injuring almond trees planted or to be planted on said lands or the buds or fruit of said trees;

"(d) That said 72 acres so planted was a first-class almond orchard in every respect;

"(e) That defendant had acquired accurate knowledge regarding the character and value of said lands and from this knowledge the said land was worth upwards of forty-four thousand dollars ($44,000.00)"

[1, 2] Which were by the court found to be false and statements of fact made with the intention of deceiving, and which did deceive, respondents. It is contended that the trial court erred in finding that the foregoing representations were statements of fact, and that each and all of such representations are mere statements of opinion, and hence not actionable. But, if any one of the representations which the trial court found were made by appellant was a misrepresentation of a material fact upon which respondents had a right to rely, and did rely, it will suffice to support respondents' cause of action. Harris v. Miller, 196 Cal. 8, 235 P. 981. The representation as to 72 acres of the tract purchased by respondents being planted to certain varieties of almonds in certain specified proportions was such a representation. The record shows that it was made, and that it was a false statement. The evidence also shows that it was a representation of a very material fact. It was, moreover, a statement in which respondents, considering their unfamiliarity with almond culture, had a right to rely, and the evidence indicates that they did rely upon it. No element necessary to support respondents' cause of action relative to this representation is lacking, and, under the authority of Harris v. Miller, supra, it is not necessary to consider the four remaining representations which the trial court found were false statements of fact. It may be said in passing that, bearing in mind the circumstances of this case, we are of the opinion that there is only one of the remaining representations as to which there is any doubt of the correctness of the court's finding that it was a statement of fact. This is the representation that the lands of the appellant were of the finest almond land in the world.

[3] It is further urged by appellant that the evidence shows that three of the respondents came from their homes in other states for the express purpose of investigating the proposal described in the published booklet, that they made inquiries, were shown properties both of appellant and other owners, sought for and obtained information—in short, that they made a careful and thorough investigation, and hence that they did not rely upon the representations made to them by appellant, but relied entirely upon their own investigation. This contention may not prevail. So far as the investigation of the particular tract purchased by respondents is concerned, the evidence produced at the trial conclusively shows that the investigation of this tract was confined to one brief visit by two of the respondents accompanied by an agent of the appellant. Furthermore, it is apparent that, throughout the period of investigation, respondents placed reliance upon the representations made to them by appellant's agents, particularly upon the representations of Mr. Nehrhood, referred to in the booklet as appellant's field manager, horticultural expert, and the foremost authority on almond culture in California.

[4-6] It is also urged by appellant that the damages awarded by the trial court are excessive, and it is said that it is significant that the value of the land as found by the court is the exact amount which the plaintiffs had paid on their contract. It will suffice to say that an examination of the record discloses that, while there is a marked conflict in the evidence respecting the value of the land or

the date of the execution of the contract, nevertheless there is ample evidence of a substantial character to support the finding of the court as to the value of the land. The court applied the proper measure of damages. Hines v. Brode, 168 Cal. 507, 143 P. 729. As to the objection that the trial court in fixing damages did not take into account such elements as orchard care, replanting trees, payment of taxes, and commissions paid by appellant to one of the respondents, it does not appear that the trial court failed to consider the elements of orchard care, replanting of trees, and payment of taxes. These elements were not on trial of the case disassociated from the value of the land as appellant represented it to be. It does not appear from the record that any independent evidence was presented to the trial court relative to the value of these elements. Appellant will not now be heard to complain that the court failed to take into account elements in mitigation of damages when the duty rested upon it to have presented evidence of this character. As to the commission paid by appellant to one of the respondents, no claim for set-off or recoupment of such an item was alleged in appellant's answer or made by appellant during the trial of the action. Nor do we think such claim could be maintained in the present action.

[7] The further contention is made by appellant that respondents are estopped from maintaining this action by reason of their having elected the remedy of rescission in their former suit. This contention is entirely without merit. As counsel for appellant admits, the point has been decided adversely to his contention in the case of Campanella v. Campanella, 204 Cal. 515, 269 P. 433. The principle which controls in those cases wherein it has been held that a former judgment between the same parties relative to matters involved in a subsequent action is the principle of estoppel, but, in order that this principle may apply, there must have been a ruling upon the merits in the former case. It is not pretended that there was such a determination in the prior action instituted by respondents for the rescission of their contract with the appellant. The institution of the prior action for rescission, dismissed without prejudice to the institution of a new action upon the motion of respondents, amounted to no more than a mere gesture on their part which indicated their dissatisfaction with the contract they had entered into with appellant. The suit was not prosecuted to a hearing. There was no determination of the issues. Under such circumstances, the judgment of dismissal could not operate as res adjudicata.

[8-11] It is further urged by appellant that respondents are barred from relief in this action because of their laches. The trial court found that none of the respondents has been guilty of any laches. The question of laches is one for the determination of the trial court, and its conclusion thereon will not be set aside by an appellate court, if it finds reasonable support in the evidence. McMahon v. Grimes, 206 Cal. 526, 275 P. 440; Suhr v. Lauterbach, 164 Cal. 591, 130 P. 2; Powell v. Oak Ridge Orchards Co., 84 Cal. App. 714, 258 P. 636. The contract of sale herein was made on January 24, 1920. The first complaint was filed by the plaintiffs March 5, 1923. It is said by counsel for appellant that this was practically a year after the date when the court found that the respondents discovered the alleged fraud, and from the context of appellant's brief we are led to infer that the date on which the discovery of the alleged fraud was made was April 25, 1922. It is argued that respondents could have made a discovery of the alleged fraud at a much earlier date; that at all events respondents took all the benefits of the contract, particularly the benefits of the care of the orchard, the replanting of trees, and the payment of taxes, and delayed for a period of practically one year after discovery of the alleged fraud of appellant before they took any action. It is well settled that, in order to bar a remedy because of laches, there must appear, in addition to mere lapse of time, some circumstances from which the appellant or some other person may be prejudiced. If the respondents are to be barred from their remedy in the present case on the ground that they have been guilty of laches, it must be that their delay in instituting an action has been of such length and under such circumstances that it would be inequitable to enter into an inquiry as to the validity of their claim or to allow such a remedy. Suhr v. Lauterbach, supra. But nothing appears in the record to indicate how appellant has been prejudiced by the failure of respondents to have instituted an earlier action, or, indeed, that there has been any prejudice. If, as counsel for appellant declares, the court found that the plaintiffs discovered the alleged fraud on April 25, 1922, the appellant had then already performed its duty to cultivate and care for the orchard and to pay all taxes and assessments against the property for a period of two years following the date of the agreement, January 24, 1920. It was thereafter under no obligation to render further service without charge to the respondents in cultivating and caring for the orchard. There is nothing whatever in the record herein to indicate that appellant was in any respect prejudiced by the delay of respondents to institute their action, and the specific finding of the trial court that respondents have not been guilty of any laches should not, therefore, be disturbed.

The judgment is affirmed.

We concur: BARNARD, P. J.; MARKS, J.

In re SILVA.*

Civ. 4196.

District Court of Appeal, Third District, California.

Jan. 31, 1931.

Rehearing Denied March 2, 1931. Hearing Granted by Supreme Court March 30, 1931.

1. Infants 🔑19.

Written report of probation officer is merely preliminary to institution of proceeding to declare minor child abandoned, and not part of evidence in proceeding (Deering's Gen. Laws 1923, Act 3966, § 20).

2. Infants 🔑19.

Written report of probation officer need not be certified as part of transcript of evidence on appeal in proceedings to have infant declared abandoned (Deering's Gen. Laws 1923, Act 3966, § 20; Code Civ. Proc. § 953a).

3. Appeal and error 🔑612(1).

Trial court is without authority to certify to transcript of testimony not taken by official court reporter (Code Civ. Proc. § 953a).

4. Appeal and error 🔑522(1), 539.

Testimony taken at trial without presence of official reporter can only be supplied appellate court by stipulation or by bill of exceptions (Code Civ. Proc. § 953a).

5. Appeal and error 🔑612(1).

Trial court is without authority to certify to only portion of material testimony in transcript on appeal, unless balance is omitted pursuant to stipulation (Code Civ. Proc. § 953a).

6. Appeal and error 🔑596.

Appellant has duty to furnish reviewing court with authenticated record of all material evidence adduced at trial (Code Civ. Proc. § 953a).

7. Appeal and error 🔑907(3).

In absence of complete authenticated record of all material evidence adduced at trial, appellate court will assume that every material fact necessary to support judgment exists in omitted evidence.

8. Appeal and error 🔑939.

Trial judge's certificate that transcript contained complete record of all evidence adduced at trial must be assumed true, in absence of proper amendment (Code Civ. Proc. § 953a).

9. Courts 🔑116(1).

All courts of record have inherent power to correct their records so as to make them speak truth.

10. Appeal and error 🔑648.

Trial judge's certificate to transcript of record which becomes record in appellate court cannot be changed by trial judge except by authority of appellate court.

11. Appeal and error 🔑648.

Minute order of trial court modifying trial judge's certificate to transcript of record after same became record in appellate court was ineffective, in absence of motion for diminution of record (Code Civ. Proc. § 953a; Supreme Court Rule 14).

12. Appeal and error 🔑667, 670(1).

Neither statement of reporter contained in transcript of record inconsistent with trial judge's certificate nor ex parte affidavits can be considered to impeach validity of certificate (Code Civ. Proc. § 953a).

13. Infants 🔑19.

"Abandonment" of infant consists of relinquishing custody, control, and parental authority over child, with intent of surrendering those rights (Deering's Gen. Laws 1923, Act 3966, § 15).

[Ed. Note.—For other definitions of "Abandon; Abandonment," see Words and Phrases.]

14. Infants 🔑19.

Parents' failure to visit child or contribute toward maintenance, when opportunity or ability exists, is some evidence of abandonment (Deering's Gen. Laws 1923, Act 3966, § 15).

15. Infants 🔑19.

Parents should not be deprived of custody of child without substantial evidence of either abandonment or unfitness (Deering's Gen. Laws 1923, Act 3966, § 15).

16. Infants 🔑19.

Evidence *held* insufficient to support finding that parents relinquished custody of child with intent of abandoning it (Deering's Gen. Laws 1923, Act 3966, § 15).

Appeal from Superior Court, Merced County; E. N. Rector, Judge.

In the matter of the proceedings on the petition of Marie S. Canisso to have Mary Lopes Silva declared an abandoned child. From a judgment declaring the infant to be an abandoned child, the parents appeal.

Motion to dismiss appeal denied, and judgment reversed.

T. F. Lopez, of Fresno, for appellants.

S. V. Cornell, of Turlock, for respondent.

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*Hearing granted 2 P.2d 341.

Mr. Justice ROLFE L. THOMPSON delivered the opinion of the court.

This is an appeal from a judgment declaring the infant daughter of the appellants to be an abandoned child. There is also a motion to dismiss the appeal on the ground that the transcript of evidence is incomplete.

Mary Lopes Silva is the infant daughter of the appellants, who also possess several other children. At the urgent request of the petitioner, Marie S. Canisso, the child was intrusted to her care by its parents, and remained a member of her family for the period of five years. The parents then demanded the return of their child. Mrs. Canisso thereupon petitioned the court for a decree, pursuant to the provisions of the Juvenile Court Act of California (Stats. 1915, p. 1225, and amendments, 1 Deering's Gen. Laws of Calif., 1923, p. 1535, Act 3966), to declare Mary Lopes Silva an abandoned child and free from the control of her parents.

A trial of the cause followed. The hearing was commenced in the absence of the court reporter. After the examination of the first witness had been completed in chief, the reporter appeared, and the balance of the testimony was taken in shorthand and subsequently transcribed. The petitioner abandoned her effort to prove the parents of the child were unfit to care for her. In the course of the trial counsel for the petitioner said: "Perhaps I can shorten things up. I realize we have made no showing as to the (un)fitness of the home of the parents, and that part of our petition will have to be abandoned."

The court found that the child had been left by its parents in the custody of the petitioner for a period of more than a year with intent on the part of the parents to abandon her, and that during this period of time the parents had neither contributed to her support nor provided for the maintenance of the child. A decree was accordingly rendered to the effect that Mary Lopes Silva was an abandoned child and free from the control of her parents.

An appeal from this decree was perfected by the parents of the child pursuant to section 953a of the Code of Civil Procedure. A transcript of all testimony which was taken by the phonographic reporter was transcribed and duly certified by the trial judge on August 16, 1930, in the following language: "The foregoing transcript * * * including all testimony offered or taken * * * is true and correct and is hereby settled and allowed." This transcript and the proceedings on appeal were filed in this court August 30, 1930. No application for diminution of the record to correct any defect or error in the transcript, pursuant to Supreme Court rule XIV, was ever made to this court, or at all. October 15, 1930, the trial court, apparently on its own motion, made and entered a minute order in said matter purporting to correct and amend the certificate to the transcript. This minute order recited that the former certificate had been inadvertently made, and thereupon directed that it be amended to certify that the transcript of testimony to which it was attached is full, true, and complete, "except that said transcript does not contain any record of the direct examination of the petitioner in said matter, to-wit: Marie S. Canisso, and that there was no official court reporter present at the time of the direct examination of the said Marie S. Canisso." A certified copy of this minute order, accompanied by affidavits to the same effect, were subsequently filed in this court. Upon this showing a motion to affirm the judgment was made to this court. The appeal was also submitted on its merits.

The motion to dismiss the appeal on the ground of incompleteness of the record charged: (1) Failure to certify to the written report of the probation officer as a part of the evidence; (2) omission of the evidence adduced in the examination in chief of the witness Marie S. Canisso; and (3) the invalidity of the certificate to the transcript on appeal, for the reason that a judge is not authorized to certify to evidence which is not taken by the official court reporter.

[1, 2] The petitioner relies upon the rule that a judgment will be affirmed on appeal when the transcript of testimony is incomplete, for the reason that it is assumed the omitted evidence will amply support the judgment in every particular in which the defect does not appear upon the face thereof. 2 Cal. Jur. 697, § 401; Foster v. Young, 172 Cal. 317, 156 P. 476; Coleman v. Farwell, 206 Cal. 740, 276 P. 335. The written report of the probation officer, which is required by the provisions of section 20 of the Juvenile Court Act, is merely preliminary to the institution of proceedings to declare a minor child to be either free from the control of its parents or a ward of the court. It is not a part of the evidence upon which the court may rely in determining the issues of the case. It is an extrajudicial statement of facts which gives the contestants no opportunity for cross-examination of the officer. It is not binding as a part of the evidence of the case. It is therefore unnecessary to certify to this document as a part of the transcript of evidence.

[3] In accordance with good reason, it has been held a court is without authority to certify to a transcript of testimony which was not taken by the official court reporter. 2 Cal. Jur. 623, § 343; Bush v. Allen, 172 Cal. 102, 155 P. 456; Jones v. Busick, 75 Cal. App. 606, 243 P. 27.

[4-7] The only methods of supplying an appellate court with testimony taken at the trial without the presence of an official reporter is either by stipulation as to the facts or by the settlement of a bill of exceptions

in the manner provided by statute. On principle, it would seem to be equally true that a court would lack authority to certify to only a portion of the material testimony, unless the balance of the evidence were omitted by stipulation. This rule does not apply to identified documents which have been offered in evidence. The authentication of only a part of the material evidence is of no value to a reviewing court. The omission of a single material fact may change the entire result of the action. It is therefore the duty of an appellant to furnish the reviewing court with an authenticated record of all the material evidence adduced at the trial. In the absence of such complete record, the appellate court will assume that every material fact necessary to support the judgment exists in the omitted evidence.

[8] In the present case, however, the court certified that the record on appeal contained a full and complete transcript of all the evidence which was adduced at the trial. This certified copy of the transcript of evidence was duly filed in the appellate court. In the absence of a valid amendment to this certificate, procured in the manner required by law by means of an order of the appellate court to correct the error by diminution of the record, it must be assumed this certificate of the trial judge is true and correct. Bell v. Brigance, 194 Cal. 445, 229 P. 27.

[9] All courts of record have inherent power to correct their records so as to make them speak the truth. Kaufman v. Shain, 111 Cal. 16, 19, 43 P. 393, 52 Am. St. Rep. 139; 15 C. J. 975, § 395. But it is said in the authority last cited: "One court has not authority to correct the records of another court." In re Dubosky (D. C.) 232 F. 380.

And in 2 Ruling Case Law, 155, § 130, it is said: "No record lodged with the clerk of the appellate court can be changed without the permission of the court duly entered of record at the time."

[10-12] The mere certificate to a transcript which, by means of an appeal, has become a record in a court of review, has passed beyond the jurisdiction of the trial judge, and may not be changed except by authority of the court in which the record reposes. No motion to change the certificate by diminution of the record was made in the present case. Three months had elapsed since the original certificate was executed. The transcript to which it was attached was no longer a record in the trial court. The minute order which was subsequently made by the trial judge in an effort to modify this certificate was therefore ineffectual so far as the transcript on appeal is concerned. Nor does the recital in the reporter's transcript of evidence that "Mrs. Marie S. Canisso (was) re-called for cross-examination" impeach the binding effect of the certificate. Although this language does infer that the witness had been previously called for examination in chief, neither this language of the reporter contained in the transcript which may be inconsistent with the solemn certificate of the trial judge, nor ex parte affidavits, may be considered to impeach the validity of the certificate. If this were possible, the authentic act of a court of record would be valueless. For the purpose of this motion to dismiss the appeal, we must therefore accept the certificate of the trial judge as true and assume that the transcript is a full and complete record of all the evidence which was adduced at the trial. It necessarily follows this motion to dismiss the appeal on account of alleged incompleteness of the transcript lacks support of the record. The motion to dismiss is therefore denied.

The appeal must be considered on its merit. For the reasons heretofore assigned, only the valid record as it is presented to us may be considered. We must assume there is no legal evidence before us of a purported change of the certificate, or of an absence of any evidence which was adduced at the trial.

[13-16] After a careful examination of the entire record, we are convinced there is no substantial evidence to support the finding of the court to the effect that the parents of Mary Lopes Silva relinquished her custody with the intent of abandoning the child. This is the only issue remaining in the case. During the progress of the trial, the petitioner specifically waived the question regarding the fitness of the parents to care for the child. Abandonment consists of relinquishing the custody, control, and parental authority over a child with the intent of surrendering those rights. In re Snowball, 156 Cal. 240, 104 P. 444; Juvenile Court Act, supra, § 15. The failure to exhibit an interest in the child by visiting it or by contributing toward its maintenance, when the opportunity or ability to do so exists, is some evidence of abandonment. In the present case there is no substantial evidence of abandonment. It is a serious matter to deprive parents of the custody of a child. This should not be permitted without substantial evidence of either abandonment of the child or unfitness of the parents to care for it.

The evidence shows without contradiction that the parents of the infant child were employed on the premises of petitioner. The respective families were friends, countrymen, and neighbors living only about a mile apart. Mrs. Canisso had no small children of her own. The appellants had a large family of some eight children, and were poor. The petitioner became attached to the child, and asked the mother of the child to permit her to keep it for a few weeks. The child remained with petitioner for nearly five years, during which time she was well and kindly treated, receiving frequent visits and contributions of clothing from her parents.

Regarding her custody of the child, Mrs. Canisso testified through an interpreter: "Q. Did you at that time ask Mrs. Silva to take the child for a couple of weeks as you had no small child and wanted company? A. Yes, she told her she could keep her for two weeks.

"Q. Now, since then, the Silvas have asked for that child many times, haven't they? A. They never wanted to take her home until now. * * * She said they came there and fight for it.

"Q. But the Silvas never told you that you could keep that child for good, did they? A. She told her she could keep her for two weeks, but they did not come and get her at the end of two weeks. * * *

"Q. Did Mrs. Silva ever tell you that you could keep that child for good, that they would let you have her for always? A. No sir, but she had the baby over there, and they never went after her. * * *

"Q. Didn't the Silvas visit over at your house quite often? A. They did not visit Mrs. Canisso, they visited the baby." Several witnesses testified in behalf of the petitioner, to the effect that she took good care of the child. No further material facts were elicited from these witnesses.

Frank Filx, who was a partner and lived with Mr. Silva for four years, testified that the parents visited their child at the home of Mrs. Canisso, "about twice a month."

Mrs. Marie Denize, a friend of both families, testified that Mrs. Canisso told her "the child was Mrs. Silva's * * * that she had her there and they wanted to keep it because she liked it. * * * Because Mrs. Silva had lots of them and she said she would help Mrs. Silva by keeping her there for a while." This witness also testified that Mrs. Silva often visited her child and took wearing apparel to it whenever she was in need of clothing. The husband of Mrs. Denize testified to substantially the same facts.

Tony Silva, the father of the child, testified that they left the child with Mrs. Canisso at her request for a period of about two weeks. He said they often asked for the child, and the petitioner replied: "You are not paying no board, it is not costing you anything, and let her stay here." He said that they often visited the child, and bought clothing for it "whenever I buy for others I buy for her." Mrs. Silva testified to substantially the same facts related by her husband. Both parents testified they had never told Mrs. Canisso she could keep the child, and both claimed they had often demanded her return.

Laura, the daughter of petitioner, testified that Mr. and Mrs. Silva had given the child "a few pennies for a birthday," and that "the baby has a little bank account of her own now." She said the parents came for the child shortly before the proceedings for abandonment were commenced, and that her mother said, "They could not take the baby unless they paid the board."

The record contains no evidence in conflict with the foregoing statement of facts. A fair construction of the record indicates that the child was left with the petitioner temporarily, for the reason that the parents were struggling to maintain a large family and because Mrs. Canisso was attached to her. The respective families were neighbors and friends, and belonged to the same nationality. There is no evidence of intent on the part of the parents to abandon control of their infant child. Just the contrary is exhibited by the constant interest in the child, shown by frequent visits, contributions of clothing, and birthday gifts, small as they may have been. The testimony of the petitioner corroborates this conclusion. She admits that she first obtained possession of the child for two weeks only. No doubt she became attached to the child and did not wish to give it up. Evidently she took good care of it. This is not sufficient, however, upon which to deprive the natural parents of a child of its custody. To do so upon such unsatisfactory evidence as this case presents would become a travesty on justice. There is no substantial evidence to support the findings of an abandonment of the child on the part of the parents.

As before stated, the motion to dismiss is denied; and the judgment is reversed.

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111 Cal. App. 572

MacCORKELL v. WILLIAMS.

Civ. 7717.

District Court of Appeal, First District,
Division 2, California.
Feb. 5, 1931.

1. Appeal and error 🔑1011(1).

In trial without jury, duty of resolving conflict in evidence rests on trial court, whose judgment is conclusive.

2. Automobiles 🔑244(6, 35).

That motorist, approaching pedestrian crossing at thirty miles an hour, was looking elsewhere and failed to see pedestrian until collision, justified finding of negligence.

3. Automobiles 🔑244(40).

Evidence justified finding that injury to pedestrian, struck by motorist approaching crossing at thirty miles an hour without looking, was not unavoidable as regards motorist.

4. Automobiles ⚷245(72).

Question of contributory negligence of pedestrian, struck by motorist who approached crossing at thirty miles an hour without looking, *held* for court in trial without jury.

5. Negligence ⚷136(26).

Existence of contributory negligence is ordinarily jury question, or question for court in trial without jury.

6. Automobiles ⚷217(2).

Pedestrian, before lawfully attempting to cross busy thoroughfare, need not, in absence of ordinance to contrary, wait on curbing until he can cross ahead of all vehicles in sight.

7. Automobiles ⚷160(1), 216.

Neither vehicles nor pedestrians ordinarily have superior right, but each must use street with due regard to other's rights.

8. Automobiles ⚷206.

In exercise of ordinary care, pedestrian may rely on expectation that automobiles will conform to customary traffic rules.

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Action by John H. MacCorkell against Frank A. Williams. Judgment for plaintiff, and defendant appeals.

Affirmed.

Joe Crider, Jr., of Los Angeles, for appellant.

Henry P. Goodwin and Burton Briggs Crane, both of Los Angeles, for respondent.

BURROUGHS, Justice pro tem.

This is a suit for damages for personal injuries. The cause was tried by the court without a jury. Judgment was entered in favor of the plaintiff for the sum of $5,732.45. The defendant has appealed from said judgment. The appeal is based upon the ground that the findings of the trial court, as follows: That preceding and at the time of the accident the plaintiff was exercising reasonable and ordinary care for his own safety; that he was not guilty of contributory negligence; that the accident from which plaintiff's injuries resulted was the direct result of defendant's negligence; and that the injuries sustained by the plaintiff were not the result of an inevitable or unavoidable accident so far as defendant is or was concerned, are each and every one without support in the evidence.

Colorado boulevard is a paved highway about sixty feet wide between the curb lines and runs easterly and westerly through the city of Glendale in the county of Los Angeles. Griswold street is a public highway in said city about thirty-five feet wide between curbs and it intersects Colorado boulevard from the south but does not continue north of said Colorado boulevard. At the time of the accident which resulted in plaintiff's injuries, the plaintiff John H. MacCorkell was crossing Colorado boulevard from the north curb to the south curb, headed for some point in Griswold street. Somewhere between the center and the south curb of said boulevard plaintiff came into collision with the front end of a Cadillac automobile driven by the defendant Frank A. Williams, and was seriously injured.

[1] The evidence is conflicting on many material issues. Under the authorities the duty of resolving this conflict rested with the trial court, and the trial court having decided such conflict against the defendant, this court is bound thereby. Anderson v. Los Angeles Transfer Company, 170 Cal. 66, 148 P. 212. Reviewing the evidence in accordance with the foregoing rule, we shall state sufficient thereof to sustain the findings of the court, if there be such evidence in the record. John H. MacCorkell testified that he started to cross Colorado boulevard from the north curb thereof to a point on the westerly line of the sidewalk on Griswold street. Before stepping from the curb he looked both ways for traffic; that automobile traffic was coming toward him from both directions; that the nearest car from the east was 75 to 100 feet away; that the nearest car approaching from the west was from 100 to 150 feet away; that when he was a quarter of the way across he again looked east and west; that when he reached the middle of the street he observed the traffic both east and west on the boulevard; that he remembered hearing automobile brakes squeak; that he glanced toward the east and saw an automobile coming from that direction about 40 or 50 feet away; that he raised his right hand and knew nothing more until he recovered consciousness in the hospital a few days later; that he did not hear any automobile horn or warning sound. It also appears that plaintiff was on a pedestrian crossing. B. C. Gorrill testified that he was driving his car in a westerly direction on the north side of Colorado boulevard; that he was driving at approximately 20 miles an hour; that when he reached the intersection of Griswold street with Colorado boulevard he had slowed down to about 10 miles an hour; that he started to turn into Griswold street; that when the witness first saw the plaintiff, the plaintiff was about 4 feet north of the east and west center line of Colorado boulevard and approximately on a line between the northern curb of Colorado boulevard and the eastern curb of Griswold street; at that time the witness' car was about 40 feet east of

plaintiff on Colorado boulevard; that the witness continued traveling westerly until he was about 10 feet east of the plaintiff; that from there he turned his car about 3 feet northerly toward the north curb line of the boulevard and stopped; that in slowing down his car the brakes squeaked; that at that point he first saw the Cadillac car of the defendant about 40 feet west of the center of the intersection of the boulevard and Griswold street, between the south curb line and the center of the boulevard and traveling at about 30 miles an hour; that the driver's head "was turned somewhat to the south"; from then on until the accident the witness did not see him turn his head in the direction he was going; that from the point where the witness first saw the plaintiff, the latter was walking south across the boulevard and continued until he was about the middle of the south half of the boulevard and on a line with the easterly curb line of Griswold street where he was struck by the defendant's car; that from the point where the witness saw him to the point where he was struck by the automobile, plaintiff was traveling at a fast walk; that when the brakes of the car in which the witness was driving squeaked plaintiff jumped forward 2 or 2½ feet; that immediately after the accident several people were near the car, among them the defendant, and the defendant said, "I did not see him until I hit him." Later in the day defendant told the witness that he thought he (the defendant) was driving 28 or 30 miles an hour; that as shown by skid marks on the pavement, the defendant's automobile skidded a distance of 15 feet, then a space of 10 feet in which there were no marks, and then the car skidded six feet more; that these marks started at the place where defendant's car struck the plaintiff; that the witness stopped his car so that the car of the defendant could pass him before he crossed the street; that he was 30 or 35 feet away from plaintiff when the latter jumped; that after that plaintiff continued across the street; that he looked west, made a swing back, and threw up his right arm; that the defendant's car was about 10 or 15 feet to the right of plaintiff, after that the Cadillac hit him. Ray H. Smith testified that at the time of the accident he was on the east sidewalk of Griswold street about 20 feet from the intersection of that street with the boulevard and walking north; that he saw witness Gorrill's car going west on the boulevard and he was just making the turn to go south on Griswold street; that the attention of the witness was drawn by the squeaking of the brakes just before Gorrill started to make the turn; that he looked up and saw the plaintiff approximately in the center of the street and about 4 feet north thereof on a line with the westerly curb line of Griswold street, the brakes squeaked, plaintiff glanced around and jumped about 3 or 4 feet, and went on south at a fast walk. The witness saw the car of the defendant coming at a distance, it was about 30 or 40 feet from plaintiff; that the plaintiff stopped, hesitated a second, and threw up his hand, and about that time the car hit him. The witness did not hear any horn blow; the defendant's car was traveling about 30 miles an hour; that traveling at the rate of 20 miles an hour defendant's car can be stopped in 20 feet; that by skidding the wheels it can be stopped between 15 or 20 feet. After the impact with the plaintiff's body the car continued easterly on the boulevard, veering to the south, and came to a stop about 20 feet east of Griswold street. This witness also testified to the skid marks on the pavement. It also appears from the evidence that the plaintiff was carried on the front bumper and fender of defendant's car from the point of impact to where the automobile stopped and he was found lying on the pavement at that point. The witness Smith continued testifying. He stated that he heard some one say in the presence of the driver of the Cadillac car, "I didn't see him until I hit him"; that he did not know who said it. On cross-examination this witness said that the plaintiff was going fast up to almost the time of the accident, when he glanced around and saw the car coming and stopped; when he stopped he was right in front of defendant's car. Maude M. MacCorkell, the wife of the plaintiff, testified that at the Glendale hospital she had a conversation with the defendant and he said, "I didn't see your husband until I hit him," and also said that he was going between 28 and 30 miles an hour. These statements were made the day of the accident. Guy B. McChristian and Ethel McChristian testified that in a conversation held with the defendant the evening after the accident the defendant repeated the above statements. At another time the same remarks, according to the testimony of Sam MacCorkell, were made to him by the defendant. It also appears that the defendant was familiar with Colorado boulevard and Griswold street and had driven on the boulevard many times. The defendant and some of his witnesses testified that the former was driving his car at about 20 miles an hour; that the plaintiff jumped when the brakes on Gorrill's car squeaked; that he jumped back and forth in front of Gorrill's car and then ran directly across the boulevard in front of the defendant's car; that the defendant was looking in the direction he was traveling, and when he saw plaintiff he endeavored to stop his car; that when plaintiff ran in front of his car he was but a few feet away. Evidence was also introduced by the defendant that his car, traveling at 20 miles an hour, could not be stopped by the application of the brakes in less than 35 to

40 feet. There is a conflict as to the exact location of the plaintiff at the time the automobile struck him, but under the evidence we deem that an immaterial matter.

[2, 3] From the evidence above set forth does it appear that the defendant was guilty of such negligence as constituted the proximate cause of plaintiff's injuries? We think that it is clear that it does. The evidence that he was driving his car at a speed of about 30 miles an hour while approaching a pedestrian crossing and that he had driven over said street many times and was familiar therewith; that he was not looking in the direction in which he was driving; that he made the remark that he did not see the plaintiff until he hit him; and that he was driving at a speed of about 28 or 30 miles an hour—is sufficient to justify the finding of the trial court that the defendant was so negligent. Also it is sufficient to justify the further finding that so far as the defendant was concerned the accident was not unavoidable.

[4] It is also contended that the plaintiff was guilty of contributory negligence. On this subject the evidence discloses that before the plaintiff stepped from the curb on the boulevard, he looked in both directions for traffic; that he was traveling within the limits of the pedestrian crossing, where he had a legal right to be; that from time to time he looked in both directions for approaching automobiles; that as he reached approximately the center of the boulevard he again looked west; at this time he had one foot forward and as he looked up, he swung back to his other foot and threw up his hand but was struck by the defendant's car. It is true there is evidence for the defendant that at the time the brakes on Gorrill's car squeaked the plaintiff jumped and then without looking in either direction broke into a run and went directly in front of defendant's car. This evidence however merely raised a conflict.

[5-8] The case of Rignell v. Font, 90 Cal. App. 731, 266 P. 588, 590, and the cases there cited, are authority for a number of the points involved in this action. It is held in said case "the question of the existence of contributory negligence is ordinarily one of fact to be determined by the court or jury." "It cannot reasonably be said that, before one may lawfully attempt to cross a busy thoroughfare, in the absence of an ordinance to the contrary, he must wait upon the curbing until he can cross the entire street ahead of all vehicles which may be in sight." "Neither vehicles nor pedestrians ordinarily have a superior right to the use of a public street, but, upon the contrary, each must exercise the privilege with due regard to the rights of the other." Further, that in the exercise of ordinary care a pedestrian may rely upon the expectation that automobiles will conform to the customary rules of traffic. We deem it unnecessary to cite further authorities.

We are satisfied that the findings are sustained by the evidence and the judgment should be affirmed. It is so ordered.

We concur: NOURSE, P. J.; STURTEVANT, J.

QUEIROLO et al. v. PACIFIC GAS & ELECTRIC CO.*

Civ. 7384.

District Court of Appeal, First District, Division 1, California.

Feb. 3, 1931.

Rehearing Granted March 5, 1931.

1. Automobiles ⚷181(1).

Automobile driver does not owe invited guests same degree of care which common carrier owes to passenger, but must use ordinary care and diligence for their safety.

2. Automobiles ⚷246(2).

Instruction that guest was entitled to reasonable care and caution by truck driver *held* not objectionable as requiring same degree of care imposed on common carriers.

3. Negligence ⚷117.

Defense of contributory negligence, if disclosed by plaintiff's evidence, may be taken advantage of, although not pleaded.

4. Trial ⚷253(7).

Instruction directing verdict for plaintiff must include all conditions necessary to show defendant's legal liability.

5. Automobiles ⚷224(1).

Automobile passenger must use reasonable care for his own safety.

6. Automobiles ⚷245(87).

Whether automobile passenger has used reasonable care for his own safety is jury question, unless evidence be insufficient to support finding of contributory negligence.

7. Automobiles ⚷224(5).

Automobile passenger, if aware that driver is carelessly rushing into danger, may be obligated to take steps for his own safety.

8. Automobiles ⚷224(5).

Automobile passenger's duty to remonstrate against excessive speed depends on circumstances of case.

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Rehearing granted 300 P. 487.

9. Automobiles 🔑224(5), 226(2).

Automobile guest *held* not contributorily negligent by failing to protest against excessive speed, where failure did not proximately contribute to injuries, or protest could not have affected driver's conduct.

> Evidence showed that driver of truck involved, immediately on discovering approaching automobile, swerved to right in attempt to avoid collision, and that interval between appearance of danger and occurrence of accident was too slight to justify conclusion that any act of guest would have affected conduct of driver.

10. Trial 🔑241.

Evidence that speed of truck was excessive, and that truck was not under control, justified instructions involving quotations from Motor Vehicle Act regarding drivers' duty concerning care, speed, and control of vehicle.

11. Negligence 🔑121(2).

"Res ipsa loquitur doctrine" is based in part on theory that defendant, controlling instrumentality causing injury, knows cause of accident or has best opportunity of ascertaining cause, and that plaintiff is obliged to allege negligence generally, and rely on happening of accident.

> [Ed. Note.—For other definitions of "Res Ipsa Loquitur," see Words and Phrases.]

12. Negligence 🔑121(2).

Where complaint alleges negligence specifically rather than generally, res ipsa loquitur doctrine is inapplicable.

13. Negligence 🔑121(2).

Plaintiff alleging particular act of negligence, which is act that legal inference tends to establish, is not thereby deprived of res ipsa loquitur doctrine.

14. Automobiles 🔑246(60).

Instruction that invited automobile guest need not show specific negligence causing injury, but might rely on proof that accident, with due care, would not ordinarily have occurred, *held* not erroneous.

15. Negligence 🔑58.

To constitute "proximate cause," injury must be natural and probable consequence of negligent act.

> [Ed. Note.—For other definitions of "Proximate Cause," see Words and Phrases.]

16. Trial 🔑260(8).

Refusing instruction correctly defining proximate cause *held* harmless, where satisfactory definition thereof was given.

17. Trial 🔑252(8).

Instruction imposing on automobile guest absolute duty of protesting against excessive speed *held* properly refused, being unjustified by evidence.

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Action by Rita Queirolo and husband against the Pacific Gas & Electric Company. Judgment for plaintiffs, and defendant appeals.

Affirmed.

Thos. J. Straub and J. C. Wood, both of San Francisco, for appellant.

Harvey S. Craig, of Oakland, for respondents.

PER CURIAM.

Plaintiffs, who are husband and wife, brought this action to recover for injuries sustained by Rita Queirolo through the overturning of an automobile truck operated by an employee of defendant company.

The defendant maintained a camp at Electra, and used a truck in hauling supplies to the camp from the town of Jackson. Joseph D. Queirolo was one of the employees of defendant. Elmer Boitano was the driver of the truck, and, according to his testimony, had been instructed by the foreman in charge to carry the wives and children of employees to and from the camp. On July 14, 1926, Mrs. Queirolo was granted permission to ride to Jackson and return. The evidence shows that, while returning, the driver, in approaching a curve on the highway, which at that point rounds a high bank on the left, was driving to the left of the center of the highway. His speed was estimated to have been from fifteen to thirty-five miles per hour. At or near the curve he met another automobile, whereupon he swerved sharply and passed down a sloping bank on his right-hand side of the highway. The truck was overturned, causing injuries to Mrs. Queirolo. It was also testified that the driver, until he reached a point about fifteen feet from the approaching automobile, was not looking in that direction but to his right, and did not see the danger until the horn of the automobile sounded.

The action was tried by a jury, which returned a verdict for the plaintiffs, and defendant has appealed from the judgment entered thereon. As grounds therefor it is contended that the court improperly refused certain instructions offered by defendant, and that two of the instructions given were prejudicially erroneous.

The court instructed the jury as follows:

"If you find from the evidence that Rita Queirolo was given permission by defendant, the company just named, acting through one of its duly authorized agents, to ride to the town of Jackson and return on the company's stage, she was at the time of the accident entitled to receive at the hands of the driver reasonable care and caution upon his part looking to the avoidance of hurt or injuries to herself. I will modify that somewhat: I have already advised you as to the nature of the accident. If you believe from the evidence that Elmer Boitano was negligent, and that such negligence was the proximate cause of the injuries to the plaintiff, Rita Queirolo, and further find that he was at the time an agent of the defendant company and acting within the scope of his authority as such, then your verdict must be for the plaintiffs and against the defendant, Pacific Gas and Electric Company."

[1, 2] While, as urged by defendant, the operator of an automobile does not owe invited guests the same degree of care which a common carrier owes a passenger, he is nevertheless bound to use ordinary care and diligence for their safe carriage. Nichols v. Pac. Elec. Ry. Co., 178 Cal. 630, 174 P. 319. The first part of the instruction states the above rule substantially; and the contention that it imposed upon defendant the duty resting upon common carriers is without merit.

As to the remaining portion of the instruction, it is contended by defendant that the evidence shows plaintiff to have been guilty of negligence, in that she failed to protest against the speed the truck was traveling and that the instruction erroneously omitted this element.

[3-6] Although contributory negligence be not pleaded as a defense, which was the case here, nevertheless, if it appears from the evidence introduced by the plaintiff that he was guilty of such negligence, the defense may be availed of though not pleaded (Cahill v. Stone Co., 153 Cal. 571, 96 P. 84, 19 L. R. A. [N. S.] 1094; Hoy v. Tornich, 199 Cal. 545, 250 P. 565), and it is also the rule that an instruction directing a verdict for the plaintiff must embrace all the conditions necessary to show the legal liability of the defendant (Pierce v. United Gas & Elec. Co., 161 Cal. 176, 118 P. 700; Douglas v. Southern Pacific Co., 203 Cal. 390, 264 P. 237). According to plaintiff's testimony, the truck as it rounded a curve was traveling more than twenty-five miles an hour. She further testified that she knew the vehicle was going too fast, but made no protest. An automobile passenger is bound to use reasonable care for his own safety; and whether he has used such care is a question of fact which must be submitted to the jury (Shields v. King, 207 Cal. 275, 277 P. 1043), unless the evidence be insufficient to support a finding of contributory negligence (Flores v. Fitzgerald, 204 Cal. 374, 268 P. 369).

It has been held that the negligence of the driver of an automobile cannot be imputed to a passenger unless the latter exercised some control over the driver, or had the power to supervise or direct the manner in which the vehicle should be operated. Marchetti v. Southern Pacific Co., 204 Cal. 679, 269 P. 529.

[7-9] In the case at bar it is not contended that the plaintiff could have exercised any control, or had the power to direct the operation of the truck. According to her testimony and that of the driver, the approaching automobile was first seen by them when the same was approximately twenty feet away. Likewise the truck came within the view of the driver of the automobile at about the same distance. While, as held in Thompson v. Los Angeles, etc., Ry. Co., 165 Cal. 748, 134 P. 709, and Parmenter v. McDougall, 172 Cal. 306, 156 P. 460, if a passenger is aware that the driver is carelessly rushing into danger it may be incumbent upon him to take steps for his own safety; yet, as pointed out in Marchetti v. Southern Pacific Co., supra, these cases state the rule upon the subject of a passenger's duty in the face of a known danger, and have no application where the danger is not apparent, and it is not shown that there was anything that the passenger could have done to avert the accident after the danger became known to him. The duty of a passenger to remonstrate against excessive speed is dependent upon the circumstances of the particular case. Dowd v. Atlas, etc., Service Co., 187 Cal. 523, 202 P. 870. It is manifest from the evidence in the present case that the driver, immediately upon discovery of the approaching automobile, endeavored to avoid a collision, and that the interval between the appearance of danger and the happening of the accident was too slight to justify the conclusion that any act by plaintiff would have affected the conduct of the driver, or that her failure to act proximately contributed to her injuries.

[10] The court in its charge quoted certain paragraphs from the Motor Vehicle Act relating to the duty of drivers as to care, speed, and control of the vehicle. It is claimed that these provisions had no bearing upon the issues in the case.

There was evidence that the speed of the truck was under the conditions shown excessive; also from the way in which the accident happened the jury might reasonably have inferred that the truck was not kept under control. In view of this evidence, the instructions were not improper.

The following instruction was given: "The plaintiff is not required to show particularly what the specific act of negligence was which produced the injury. It is only required to show by preponderance of evidence that the accident could not ordinarily have occurred had due care been employed by defendant, and you are instructed that if the testimony in this case shows by a preponderance of the evidence that the plaintiff, Rita Queirolo's injuries were sustained by reason of the negligent acts of the defendant's employee, and that those negligent acts were the proximate cause of the injuries, then it will be your duty to return your verdict for the plaintiff."

Appellant contends that this instruction improperly permitted the jury to presume negligence from the happening of the accident, and that, in view of plaintiff's pleading, the res ipsa loquitur doctrine had no application to the case.

[11-14] The complaint alleged, in substance that, due to the negligent operation of the truck by defendant's driver, the same ran off the highway and turned over, causing injury to the plaintiff. The res ipsa loquitur doctrine is based in part upon the theory that a defendant in charge of an instrumentality which causes injury either knows the cause of the accident or has the best opportunity of ascertaining it; and the plaintiff, having no such knowledge, is compelled to allege negligence in general terms and rely on proof of the happening of the accident in order to establish negligence. Connor v. Atchison, etc., Ry. Co., 189 Cal. 1, 207 P. 378, 26 A. L. R. 1462. Consequently where, instead of relying upon a general allegation of negligence, the complaint sets out specific negligent acts or omissions complained of, the doctrine does not apply. Marovich v. Central Cal. Traction Co., 191 Cal. 295, 216 P. 595. But it has also been held that the doctrine applies where negligence is pleaded both generally and specially (Roberts v. Sierra Ry. Co., 14 Cal. App. 180, 111 P. 519, 527; Bourguignon v. Peninsular Ry. Co., 40 Cal. App. 689, 181 P. 669), where the evidence tends to show specific acts of negligence (Burke v. Dillingham, 84 Cal. App. 736, 258 P. 627; Kilgore v. Brown, 90 Cal. App. 555, 266 P. 297), or where the injured person is an invited guest (Brown v. Davis, 84 Cal. App. 180, 257 P. 877). Nor, as held in Atkinson v. United Railroads, etc., 71 Cal. App. 82, 234 P. 863, is the plaintiff deprived of the right to rely upon the doctrine by reason of having averred the particular act of negligence complained of where such act is the one which the legal inference tends to establish. And in Seney v. Pickwick Stages, etc., Inc., 82 Cal. App. 226, 255 P. 279, 280, where the same rule was approved, it was held that the doctrine applied to allegations "that 'defendant operated the auto stage * * * in such a careless, reckless, wanton, and negligent manner that the said auto stage was overturned.'" In view of the above decisions the instruction was not erroneous.

[15, 16] The following instruction was also given: "I instruct you that the proximate cause must be understood to be that which in the natural and continuous sequence, unbroken by any new independent cause, produces that event and without which the event would not occur."

Appellant concedes the correctness of this instruction, but complains that another offered by it, stating the test by which to determine the question of proximate cause, was improperly rejected. To constitute proximate cause, the injury must have been the natural and probable consequence of the negligent act (Williams v. San Francisco, 6 Cal. App. 715, 93 P. 122; Marton v. Jones, 44 Cal. App. 299, 186 P. 410); and it has been held that the consequence must be one which in the light of the circumstances an ordinarily prudent man ought reasonably to have foreseen might probably occur as the result of his negligence (Benson v. Southern Pacific Co., 98 Cal. 45, 32 P. 809, 33 P. 206; Marton v. Jones, supra; Henry v. Southern Pacific Co., 50 Cal. 176). As has been stated, the latter rule is usually given in connection with the first as explanatory of it; that is to say, the natural and probable consequences of a negligent act or omission are those which ought to have been foreseen or could reasonably have been anticipated. 45 Corp. Jur. "Negligence," § 483, pp. 913, 917. The instruction given has, however, been approved as a satisfactory definition (Baillargeon v. Myers, 180 Cal. 504, 182 P. 37); and, while the offered instruction correctly explained the rule and might properly have been given, we cannot say that its refusal was prejudicially erroneous.

[17] The following instruction offered by appellant was also refused: "You are instructed that a passenger in an automobile operated by another not for hire is required to use ordinary care for her own safety; and though you may believe that Elmer Boitano, the driver of the truck in this case, was driving at an excessive rate of speed immediately prior to the accident considering the nature and condition of the highway, if you further believe from the evidence that said Elmer Boitano drove said truck along said highway between the town of Jackson and the place where the accident occurred at a similar rate of speed and in a similar manner, and if you find that the plaintiff failed to remonstrate with said Elmer Boitano as to his manner of driving said automobile, or to request said Elmer Boitano to stop said automobile and permit plaintiff to alight therefrom, then you are instructed that the plaintiff failed to exercise ordinary care for her own safety, and if you further find that plaintiff's failure to exercise such care for her own safety contributed to the cause of the accident, then your verdict should be for the defendant."

The duty of a passenger to remonstrate against excessive speed or to withdraw from the vehicle, a reasonable opportunity therefor being afforded, is not absolute; the question whether by failing to do so he is wanting in ordinary care being dependent upon the circumstances of the particular case. Shields v. King, supra. The offered instruction made it the absolute duty of plaintiff under the evidence to protest against the speed of the truck. As stated, there was no evidence which would have justified the conclusion that the plaintiff was bound to remonstrate, and the instruction was properly refused.

The verdict was fully supported, and a review of the record discloses no error which would warrant a reversal of the judgment.

The judgment is affirmed.

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111 Cal. App. 403

FIRPO v. PIPER et al.

Civ. 7461.

District Court of Appeal, First District,
Division 2, California.
Jan. 28, 1931.

1. Partnership ⚷264, 285.

Unauthorized transfer of partnership interest to stranger and sale of assets to corporation dissolved partnership and relieved partner not knowing thereof from liability on contract executed after dissolution (Civ. Code, §§ 2397, 2450).

2. Partnership ⚷285.

Company contracting with partnership could not recover against partner unless knowing he was member of original partnership and having no knowledge of dissolution of partnership (Civ. Code, §§ 2397, 2450).

3. Partnership ⚷296(3).

Evidence showed company selling advertisements knew it was dealing with corporation to which partnership assets were sold as real party in interest, precluding recovery against partner not knowing of sale of partnership nor contract entered into (Civ. Code, §§ 2397, 2450).

Appeal from Superior Court, City and County of San Francisco; F. M. Jamison, Judge.

Action by E. Firpo against Frederick J. Piper and others. Judgment for defendant J. W. Woodruff, and plaintiff appeals.

Affirmed.

Raymond Perry, of San Francisco, for appellant.

Arthur W. Bolton, of San Francisco, for respondent.

LUCAS, Justice pro tem.

Appellant, as the assignee of Lockwood-Shackelford Company, a corporation, brought suit to recover the value of advertising services alleged to have been rendered defendants at their special instance and request and for which it is alleged defendants promised and agreed to pay the sum of $3,311.93. The defendants Green Manufacturing Company, a copartnership, F. J. Piper, Charles E. Smock, copartners, and Dale H. Poole, guarantor, defaulted, and judgment was entered against them. The respondent, J. W. Woodruff, one of the original copartners in Green Manufacturing Company, appeared and contested the action. In addition to filing a general denial, he pleaded two separate and special defenses; namely, that the indebtedness sued upon was incurred by defendants Piper, Smock, and Poole as individuals and as directors or officers of Redusoll, Inc., the corporate successor to the assets and business of Green Manufacturing Company, and that it had already been judicially determined in the United States District Court, in the matter of Green Manufacturing Company, a bankrupt, that respondent was not liable for the amount sued for herein.

At the conclusion of the trial the court found that the advertising services were not rendered to respondent at his instance and request, and that he did not promise and agree to pay therefor, but, on the contrary, that the services were performed for Redusoll, Inc. It further found that the order in the bankruptcy proceedings constituted a final determination of respondent's liability for appellant's claim. Judgment was entered accordingly.

In order to pass upon the correctness of the above findings, it will be necessary to analyze with some care the evidence offered and received in the trial court.

It appears that on January 12, 1925, for the purpose of manufacturing and selling "Redusoll" and certain extracts, hair tonics, and reducing creams under the name of Green Manufacturing Company, the defendants Piper and Smock and the respondent, Woodruff, signed certain articles of copartnership, whereby the said Piper agreed to employ all of his time in manufacturing said products, at a salary of $200 per month, the said Smock agreed, for a similar compensation, to employ all of his time in selling said products, and the said Woodruff agreed to lend financial aid to said business. It was specifically agreed in the articles of copartnership that no obligation was to be incurred in excess of the sum of $250 without the written consent of all the parties thereto, and that on demand of any two parties a corporation should be formed, wherein each of the partners was to have an equal share. Thereafter the said Piper and the said Smock proceeded to manufacture and market the products of the said copartnership under the name of Green Manufacturing Company, while the said Woodruff, whom it appears was an officer in the United States navy and absent from the state of California at all times during the subsequent conduct of the business, furnished financial assistance as agreed.

Some time in July or August of 1925, the defendant Poole was called upon by defendants Smock and Piper in regard to financing the business of Green Manufacturing Company. After investigation by Poole, it was agreed among the three that Poole should have a one-quarter interest in the business for financing it. No new partnership papers were drawn up, however, as Poole agreed to incorporate a new company to take over the business. Poole forthwith assumed active charge of the business, put his own money into the project, and changed the sales policy and the price of the products. Poole at no time had dealings with the respondent, Woodruff. The latter testified that, while he received a communication from Piper or Smock regarding Poole becoming a partner or acquiring an interest in the business, he never communicated with them about the matter, and that he had no information as to whether or not Poole ever became a partner.

On August 21, 1925, as a result of Poole's activities, articles of incorporation of Redusoll, Inc., were drawn up, signed by the said Piper, Smock, and Poole, and by one Brechtel and one Brown as incorporators. The articles of incorporation were filed with the secretary of state on August 29, 1925. On September 3, 1925, a bill of sale from Green Manufacturing Company to Redusoll, Inc., of all of Green Manufacturing Company's assets was signed by Messrs. Piper and Smock for and on behalf of the old partnership. Said bill of sale was signed and executed in triplicate. One copy was given to Poole, one was sent to respondent, and the third was kept in the office of Green Manufacturing Company. After the execution of this bill of sale, all the assets of Green Manufacturing Company were turned over to Redusoll, Inc., and defendant Poole immediately took over the full management thereof. The location of the office was changed, the name "Redusoll, Inc.," or "Redusoll, Incorporated," was placed on the office door, stationery, billheads, cartons, and containers, the telephones were listed under that name, and all customers were notified of the change.

On September 11, 1925, an agreement for advertising was entered into by and between Lockwood-Shackleford Company and Green Manufacturing Company; one C. H. Beebe signing on behalf of the advertising company and defendant Piper signing on behalf of Green Manufacturing Company. By the terms of this agreement the advertiser, Green Manufacturing Company, agreed to pay Lockwood-Shackelford Company for its services a fee of 15 per cent. of the total expenditures made by it on account of advertising and advertising matter, the minimum service payment thereunder being fixed at one dollar per month. Although the parties contemplated the expenditure of approximately $4,000 for an advertising campaign, no definite figures were agreed upon until after the agreement was executed.

Under date of September 11, 1925, Lockwood-Shackelford Company furnished a written estimate of the cost of certain services totaling the sum of $3,990.60. This was indorsed "Approved, Green Manufacturing Company by F. J. Piper." Three subsequent estimates in the several sums of $69.75, $404.25, and $45, were also furnished, which were, respectively, indorsed "Authorized, Green Manufacturing Co. by F. J. Piper; O. K. Poole;" "Approved, Green Manufacturing Company, by F. J. Piper; O. K. Poole;" and "Authorized, Green Manufacturing Company by Poole."

Respondent, Woodruff, was never consulted in reference to the execution of the original agreement, nor in reference to the approval of any of said estimates; nor was he at any time notified that his copartners intended to or did incur any indebtedness in excess of the $250 limit expressly mentioned in their articles of copartnership.

As to what actually transpired at and about the time the advertising agreement was entered into and the estimates approved there is considerable conflict.

Herbert C. Bernsten, general manager of Lockwood-Shackleford Company, testified that he was not present when the agreement was signed, and that shortly thereafter he objected to the credit situation and demanded further information. He was, according to his testimony, shown the original copartnership agreement between Piper, Smock, and Woodruff, and was told that respondent was a man of means and that as a partner he would be liable for the indebtedness incurred. He further testified that he secured a report as to the financial standing of respondent and of Green Manufacturing Company, but did not go forward with the advertising campaign until the defendant Poole had guaranteed the account, and until Poole's financial standing had also been investigated. He admitted, however, that, at several conferences had in reference to advertising, he was told that Redusoll, Inc., was being formed to take over the business of Green Manufacturing Company, but insisted that the advertising was to be done for the latter.

C. H. Beebe, another representative of Lockwood-Shackleford Company, also testified in effect that the advertising was to be done for Green Manufacturing Company as the real party in interest.

Opposed to this testimony, the following evidence was introduced on behalf of the respondent, upon which he relies as support for the court's findings herein:

The defendant Piper testified that several times during the year 1925 the above-mentioned C. H. Beebe called upon him and solicited advertising for Lockwood-Shackleford Company; that in June or July he told Beebe that as soon as the corporation, Redusoll, Inc., was formed there would be a chance of advertising; that, the next time Beebe called after the corporation was formed, and solicited advertising, he was told that Piper had nothing more to do with that because he was only the production manager, and that Poole had been appointed as general manager of the corporation. Piper directed Beebe to see Poole about the advertising. Thereafter Beebe, Poole, and Piper met by appointment, and Beebe endeavored to get an advertising contract. Poole told Beebe he was not yet ready for advertising, that the corporation had been formed, and that it was his task now to raise money and sell stock, and that after that he would go ahead with the advertising and give him a contract. Piper then testified that, the next time he saw Beebe, Beebe presented him with a printed form of contract to sign, and stated that Poole had sent Beebe to him for the purpose of securing his signature. Piper objected to signing the contract because Poole was in charge of affairs and because the contract was made out in the name of Green Manufacturing Company. In Beebe's presence Piper telephoned to Poole and voiced these objections and was told by Poole that he was in a hurry, that it was only a matter of form involving an obligation of but $1 per month, and that it made no difference who signed the contract or in whose name it was made out. Thereupon Piper signed the contract.

Piper further testified that a short time thereafter a meeting occurred at the office of Lockwood-Shackelford Company whereat Messrs. Poole, Smock, Piper, and Bernsten were present. Bernsten submitted the first estimate or cost of the proposed advertising campaign. The estimate was passed around, and Poole said, "Piper, you had better sign this," to which Piper replied, "Why should I sign this? I am production manager; you are the general manager; and furthermore it is made out in the name of the Green Manufacturing Company." Poole replied, "It doesn't make any difference; it is just a matter of form; just sign it and it will be O. K." Thereupon Piper signed the original estimated of $3,990.60. Some of the subsequent estimates were also signed by him, as he considered them a part of the original estimate.

The following testimony was also given by Piper: "Q. Now, as I understand your testimony, what was done was between Redusoll. Inc., and the Lockwood-Shackelford Company? A. Yes, sir."

As to respondent Woodruff's name being mentioned, Piper testified that his name was not mentioned by anybody when the question of credit was discussed.

The defendant Poole gave testimony in effect as follows: That during the year 1925 both Beebe and Bernsten of Lockwood-Shackelford Company called upon him soliciting business. He told them that a new corporation was going to take over the business of Green Manufacturing Company, and that, when the affairs were all arranged, he would talk about an advertising contract. Finally he agreed to let them handle the advertising, and they submitted the advertising contract whereby Lockwood-Shackelford Company was retained as advertising agent. He further testified that the Redusoll business was being operated under the name of the corporation, although they had not yet received permission to sell stock; that Piper, Smock, and Poole were in Bernsten's office when the estimates were talked over and they agreed to go through with the contract as outlined; that the estimate was handed to Poole to sign, but, being made out in the name of Green Manufacturing Company, Poole told Piper to sign it, saying it made no difference; that a day or two later Bernsten telephoned and said he would like to have another meeting; that the same parties again met, and Bernsten said he was not satisfied with the financial set-up and did not want to go ahead with the advertising unless Poole personally guaranteed the account. Poole thereupon signed the written guaranty.

Poole testified also that while the advertising matter was being prepared practically all of the business was being taken care of by him, and that he called at Lockwood-Shackelford Company's office nearly every day.

The following question and answer appear in the record: "Q. Practically all of this advertising agreement, so far as any conferences were concerned, was conducted by you for the Redusoll Company with the representatives of the Lockwood-Shackelford Company? A. Yes." The witness also testified that he did not recall respondent Woodruff's name having been mentioned during any of the interviews or conversations with the representatives of the Lockwood-Shackelford Company; that Woodruff was not in California at the time, had nothing to do with the business, and was neither an incorporator, officer, director, nor stockholder of Redusoll, Inc.

It further appears from the record that the advertisements put out by Lockwood-Shackelford Company in accordance with the terms of their agreement bore the name of "Redusoll, Inc.," rather than that of Green Manufacturing Company, and that the portfolio prepared by Lockwood-Shackelford Company and containing the proposed advertisements compiled for salesmen to show distributors represented to the trade that the goods were manufactured and sold by Redusoll, Inc. The portfolio also contained a copy of a letter written by the San Francisco examiner stating that they had received from Lockwood-Shackelford Company an advertising contract for over 7,000 lines of advertising for Redusoll, Inc., manufacturers of Redusoll reducing cream. Regarding this letter, Mr. Beebe testified as follows:

"That statement is absolutely correct. They had received that contract. They had received it as far as the advertising signature was concerned for Redusoll, Incorporated. Mr. Poole and I went to the San Francisco Examiner on several occasions.

"Q. Who told the San Francisco Examiner that the Lockwood-Shackelford Company had a contract for advertising for Redusoll, Incorporated; was that you, or some other member of the firm? A. They got their authorized space orders.

"Q. Who gave them that? A. The space department of the Lockwood-Shackelford Company."

[1] Upon the foregoing evidence and other evidence which it will not be necessary to detail, the trial court found "that prior to the month of September, 1925, said partnership (that of Piper, Smock & Woodruff) was dissolved;" "that at the time said advertising was done and said services were rendered defendant (respondent) J. W. Woodruff was not a partner of Green Manufacturing Company;" and "that it is not true as alleged in plaintiff's complaint that Lockwood-Shackelford Company, a corporation, rendered to defendant (respondent) J. W. Woodruff at his instance and request the advertising or advertising services referred to and described in said complaint."

We believe the testimony above set forth and referred to is sufficient to support these findings. The giving to Poole of an interest in the business and placing him in full charge of the management thereof contrary to the terms of the partnership agreement, whereby Piper and Smock were to devote their entire time to the business, the formation of Redusoll, Inc., the transfer to it of the business and assets of the copartnership and the incurring of indebtedness in excess of the limited amount, all effectuated a dissolution of the original partnership.

"A partnership can be formed only by the consent of all the parties thereto, and therefore no new partner can be admitted into a partnership without the consent of every existing member thereof." Civ. Code § 2397.

"A general partnership is dissolved as to all the partners. * * * 4. By the transfer to a person, not a partner, of the interest of any partner in the partnership property." Civ. Code, § 2450, as it existed in 1925. See, also, 20 R. C. L. 954, and Moropoulos v. Fuller Co., 186 Cal. 679, 200 P. 601.

[2, 3] If, as herein held, respondent was not in fact a member of the Green Manufacturing Company at the time the advertising indebtedness was incurred, Lockwood-Shackelford Company would have no right to look to him for payment of its claim unless it knew he was a member of the original partnership and had no knowledge of its dissolution nor of facts sufficient to place it on inquiry. The evidence, however, although conflicting, is sufficient to justify the conclusion that Lockwood-Shackelford Company did not know of respondent's former connection with the partnership, and that, even if it did have such knowledge, it also had knowledge of the partnership dissolution and that it was dealing with Redusoll, Inc., and its incorporators as the real parties in interest.

Having held with the trial court that the original partnership of Green Manufacturing Company had been dissolved prior to the date of the advertising agreement with appellant's assignor and that the services of Lockwood-Shackelford Company were not performed for respondent nor for any partnership of which he was a member and that he did not promise and agree to pay therefor, we deem it unnecessary to discuss the additional defense of res adjudicata.

The judgment appealed from is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

111 Cal. App. 466

SAN PEDRO LUMBER CO. v. KREIS et al.

Civ. 7648.

District Court of Appeal, First District, Division 1, California.

Feb. 2. 1931.

As Modified Feb. 19, 1931.

1. Mechanics' liens 🔑277(2).

Materialman, to be entitled to lien against owner of premises on which structure was erected, must prove materials were used therein.

2. Mechanics' liens 🔑281(1).

That materials sold were of kind used in structure is insufficient to prove that materials were used in structure, to entitle materialman to lien against owner.

3. Mechanics' liens 🔑281(1).

Proof that materialman shipped materials to contractor is insufficient to show materials were used in structure on which materialman claimed lien.

4. Mechanics' liens 🔑279.

Materialman claiming lien against owner of premises on which structure was built has burden of proving value of materials, in absence of fixed contract price.

5. Mechanics' liens 🔑281(1).

In action to foreclose mechanic's lien, evidence *held* insufficient to sustain finding that materialman furnished material of certain value which was used in building.

> Drivers employed by materialman claiming lien on premises for materials and foreclosure thereof testified to fifteen deliveries of material to owner's premises, value of which, according to testimony of materialman's shipping clerk, was $539.17. Drivers testified to eight other deliveries to same place, but there was no evidence as to quantity or value of these deliveries. Shipping clerk testified to value of lumber and material described in nine invoices charged to contractors and shipped to building to be used therein, value of which was $823.70, but shipping clerk testified he was never on premises and had no personal knowledge that materials were delivered or used there. Court found that materialman furnished lumber and material of value of $1,781.25.

6. Mechanics' liens 🔑277(6).

Complaint to foreclose mechanic's lien for reasonable value of materials *held* not at variance with proof showing estimate of cost of materials but no binding obligation fixing prices.

7. Mechanics' liens 🔑280(6).

Claim of lien *held* properly admitted, in action to foreclose mechanic's lien, to show compliance with statute.

8. Mechanics' liens 🔑277(2).

Materialman suing to foreclose mechanic's lien need not prove nonpayment of claim.

Appeal from Superior Court, Los Angeles County; Hugh J. Crawford, Judge.

Action by the San Pedro Lumber Company against C. W. Kreis and others. Judgment for plaintiff, and defendants Isadore Reese and another appeal.

Affirmed in part and reversed and remanded in part.

D. Howard Painter and Glen Behymer, both of Los Angeles, for appellants.

Ernest B. Coil, of Los Angeles, for respondent.

PER CURIAM.

This action was brought to foreclose a mechanic's lien filed by plaintiff on certain real property owned by defendants Isadore Reese and Ida Reese, who will be hereinafter referred to as the appellants.

Appellants entered into a contract with defendants C. W. Kreis & Son, pursuant to which the latter constructed a building upon the premises. Following the execution of this contract, the plaintiff furnished certain building material, for which the lien was claimed. The complaint alleged that the material was delivered pursuant to an agreement to furnish the quantities required by the contractors, and that the latter promised to pay the reasonable market value thereof; that between November 18, 1924, and February 17, 1925, lumber and building material were furnished, to be used and the same were actually used in the construction of the building; that the reasonable value thereof was $1,810.05, no part of which had been paid, it being alleged, however, that material of the value of $28.80 was returned.

Appellants by their answer alleged that the contractors were to pay plaintiff an agreed price for the building material, and denied that any part of the same was furnished for use or used in the construction of the building. They also denied that any part of the claim remained unpaid.

The court found that lumber and building material of the reasonable value of $1,810.05 was furnished by plaintiff to the contractors, and that the same with the exception of certain material returned, valued at $28.80, was actually used in the construction of the building. A judgment of foreclosure was entered accordingly.

As grounds for the appeal, it is contended that the above findings are unsupported, that there was a material variance between the pleadings and the proof, and that the court erred in admitting the claim of lien in evidence.

Certain drivers employed by plaintiff testified to fifteen deliveries of material to the premises, the value of which, according to the testimony of plaintiff's shipping clerk, was $539.17. These and other drivers testified to eight other deliveries to the same place, but the record discloses no evidence as to the quantity or value of these deliveries. The shipping clerk further testified to the value of the lumber and material described in nine invoices charged to the contractors and which was shipped to the building to be used therein. The aggregate value of these items was fixed by the witness as $823.70. He also testified that he was never on the premises and had no personal knowledge that any of the lumber or material was delivered there. There was testimony that a sign was placed on the premises stating that plaintiff was furnishing material, and that two of the deliveries first mentioned were received by appellant Ida Reese. A witness called by appellants estimated the total value of the rough and finished lumber used in the building at the sum of $1,306.85; this estimate being based upon prices in 1924 and 1925.

[1-4] In order to entitle a materialman to a lien as against the owner of premises upon which a structure has been erected, there must be proof that the materials were used therein (Ensele v. Jolley, 188 Cal. 297, 204 P. 1085); and the fact that the materials sold were of the kind used in a structure such as that upon which the lien is claimed is insufficient to prove that the materials were used therein (Roebling Sons Co. v. Bear Valley Irrigation Co., 99 Cal. 488, 34 P. 80). Nor is it sufficient to show that the materialman shipped the materials to the contractor. 17 Cal. Jur. "Mechanics' Liens," § 149, p. 208; W. P. Fuller & Co. v. Fleisher, 63 Cal. App. 78, 218 P. 53. And, in the absence of a fixed contract price, the value of the materials furnished must be shown, and the burden of proving their value rests upon the materialman. 40 C. J. "Mechanics' Liens," § 651, p. 460; 17 Cal. Jur. "Mechanics' Liens," § 150, p. 208.

[5] Here, with the exception of the fifteen deliveries first mentioned of the proved value of $539.17, there was either a failure to prove the fact of the other deliveries claimed or the value thereof. Moreover, the total value testified by the plaintiff's shipping clerk, he being the only witness who professed to be familiar with prices, was but $1,362.87; and this amount, as stated, included invoices of material not shown to have been delivered. This evidence was manifestly insufficient to sustain the finding that plaintiff furnished lumber and material of the value of $1,781.25 which was used in the building.

We find no merit in the claim that there was no evidence of the intention that the materials furnished should be used in the construction of the building. That such was the case is sufficiently shown by the testimony of plaintiff's shipping clerk.

[6] Nor was there a variance between the pleading and the proof. The testimony of this witness shows that an estimate of the cost of the materials was furnished the contractor, but that no binding obligation fixing the prices to be charged was entered into.

[7] The claim of lien was properly admitted in evidence to show a compliance with the statutory requirements. 40 C. J. "Mechanics' Liens," § 666, p. 465; Nofziger Lumber Co. v. Solomon, 13 Cal. App. 621, 110 P. 474.

[8] It is further urged that there was no proof of the nonpayment of plaintiff's claim. Under the rule established by the following cases, such proof was unnecessary: Melone v. Ruffino, 129 Cal. 514, 62 P. 93, 79 Am. St. Rep. 127; Stuart v. Lord, 138 Cal. 672, 72 P. 142; Barrett-Hicks Co. v. Glas, 14 Cal. App. 289, 111 P. 760; Madera Sugar Pine Co. v. Adams, 68 Cal. App. 111, 228 P. 544.

No other questions require consideration, but, in view of the insufficiency of the evidence to sustain the findings in the above particulars, it will be necessary to that extent to reverse the judgment. That portion of the decree adjudging that plaintiff is entitled to a lien for the value of the fifteen deliveries of material above referred to, amounting to $539.17, is accordingly affirmed; and that portion thereof adjudging that plaintiff is entitled to a lien for the balance of its claim, namely, $1,242.08, is reversed; and it is further ordered that the cause be remanded for a new trial on the questions as to the amount and value, if any, of material furnished by plaintiff and used in the structure described in the complaint in excess of the fifteen deliveries of material mentioned.

The judgment is reversed.

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111 Cal. App. 386

BOHN v. GRUVER (UNITED LUTHERAN CHURCH IN AMERICA et al., Interveners).

Civ. 6894.

District Court of Appeal, First District, Division 1, California.

Jan. 28, 1931.

Rehearing Denied Feb. 27, 1931. Hearing Denied by Supreme Court March 26, 1931.

1. Gifts 🔑49(2).

Evidence showed that alleged donee of bonds on trust acted mala fide, and sought to take advantage of donor's mental incapacity, and to conceal transaction from donor's widow, justifying widow's recovery.

Evidence showed that alleged donor was about 75 years of age and reposed great confidence in donee, who had been pastor of a church of which donor was a member; that about seven months before death of donor, his wife requested donee to supervise his business affairs; and that donee knew at time of alleged gift that donor was without sufficient mental capacity to understand nature of transaction.

2. Property 🔑9.

Although statute declares possession to be presumptive evidence of ownership, presumption is disputable, and may be overcome by showing character of possession (Code Civ. Proc. § 1963, subd. 11).

3. Evidence 🔑594.

Court may not arbitrarily disregard unimpeached testimony of witness (Code Civ. Proc. § 1847).

Code Civ. Proc. § 1847, declares that witness is presumed to speak truth, but such presumption may be overcome by his manner of testifying, or character of testimony; and that jury are exclusive judges of credibility.

4. Evidence 🔑589.

That witness is party to action, and is evasive and quibbling and has given contradictory versions of transaction, may be considered in determining credibility (Code Civ. Proc. § 1847).

5. Witnesses 🔑389.

That witness admitted some of his previous statements were false did not lessen their effect as impeaching evidence (Code Civ. Proc. § 1847).

6. Appeal and error 🔑994(3).

Credibility of witnesses is question for court in trial without jury (Code Civ. Proc. § 1847).

7. Evidence 🔑594.

The most positive testimony may be contradicted by inherent improbabilities, or by circumstances tending to discredit it (Code Civ. Proc. § 1847).

8. Gifts 🔑49(2).

That alleged donor of bonds was aged and feeble was suspicious circumstance, where donee claimed that donor desired secrecy regarding gift, especially as to donor's wife.

9. Gifts 🔑47(3).

Where alleged donor of gift inter vivos, although not totally incapacitated, lacks mental vigor, and cannot protect himself against imposition, fraud and undue influence are presumed.

10. Gifts 🔑49(2).

Long delay in disclosing alleged gift, or absence of disclosure until after donor's death, or absence of witnesses or writings, creates suspicion.

11. Fraud 🔑50.

Burden of proof usually rests on person asserting fraud or undue influence.

12. Gifts 🔑47(3).

Respecting gifts inter vivos, where relation of trust and confidence exists, donor's extreme age and infirmity, with slight evidence suggesting coercion, requires donee affirmatively to show absence of undue influence.

13. Evidence 🔑217(18).

Memorandum prepared by alleged donee shortly after donor's death, purporting to show circumstances of gift, *held* properly excluded as self-serving, notwithstanding memorandum was contained in deposition (Code Civ. Proc. § 1854).

14. Witnesses 🔑414(2).

Witness whose story is criticized as recent fabrication, or who is asserted to have motive for testifying falsely, may prove giving of similar account before effect could be foreseen, or motive existed.

15. Trial 🔑83(1).

Objection that witness' memorandum was self-serving was sufficient to justify court's ruling excluding it; memorandum being self-serving, and incompetent to rebut contention that witness' story was recent fabrication (Code Civ. Proc. § 1854).

16. Appeal and error 🔑854(4).

If exclusion of evidence is proper on any ground, judgment will not be reversed.

17. Trial 🔑105(2).

Court may exclude incompetent and self-serving evidence, even in absence of objection (Code Civ. Proc. § 1854).

18. Appeal and error 🔑994(3), 1012(1).

Credibility of witnesses and weight of testimony are questions for court, in trial without jury.

Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Action by Rose A. Bohn, individually and as executrix of the last will and testament of Julius A. Bohn, sometimes known as and called J. A. Bohn, deceased, against Oscar H. Gruver, wherein the United Lutheran Church in America, a corporation, and others, intervened. Judgment for plaintiff, and defendant and interveners appeal.

Affirmed.

A. P. Black, of San Francisco, and Fitzgerald, Abbott & Beardsley, Everett J. Brown, and Thomas J. Ledwick, all of Oakland, for appellants.

Harrison S. Robinson, Harry L. Price, and Chapman, Trefethen & Chapman, all of Oakland, for respondent.

PER CURIAM.

The above action was brought by Rose A. Bohn individually and as executrix of the last will and testament of Julius A. Bohn, deceased, to recover from defendant Oscar H. Gruver certain bonds of the Imperial irrigation district, together with damages.

The testator died on April 25, 1922. After making certain specific bequests, which did not include the bonds in question, he bequeathed the residue of his estate to his wife, who is the plaintiff above named. The defendant was an executor of the will. The plaintiff alleged that the bonds, which were valued at $200,000, were owned by the testator and lost during his lifetime; that defendant thereupon wrongfully became possessed thereof and detained the same; and that demand for their possession was refused. The pleading further alleged that defendant claimed an interest therein adverse to plaintiff and the estate, and concluded with a prayer for their recovery. By an amendment thereto it was further alleged that due to their detention the interest upon the installments of interest which became due upon the bonds was lost to plaintiff and the estate; that defendant concealed the fact that he had possession thereof, and consequently the inheritance taxes due thereon to the state and federal governments were unpaid until after penalties had attached, thus causing further damage. Defendant denied that Bohn was the owner of the bonds at the time of his death or that defendant wrongfully came into possession thereof, and alleged that the same were delivered and title thereto transferred to defendant by Bohn in trust for certain charitable purposes, namely, for the use and benefit of the United Lutheran Church of America and a number of its activities, which were described in the answer. Defendant further denied the alleged concealment of the bonds and the damage averred.

The church mentioned, with certain of its corporate administrative boards, filed a complaint in intervention, alleging in substance that the bonds were transferred to defendant in trust for the use and benefit of the interveners, and prayed judgment accordingly. The material allegations of this pleading were denied by plaintiff.

According to the findings the defendant had been the pastor of a church of which the deceased was a member, and the two were intimate friends. The testator, who at the time of his death was about seventy-five years of age, reposed great confidence in the defendant, but in the month of December and for several months prior thereto and thereafter was infirm, weak in body and mind, and unable to care for his property; that in September, 1921, at the request of plaintiff, defendant undertook to care for the testator so that he would not be imposed upon or dispose of his property improvidently; that defendant by reason of his influence over the testator, and due to the latter's weak condition and lack of independent advice, obtained possession of the bonds in question; that the testator, who was the owner of the bonds, did not understand or have the mental capacity to understand the nature or effect of the transactions had with defendant. It was further found that the bonds were not placed in defendant's possession by the testator with the intent to lose possession or control thereof, and that the same were not transferred in trust for the uses or purposes claimed by the defendant and the interveners or otherwise. The court also found that defendant concealed from plaintiff the whereabouts of the bonds, falsely representing to her that he had no knowledge thereof, and until September, 1925, concealed the fact that they were in his possession; that due to the concealment the inheritance taxes thereon were unpaid, and the interest which became due was not collected, causing loss to plaintiff and the estate.

Judgment was entered in favor of plaintiff for the possession of the bonds and the interest coupons which were a part thereof, it being decreed that plaintiff individually was the owner thereof subject to administration, and that neither the defendant nor the interveners had any right, title, or interest therein. In addition judgment was entered against defendant for the damage found to have been caused by his acts above described. The latter and the interveners have appealed from the judgment.

[1] As grounds therefor it is contended that the findings are unsupported and that the court erred by not admitting in evidence a certain writing prepared by the defendant.

The testator for many years had been an active member of the church mentioned, and it is admitted that his relations with the defendant had been friendly since 1904, and that during the year immediately preceding his death the two met frequently both at the testator's home and elsewhere. The evidence shows that defendant was advised of the testator's weakened mental condition at least as early as September, 1921, when at the request of the plaintiff he agreed to exercise some supervision over the testator's business affairs. In fact, the defendant admitted that he noticed the condition described in December, 1921. The testimony on this question is voluminous and a review thereof would answer no purpose. It was amply sufficient to prove that the testator during the period when it is claimed he transferred the bonds in trust was without sufficient mental capacity to understand the nature of the transaction, and that defendant knew the fact. The record discloses no direct evidence of active influence being brought to bear to obtain possession of the bonds; and defendant claims that the suggestion that the bonds be transferred in trust came from the testator, who wished the transaction kept secret, fearing opposition from Mrs. Bohn. This was his explanation of the concealment of the facts from her which continued until the fall of 1925. In the meantime the defendant as executor, acting with Mrs. Bohn, carried on what appeared to be an active search for the property, in many instances affirmatively misleading the latter. An action was brought by the two against the Imperial Valley irrigation district to recover the moneys payable on the maturing coupons of the missing bonds, and the complaint, which was verified by defendant, alleged that the bonds belonged to the testator at the time of his death, that the latter suffered a loss of their possession, and that their whereabouts were unknown. An inheritance tax return was also filed with the federal government, in which defendant stated under oath that the testator had not made a gift of any material portion of his estate or created a trust within two years prior to his death; also that he had not at any time made a gift in contemplation of death or any charitable gifts; and that at the time of his death no trust existed.

In addition to the foregoing, numerous statements were made by defendant which support the conclusion that he had not acted in good faith in the transaction, but sought to take advantage of the mental incapacity of the testator and the ignorance of Mrs. Bohn respecting the condition of her husband's estate. It further appears that at no time previous to the disclosure of his possession of the bonds did he inform the church authorities of the existence of the alleged trust. His possession was not disclosed to plaintiff until after she learned from other sources that her husband owned such bonds; and it is a fair inference from all the circumstances that defendant intended to convert the same to his own use and benefit. It was further shown that the defendant and the testator had jointly rented safe deposit boxes and visited the same together, and it was testified that the latter had declared his intention to make a gift to the church.

Appellants contend that this evidence with the fact that the bonds were found in defendant's possession strongly corroborates the defendant's testimony. The bonds, however, were not found in a safe deposit box rented by the testator or visited by him; and as against this evidence the record contains testimony that the testator declared on several occasions that he did not intend to make further substantial gifts to the church without consulting his wife.

[2] While possession is presumptive evidence of ownership (Code Civ. Proc. § 1963, subd. 11), the presumption is disputable; and it has been said to be the lowest species of evidence, which may be overcome by showing the character of the possession. Lawrence v. Long Beach, etc., Co., 44 Cal. App. 410, 186 P. 606.

Some twelve years previous to the testator's death a divorce action was commenced against him by the plaintiff, alleging cruelty. Appellants contend that this fact sufficiently shows a reason for concealing the gift from her. As against this, however, it appears that the action was dismissed and that the parties lived harmoniously thereafter.

[3-7] There were no witnesses to the alleged oral agreement between the testator and the defendant; and appellants claim that there being no contradiction of his testimony in this regard the trial court was bound to find accordingly. While the court may not arbitrarily disregard the unimpeached testimony of a witness (Hynes v. White, 47 Cal. App. 549, 190 P. 836) who is presumed to speak the truth (Code Civ. Proc. § 1847), nevertheless, as provided by this section, there are methods of impeachment other than by direct contradiction, namely, by the manner in which the witness testifies, by the character of his testimony or his motives, and the jury, or the trial court sitting as a jury, are the exclusive judges of his credibility. The record shows that the defendant in parts of his testimony was evasive and quibbling; and, as held in the following cases, such facts often operate as effectively as an impeachment as does proof tending to contradict the witness. Clark v. Tulare Dredging Co., 14 Cal. App. 414, 431, 112 P. 564; Phillips v. Hobbs-Parsons Co., 67 Cal. App. 199, 227 P. 622. As stated, the defendant at different times gave versions of the transaction and made declarations respecting the property which were contradictory and at variance with his present testimony. This together with the fact that he was a party to the action were properly considered in determining his credibility. Konig v. Lyon, 49 Cal. App. 113, 192 P. 875; Wigmore, Evidence (2d Ed.) § 966. Nor did the fact that he admitted that certain of his previous statements were false lessen their effect as impeaching evidence, and his credibility was still a question to be determined by the trial court. People v. Glover, 141 Cal. 233, 74 P. 745. Moreover, the most positive testimony of a witness may be contradicted by inherent improbabilities as to its accuracy, or where the circumstances shown tend to discredit it. Davis v. Judson, 159 Cal. 121, 113 P. 147; Caldwell v. Weiner, 203 Cal. 543, 264 P. 1100; Staples v. Hawthorn, 208 Cal. 578, 283 P. 67.

[8-10] The fact that the testator was old and feeble was in view of defendant's claim a suspicious circumstance (Staples v. Haw-

thorn, supra); and where the alleged donor is lacking in such mental vigor as to enable him to protect himself against imposition, although his mental weakness is not such as to justify his being regarded as totally incapacitated, an alleged gift inter vivos will be presumed to be fraudulent or secured by undue influence (Pomeroy v. Collins, 198 Cal. 46, 243 P. 657; Longmire v. Kruger, 80 Cal. App. 230, 251 P. 692). It is also the rule that long delay in disclosing an alleged transfer, or the fact that there was no disclosure until after the death of the donor, are circumstances which render the testimony of the claimant subject to suspicion (Plass v. Plass, 122 Cal. 3, 14, 54 P. 372; Longmire v. Kruger, supra; Austin v. Wilcoxson, 149 Cal. 24, 84 P. 417; Cox v. Schnerr, 172 Cal. 371, 379, 156 P. 509; Humble v. Gay, 168 Cal. 516, 143 P. 778; Estate of Emerson, 175 Cal. 724, 167 P. 149; Piercy v. Piercy, 18 Cal. App. 751, 761, 124 P. 561; Castlehun v. San Francisco S. & L. Society, 56 Cal. App. 220, 205 P. 65); and the same is true where there are no witnesses to the transaction and no writings to substantiate the claim (Austin v. Wilcoxson, supra).

[11, 12] As held in the following cases, though the burden of proof usually rests upon the person asserting fraud or undue influence, yet with respect to gifts or conveyances inter vivos where a relation of trust and confidence exists between the parties the extreme age and infirmity of the grantor, together with slight evidence of circumstances from which it may be inferred that the gift or conveyance was the product of coercion, will suffice to shift the burden and require the beneficiary to show affirmatively that the transaction was fair and free from undue influence. And this rule applies not only to those who bear a formal relation of trust to those with whom they deal, but in every case where there has been confidence reposed which invests the person trusted with an advantage in treating with the person so confiding. Longmire v. Kruger, supra; Cox v. Schnerr, supra; Schurman v. Look, 63 Cal. App. 347, 218 P. 624.

[13] The defendant testified that shortly after the death of the testator he prepared a written memorandum stating the circumstances under which he received the bonds, and the understanding had with the testator with respect to their application, and that this document was placed with the bonds in a safe deposit box. He further testified that the memorandum was shown to his attorney during the summer of 1925, this being shortly before the facts were disclosed to the plaintiff. The document was offered in evidence by defendant, and upon the objection that the same constituted a self-serving declaration, was rejected. Some time before the trial defendant's deposition was taken by the plaintiff. At that time he was questioned with regard to the memorandum and the same was read into the record by plaintiff. At the commencement of the trial the defendant was called as an adverse witness by the plaintiff, and in the course of his examination, for the purpose of laying a foundation for impeachment, he was asked if he had testified in certain ways in giving his deposition. No reference, however, was made to the document in question. The deposition was not offered by the plaintiff, but by the defendant, and was admitted. When the latter sought to read the memorandum into the record, however, the same was rejected. Appellants contend that under the provisions of section 1854 of the Code of Civil Procedure the memorandum was admissible. As to this it will be sufficient to say that while the document was part of the deposition, it was no part of any act, declaration, conversation, or writing of the character referred to in the above section, nor was it necessary to the understanding thereof, but was simply a self-serving declaration not made in the presence of the plaintiff. It was consequently incompetent and properly rejected (Hausman v. Hausling, 78 Cal. 283, 20 P. 570; Rogers v. Schulenburg, 111 Cal. 281, 43 P. 899); and the mere fact that it was contained in the deposition did not render it admissible (Estate of Martin, 170 Cal. 657, 151 P. 138).

[14-17] It is also urged that the memorandum tended to rebut the inference that defendant's claim was a fabrication of recent date and was admissible for that reason. While a witness who has been assailed on the ground that his story is a recent fabrication, or that he had some motive for testifying falsely, may prove that he gave a similar account of the transaction when the motive did not exist, before the effect of such account could be foreseen, or when the motive of interest would have induced a different statement (People v. Doyell, 48 Cal. 85, 91; Hotaling v. Hotaling, 187 Cal. 695, 203 P. 745; Rogers v. State, 88 Ark. 451, 115 S. W. 156, 41 L. R. A. [N. S.] 857, and note; Commonwealth v. Jenkins, 76 Mass. [10 Gray] 485, 489; 40 Cyc., [Witnesses] § 239, p. 655), here the memorandum was produced nearly three years after it is alleged to have been made, when the motives of interest were the same, and not until the effect of the statements therein could be foreseen. These circumstances under the above rule rendered the document inadmissible. The objection was sufficient to support the ruling of the court. If the exclusion of evidence is proper on any ground, the judgment will not be reversed if there appears any reason for which the evidence should have been excluded (Spottiswood v. Weir, 80 Cal. 448, 22 P. 289; Davey v. Southern Pac. Co., 116 Cal. 325, 48 P. 117); and here the court might properly have excluded the memorandum without any objection being made (Kimic v. San Jose, etc., Ry. Co., 156

Cal. 379, 104 P. 986; 24 Cal. Jur., Trials, § 57, p. 775).

As stated, the complaint alleged that the bonds were lost by the testator in his lifetime. An objection is made that the findings evade this issue. The issue was immaterial, and the findings fully cover the material facts of the transaction, namely, that while defendant came into possession of the bonds, it was not the intention of the testator to lose dominion or control thereof or to transfer the title for any purpose.

[18] Other arguments are urged in support of appellants' contention that the issues should have been decided in their favor; but the credibility of the witnesses and the weight to be given their testimony were questions for the trial court; and we are satisfied that its findings are not only fully sustained, but clearly correct.

The record discloses no prejudicial error, and no valid reason is shown for a reversal of the judgment. The judgment is affirmed.

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111 Cal. App. 478

PENDERGRASS v. AXX (two cases).

Civ. 6523, 6524.

District Court of Appeal, Second District,
Division 2, California.
Feb. 2, 1931.

1. Partnership ⚷54.

Finding that partnership in bank account in name of deceased and her sister existed between plaintiff and deceased, living together as husband and wife, *held* not warranted.

> Prior to time deceased commenced living with plaintiff as husband and wife though parties were unmarried, a savings account was opened in name of deceased and her sister as joint tenants with right of survivorship. Thereafter, during severe illness, deceased withdrew entire sum and placed it in an account under names of herself and plaintiff. Subsequently deceased restored the account so withdrawn to original account, where it remained until deceased's death.

2. Money paid ⚷1.

Any payment by plaintiff of debts of deceased with whom plaintiff was living as man and wife, though unmarried, *held* payment as mere volunteer.

3. Money paid ⚷1.

Mere volunteer cannot recover amount of obligation paid by him.

Appeals from Superior Court, Los Angeles County; William S. Baird, Judge.

Actions by J. J. Pendergrass against Josephine M. Axx, individually and as executrix of the estate of Ada F. Brinkworth, deceased. Judgments for plaintiff, and defendant appeals.

Reversed.

Lee D. Mathews, of Los Angeles, for appellant.

Rosecrans & Emme, of Los Angeles, for respondent.

IRA F. THOMPSON, J.

Two actions were commenced in the court below by the plaintiff Pendergrass, the one against Josephine M. Axx individually for money had and received in the sum of $1,200, and the other against her in her representative capacity as executrix of the last will and testament of Ada F. Brinkworth, deceased, to recover, first the sum of $471.50, the value of certain property claimed by the plaintiff to which it was alleged the defendant asserted title; second, the sum of $3,300 for services rendered; third, $1,309.60 to cover obligations of the deceased alleged to have been paid by plaintiff; and, fourth, $197, being the amount of other obligations of the testator for which the plaintiff alleged he was being held responsible. The two actions were tried together, resulting in a judgment in the first action against the defendant in her individual capacity in the sum of $600, and in the second action against her as executrix in the sum of $429.14. The defendant prosecutes appeals from both judgments. By stipulation the records are presented to us by one transcript. The respondent has afforded us no assistance, having filed no brief in support of his position. We shall, therefore, under rule V of the rules of the Supreme Court and District Courts of Appeal, accept the statement of facts as presented to us by the appellant's brief.

[1] The nature of the two causes of action is sufficiently dissimilar to warrant our belief that to treat them separately will aid in an understanding thereof. We therefore turn to the action against appellant individually. Mrs. Brinkworth and the respondent lived together as man and wife, although unmarried, from September, 1918, to the time of her death on October 16, 1927. On May 3, 1918, an account was opened at the main office of the Security Trust & Savings Bank in Los Angeles by the deposit of $532.85 in the names of Mrs. Brinkworth and her sister, the appellant, as joint tenants. On February 24, 1924, both of them signed a statement as follows: "The within account, No. 314107, and all moneys credited to the same, or heretofore or hereafter credited thereto, is owned in joint ten-

ancy and not as tenants in common, and shall be joint as to time, title and possession, and by mutual agreement is payable to either Ada F. Brinkworth or Josephine M. Axx whose names are signed hereto, or the survivor or survivors of them subject to the provisions of all laws then in force. The receipt or acquittance of any one of said undersigned, to whom such payment is made, shall be a valid and sufficient release and discharge for all payments made. The bank has the right to waive presentation of the pass book by either party." Various withdrawals and deposits were made until on July 13, 1927, there was a balance in the account of $1,941.48. On that date during a severe illness of Mrs. Brinkworth she withdrew the entire sum and placed it in an account under the names of herself or the respondent. It is to be observed that the respondent called upon and secured a gentleman from the Glendale branch of the Security Bank to go with him to the sanitarium at which Mrs. Brinkworth was being treated for the purpose of making this transfer of the account.

Thereafter the following withdrawals occurred, all in 1927: July 26, $41.98; August 29, $200; September 15, $1,200; October 18, $100; and November 10, $400. Perhaps it should be added that in the joint account of deceased and appellant there was a balance of $1,008.34 on September 1, 1918. The item of $1,200 withdrawn on September 15, 1927, from the account of Mrs. Brinkworth and respondent was redeposited in the former joint account of appellant and her sister; the latter saying to the former at the time: "There has been an awful blunder made out at the Glendale Sanitarium, I want this money transferred back to its original account." Two items of $100 were subsequently withdrawn from this reopened account before the death of Mrs. Brinkworth, but by whom the money was withdrawn does not appear. The respondent testified that when he went to live with Mrs. Brinkworth he had only $200; that they agreed that she was to maintain the house and that he was to pay the grocery bill; that he worked and turned over his check to her for that purpose and what was left "to save it"; that they had an account with the California Bank, where money was deposited from his earnings, and also "she was depositing them at Fifth and Spring" (the Security Bank). However, money was withdrawn from the account with the Security Trust & Savings Bank as well as the other to pay bills.

The trial court proceeded upon the theory that the plaintiff had established a partnership fund existing between the deceased and respondent, and apparently overlooking the $200 which was withdrawn from the joint Brinkworth-Axx account, gave plaintiff one-half thereof. The position which respondent would have to assume, were he here defending his judgment, is untenable. Let us suppose that the $1,008.34 which was in the joint account on September 1, 1918, together with the interest accumulating thereon (interest was credited to the account totaling $593.77), had not been transferred from the joint account to that of respondent and deceased, could it be possible for the respondent to assert title thereto under the testimony recited. There is nothing to indicate an intention to devote the fund to that purpose, and it is manifest that under such circumstances the respondent would not be entitled to recover. It makes no difference that, perhaps by persuasion, he temporarily succeeded in inducing deceased to change the situation which she, at least partially, restored within two months. The fund remained the property of the appellant.

[2, 3] It is sufficient for our purpose in considering the second cause of action to point out that not only is the evidence of payment of any bill by the respondent unsatisfactory, but also there is not a scintilla of evidence from which it may be inferred that they were paid, if at all, at the request of the deceased or other than as a mere volunteer. It is a well-established rule of law that a mere volunteer cannot recover the amount of obligations paid by him. McGee v. City of San Jose, 68 Cal. 91, 8 P. 641; McGlew v. McDade, 146 Cal. 553, 80 P. 695; Stanley v. Westover, 93 Cal. App. 97–111, 269 P. 468.

Judgment in Pendergrass v. Axx reversed. Judgment in Pendergrass v. Axx, as executrix of the Estate of Ada F. Brinkworth, Deceased, reversed.

We concur: WORKS, P. J.; CRAIG, J.

111 Cal. App. 215

PEOPLE v. COLLIER et al.

Cr. 1595.

District Court of Appeal, First District,
Division 2, California.
Jan. 20, 1931.

Rehearing Denied in Part and Granted in Part
Feb. 4, 1931.

1. Conspiracy 🔑47.

Coconspirator's testimony sustained conviction for conspiracy to ask and receive bribes (Pen. Code, § 68).

2. Criminal law 🔑427(3).

Conversation between conspirator and bootlegger in presence of coconspirators respecting protection to bootlegger *held* admissible against all coconspirators though conspiracy was not proved until later in trial.

3. Criminal law 🔑742(2).

Whether coconspirator's testimony should be believed was for jury.

4. Criminal law 🔑1159(4).

Appellate court can reject positive testimony of witness only when testimony is inherently improbable.

5. Criminal law 🔑1144(13).

Appellant must show that testimony attacked in appellate court is inherently improbable or that it is incompetent, or not legal evidence upon which jury can rely.

6. Criminal law 🔑510.

In prosecution for conspiracy to receive bribes and for bribery, accomplice's testimony of specific act of bribery required corroboration.

7. Criminal law 🔑511(1).

Under count charging conspiracy to receive bribes, testimony of accomplice need not be corroborated in every particular.

8. Criminal law 🔑1144(13).

Appellate court must assume in support of verdict that jury in prosecution for conspiracy found defendants guilty of one of alleged overt acts.

9. Criminal law 🔑1144(13).

In determining sufficiency of corroborating evidence, appellate court assumes jury drew all inferences from facts proved as "reason of jury" might sanction (Code Civ. Proc. § 1958).

10. Criminal law 🔑1159(5).

Appellate court cannot weigh evidence corroborating accomplice (Pen. Code, § 1111).

11. Criminal law 🔑511(2).

Evidence corroborating testimony of accomplice need not connect defendant with commission of offense beyond all reasonable doubt (Pen. Code, § 1111).

> Pen. Code, § 1111, provides that conviction cannot be had upon testimony of accomplice unless it be corroborated by such other evidence as shall tend to connect defendant with commission of offense.

12. Criminal law 🔑1159(5).

Unless appellate court can say corroborating evidence is incompetent or that it could not tend to connect defendant with commission of offense, jury's finding on issue should not be disturbed (Pen. Code, § 1111).

13. Criminal law 🔑511(1).

In prosecution for conspiracy to ask and receive bribes, evidence corroborating testimony of accomplice *held* sufficient (Pen. Code, § 1111).

14. Criminal law 🔑742(2).

In prosecution for conspiracy to ask and receive bribes, whether coconspirator's wife relaying tip off message to hotel was accomplice was for jury.

15. Criminal law 🔑423(2).

In prosecution for conspiracy, testimony of conspirator regarding conversations had with some of coconspirators in absence of objecting coconspirator after formation of conspiracy *held* admissible (Pen. Code, § 1111).

16. Criminal law 🔑423(5).

In prosecution for conspiracy to ask and receive bribes, coconspirator's testimony relating to payments made by various bootleggers and his division of proceeds among coconspirators *held* admissible.

17. Criminal law 🔑423(2).

In prosecution for conspiracy to ask and receive bribes, testimony regarding coconspirator's division of money in his home before visits of coconspirators *held* admissible.

18. Conspiracy 🔑46.

When question is whether accused was party to general conspiracy, distinct overt acts in furtherance of such design are admissible.

19. Indictment and Information 🔑176.

Where indictment alleged period of conspiracy to ask and receive bribes as from February 1, 1927, to August 20, 1927, evidence of transactions occurring within few weeks following August 20 was admissible.

20. Conspiracy 🔑45.

State, after proving conspiracy alleged, could offer in corroboration thereof activities of conspirators and others as evidence of probable effect of common design.

21. Criminal law 🔑338(1).

Evidence is "relevant" when, regardless of weakness, it tends to prove issue.

[Ed. Note.—For other definitions of "Relevant," see Words and Phrases.]

22. Conspiracy 🔑48.

Questions of common design of criminal enterprise and whether design extended beyond time of commission of overt act are for jury.

23. Indictment and information 🔑176.

Any competent evidence tending to prove extent of conspiracy or common design is relevant on issues of common design and whether it extended beyond time of committing overt act.

24. Criminal law 🔑1169(5).

Any error in admitting evidence regarding transactions between conspirator and others, including one of coconspirators after he fled, was cured by order striking out and instruction to disregard it.

25. Witnesses 🔑405(2).

In prosecution for conspiracy to receive bribes, permitting rebuttal testimony that defendant, contrary to his denial, had been served drinks in hotel during period of conspiracy, and that on occasions of raid proprietor had removed liquor, *held* proper.

Defendants claimed that impeachment was on collateral matter, but evidence disclosed that defendant deputy sheriff whose special duty it was to make arrests of those engaged in illegal sale of liquor, frequented one of bootlegging establishments which coconspirator had testified was on his list, and that no arrests were made and the testimony tended to corroborate coconspirator.

26. Criminal law 🔑428.

In prosecution for conspiracy to ask and receive bribes, evidence corroborating coconspirator's testimony *held* insufficient as to defendant who was alleged to have given bribe (Pen. Code, § 1111).

On Petition for Rehearing.

27. Criminal law 🔑447.

When agreement is not in writing, parol evidence is admissible to prove contents.

28. Criminal law 🔑363.

When agreement is in parol, evidence of conversations of parties tending to disclose agreement is evidence of res gestæ.

29. Criminal law 🔑427(4).

Where conspiracy charged is agreement to do or not to do certain act, evidence of conversations and acts of conspirators constituting agreement is admissible.

30. Criminal law 🔑423(5).

Where, as part of parol agreement, one or more of conspirators undertakes to ask for bribe, accept bribe, to do or not to do act for purpose of effectuating compact, and to give assent to compact by words or actions, evidence of such facts is admissible (Code Civ. Proc. § 1850).

Code Civ. Proc. § 1850, provides that when declarations or acts forming part of transaction which is itself fact in dispute, or evidence of that fact, such declaration or act is evidence as part of transaction.

Appeal from Superior Court, Alameda County; Lincoln S. Church, Judge.

John J. Collier and others were convicted of conspiracy to ask and receive bribes, and they appeal.

Affirmed as to defendants Collier and Davis, and reversed with directions as to defendants Shurtleff and Gardella.

Myron Harris and Leo A. Sullivan, both of Oakland (R. B. McMillan, of San Francisco, of counsel), for appellant Gardella.

John W. Collier and Myron Harris, both of Oakland for appellant Collier.

Willard W. Shea, Public Defender, and Raymond A. Ferrario, Deputy Public Defender, both of Oakland, for appellant Shurtleff.

Leo A. Sullivan, of Oakland, for appellant Davis.

U. S. Webb, Atty. Gen., William F. Cleary, Deputy Atty. Gen., and Earl Warren, Dist. Atty., and J. Frank Coakley, Deputy Dist. Atty., both of Oakland, for the People.

NOURSE, P. J.

The defendants were tried jointly on an indictment framed in four counts, the first of which charged conspiracy to ask and receive bribes, the other three charging completed acts of bribery. During the course of the trial the offense charged in count 3 was dismissed and the jury returned its verdict finding the four defendants guilty on the first count and not guilty on counts 2 and 4. From the judgment on the verdict and from the orders denying their motions for a new trial the four defendants appeal upon a typewritten record. Each defendant was represented by individual counsel at the trial and each has filed separate briefs on this appeal requesting that any point raised by others be available to him. Upon some of the issues presented on the appeal the legal considerations are applicable to all appellants, but in most instances the circumstances are such that each appellant must be treated separately.

The story of the conspiracy originates in the testimony of Fred Smith, a coconspirator. In the general election of 1926 a bitter contest was waged in Alameda county between B. F. Becker and Barnett, the incumbent, for office of sheriff in which Becker was successful. In January, 1927, Becker, who had been chief of police of the city of Piedmont, brought with him to the sheriff's office the defendant John L. Davis, who had been associated with him in the Piedmont office. Davis was made a deputy sheriff. Collier, who had occupied that position for many years under the former sheriff, was retained. Shurtleff, who had formerly been a federal prohibition officer, was appointed by Becker as chief criminal deputy, and Davis and Collier were assigned to work under him as a "raiding squad" to enforce the provisions of the Wright Act (St. 1921, p. 79) relating to the manufacture and sale of intoxicating liquor. The defendant Gardella was a confessed "bootlegger" operating in the eastern section of Alameda county.

Fred Smith met Becker and Davis while they were in the Piedmont office and became very active in Becker's campaign for sheriff in the fall of 1926. Soon after Becker assumed the office of sheriff in January, 1927, Davis sought out Smith and proposed his plan to force the bootleggers of the county to pay tribute for protection against arrest for violation of the prohibition law. In the latter part of January, 1927, Davis, accompanied by defendant Collier, appeared at Smith's place of business in San Leandro and, in the presence of Collier, told Smith that there were several bootlegging places operating in Livermore and vicinity which would "have to lay it on the line or get knocked off," and proposed that the three drive into Livermore, where he (Davis) would introduce Smith to the Gardellas. Davis then drove Smith and Collier to the Gardellas' bootlegging establishment, where all had drinks of liquor and where Davis introduced Smith as "the closest man in the county to the sheriff" and "the man to talk business to with regard to protection." Gardella replied that he had not been active in Becker's campaign; that he had been a "Barnett man," "but that if it was going to be necessary to pay for protection, if the business would afford it, why he would do so." Gardella then said that under present conditions he could probably pay around $75 a month if he was assured of proper protection. Smith assured him that "that was all right," whereupon Collier left the party, saying that he would wait for them out in the car. Davis then went into the "barroom" while Gardella procured $75, which he paid to Smith. These two then joined Davis, who then said to Gardella: "If you got any other of your friends down here who are all right we can arrange the same thing for them." Gardella replied: "All right, I will have a talk with them." He (Gardella) then mentioned Croce, Duarte, Valponi, and another as bootleggers who could be expected to pay monthly sums for protection and the rate to be charged each was discussed among the three. They then agreed that Smith should return to Gardella in two or three days to receive the money which Gardella promised to collect from those mentioned. Davis and Smith then joined Collier in the car and Smith divided the money he had received from Gardella—$25 to Davis, $25 to Collier, and $25 to himself.

A few days later, according to the arrangement made at the time, Smith returned to Gardella and received two envelopes, one containing $50, the other $25, which Gardella told him had been collected from two of the bootleggers and which Smith divided with Collier and Davis. From this time on to the early part of August, 1927, Smith continued the collection of monthly tribute from those engaged in the violation of the prohibition act, either in the operation of stills or in the transportation and sale of illicit liquor. These sums were divided one-quarter to Davis, one-quarter to Collier, one-quarter to Smith, and the remainder was held by Smith as a "trust fund" for campaign purposes, out of which he testified he paid a portion to Shurtleff.

During all this time the district attorney of the county maintained a staff of special detectives engaged in investigating violations of the prohibition act and the practice of the two offices was that when the district attorney's staff discovered violations of the act search warrants were delivered to the sheriff's office for service. These warrants came into the hands of Shurtleff, who handed them to Collier and Davis for service. From the testimony of Collier and Davis it appears that during the period in question they found liquor and made arrests in 90 per cent. of the raids made by them, but that they were unsuccessful in their raids upon the bootleggers in the vicinity of Livermore because they were always "tipped off" before they arrived. It was the theory of the state throughout the trial that this was the "protection" given to those who paid the conspirators and that information was always given in advance of a raid upon their friends, this information coming directly from Davis before he and Collier left the sheriff's office or coming to the bootlegger from Smith through information furnished him by Davis, Collier, or Shurtleff.

[1] The foregoing statement of facts, which is taken mainly from the testimony of Smith, is sufficient, if corroborated in the particulars required by law, to involve all four defendants in the conspiracy charged. It is apparent from this evidence that the conspiracy was formed in the latter part of January, 1927, to ask and receive bribes for the purposes alleged in the indictment and that Davis, Collier, Smith, and Gardella were the instigators of the conspiracy. The precise date when Shurtleff joined in the conspiracy does not appear. Hence, aside from the matter of corroboration, which will be treated later, the evidence is legally sufficient to sustain the verdict unless the testimony of Smith was incompetent for the reasons assigned by the appellant Collier.

The point raised by this appellant is that Smith, being an accomplice, was incompetent to testify regarding any of the agreements or conversations had between his coconspirators until after the conspiracy was proved; that is to say that evidence of these conversations was inadmissible to prove the corpus delicti. In this connection the appellant relies on subdivision 6 of section 1870, Code of Civil Procedure, which provides that, "After proof of a conspiracy, the act or declaration of a conspirator" may be given in evidence "against his coconspirator." From this it is argued that no evidence of the act or declaration of a conspirator can be received for the purpose of proving the conspiracy. The argument is based on what we deem to be a misconception of the meaning of the Code and upon disconnected excerpts from decisions where the language has not been carefully chosen. The Code section is an exception to the well-known hearsay, rule which is stated in section 1845, Code of Civil Procedure, as follows: "A witness can testify of those facts only which he knows of his own knowledge; that is, which are derived from his own perceptions, except in those few express cases in which his opinions or inferences, or the declarations of others, are admissible." Following this, section 1850 of the Code of Civil Procedure provides that when the declaration or act forms a part of the transaction, which is itself the fact in dispute, or evidence of that fact, such declaration or act is evidence as part of the transaction, while subdivision 3 of section 1870 permits evidence of an act or declaration of another in the presence of a party and his conduct in relation thereto and subdivision 7 of the same section permits evidence when the act or declaration comes within the provisions of section 1850. Reading these sections together, it seems clear that the purpose of the statute is that the act or declaration of a party could not be received in evidence as proof of a conspiracy with others until such conspiracy was established, but that, when the matter at issue is the formation of the conspiracy, or the purposes for which the combination was made, evidence of the acts and declarations of the coconspirators among themselves and in their presence is admissible for the purpose of proving that issue.

If this were not so let us see to what limits appellants' argument would carry us. A, B, and C are charged with conspiracy to commit murder. A carries out the act and numerous eyewitnesses are called to testify concerning the acts of A in the commission of the homicide. Certainly their testimony would not be barred under this section because A is charged as a conspirator with B and C because such testimony would cover facts of the witnesses' own knowledge within the meaning of section 1845. But if A had made declarations involving B and C in the conspiracy, such statements would be pure hearsay and inadmissible against B and C until the conspiracy had been proved. But if these witnesses overheard A, B, and C plotting the murder, their testimony of these conversations had in the presence of all the conspirators would be admissible under the express provisions of subdivision 3 of section 1870, as well as under the provisions of section 1850. However, the latter section is nothing more than a restatement of the well-settled res gestæ rule under which "where the making of a statement in controversy, or the doing of an act, assists in constituting the transaction or in proving per se a relevant fact, the declaration or act is competent." 22 Cor. Jur. 446. Such is the rule of People v. Gregory, 120 Cal. 16, 19, 52 P. 41; Gillam v. Sigman, 29 Cal. 637, 641; People v. Petruzo, 13 Cal. App. 569, 577, 110 P. 324.

[2] The application of the rule to the instant case seems plain in so far as it relates to appellants Collier and Davis. They were both sheriff's deputies assigned to the enforcement of the prohibition law. The conspiracy charged to them was their agreement to refrain from making raids upon violators of that law until information had been given permitting the destruction of evidence. In the formation of the conspiracy in January, 1927, no act or declaration was required from these two—all that was needed, and all that was done—was the lending of their presence in the company of Smith, who assumed the role of soliciting and collecting the bribe funds. This was the conspiracy which the prosecution sought to prove at that time—the res gestæ was the conversations between Smith and Gardella in the presence of Davis and Collier and it is of no moment that, before the money was passed, Collier stepped outside. If he had then notified the others that he would not be a party

to the transaction, or had later refused to cooperate, he might now complain, but his subsequent actions show a full acquiescence in the arrangements made by the others. Hence, these conversations were not hearsay under any possible theory, and were admissible against all the coconspirators even though it might be said that the conspiracy was not "proved" until later on in the trial. The order of proof is not material. People v. Stokes, 5 Cal. App. 205, 209, 89 P. 997.

Neither Collier nor Davis denied their association with Smith and Gardella. They denied that they received any bribes from them and explained that they "worked" with Smith under instructions from the head of the office. We accordingly hold that Smith's testimony was admissible as tending to establish the formation of the conspiracy alleged in the indictment, and was competent proof of the acts and conduct of appellants Collier and Davis which made it possible for Smith to approach Gardella in the role he assumed as one of the conspirators. Whether this testimony had sufficient corroboration so that the "fact" of the conspiracy was proved is a question to be treated later.

[3] Much is said in the brief of the appellant Collier regarding the bad reputation of Smith for truth, honesty and integrity. From this it is argued that his testimony should not be believed, but that, of course, was for the jury to decide. It is significant, however, that notwithstanding the reputation of this witness these two deputies associated with him constantly, calling at his home at least twice a week over a period of six months and frequently, with their wives and other members of their families, joining Smith and his wife in drinking parties at the bootlegging places named by Smith as having paid for protection.

[4, 5] This appellant also urges the "improbability" of Smith's story of the conspiracy because Collier had met Smith but three weeks before the time testified to. But it does not appear how long Collier had known Davis, and it is apparent from the record that Davis was the instigator of the entire plan and brought Collier to Smith with the proposal that Smith act as the go-between to make the collections from the bootleggers, leaving the deputies in the clear to deal with Smith alone. We understand that an appellate court can reject the positive testimony of a witness only when that testimony is "inherently improbable." It is not sufficient that the testimony may disclose circumstances which are unusual. Where the testimony is such that within the knowledge of reasonable men it cannot be true the appellate court might assume that knowledge and hold the testimony legally insufficient, but to do so the court must act on what is equivalent to judicial notice. We are not advised of any precedent which would sanction our taking judicial knowledge of the extent of the acquaintance which must be had with the modern bootlegger before he could be asked to pay for protection. All the appellants devote much time and space in their attacks upon the credibility of the witness Smith, and lest they feel that their arguments have gone unnoticed, let it be said here that the appellate court does not sit as a jury to determine the issues of fact upon the credibility of the testimony of the witnesses but, when the attack is made on these grounds, it is necessary for the appellant to go further and show that the testimony which we are asked to reject is inherently improbable or that it was incompetent, or for some other reason, not legal evidence upon which the jury could rely.

[6-8] The appellant Collier argues that the evidence was insufficient to prove an overt act. Ten overt acts are alleged in the indictment. No. 1 is merely a repetition of the acts leading to the formation of the conspiracy. No. 2 covers the same matters alleged in count 3 of the indictment which was dismissed. Nos. 4 and 9 cover the same matters alleged in counts 2 and 4 of the indictment upon which the appellants were acquitted. The remaining charges covered specific acts of bribery similar to those alleged in counts 2 and 4 but involving different bootleggers. From the fact that count three was dismissed and from the fact that the jury acquitted on counts 2 and 4 it is argued that it is not unreasonable to say that "had the prosecution seen fit to mold each of these overt acts (3, 5, 6, 7, 8 and 19) into separate charges of bribery as they did with three of them, the jury would have acquitted the defendants on them also." This is a conjecture in which we are not permitted to indulge. Counts 2 and 4 were specific charges of bribery. Evidence of the bribery came from the testimony of Smith who was an accomplice. Hence, his testimony on the specific act of bribery required corroboration. But, on the first count for conspiracy, it was not necessary that the testimony of the accomplice be corroborated in every particular. Thus the jury may have been satisfied with the testimony of Smith on some one of the overt acts, other than Nos. 2, 4, and 9, and may not have been satisfied that this testimony was corroborated on the specific acts alleged in counts 2, 3, and 4. The acquittal of appellants on these two counts can mean nothing more than that the jury did not believe the evidence sufficient to convict, but such acquittal can have no bearing upon the other matters alleged, and we must assume in support of the verdict that the jury found them guilty of one of the alleged overt acts, and that is all that is needed.

The heavy attack of all the appellants is based on the common ground that the evidence of corroboration is insufficient. In these attacks the appellants find much comfort in the recent decisions of the appellate courts, particularly People v. Davis (Cal. Sup.) 293 P. 32; People v. Washburn (Cal. App.) 286 P. 711; and People v. Sheffield (Cal. App.) 293 P. 72. All three decisions involved prosecutions of public officials for bribery in the performance of their public duties and all three reversed the convictions. In each the appellate court ruled that the corroborating evidence was insufficient, but it will be noted that, in each case, errors at law occurred during the trial which the court rendering the decision held to have been prejudicial. It would be merely voicing the common complaint of the bar at large to say that the decisions upon this important subject are in hopeless conflict and confusion, and this is so because the courts are asked to determine each case upon the peculiar facts and circumstances in the record. There is no hard and fast rule by which it can be determined what evidence is sufficient and what is insufficient when the appellate court approaches the subject as a trier of fact in the place and stead of the jury. The Code section is plain, section 1111 of the Penal Code provides: "A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof." In People v. Davis, supra, the Supreme Court pointed out that the rule had always been adhered to that "the corroborating evidence must do more than raise even a grave suspicion of defendant's guilt" and People v. Kempley, 205 Cal. 441, 271 P. 478, and other authorities were cited. Of course, evidence which merely creates a suspicion would not be sufficient else the provisions of section 1111 would be meaningless, and, though we find many "negative" authorities on what is insufficient under the section, it is difficult to find the authorities which declare what is sufficient. People v. Negra, 208 Cal. 64, 69, 280 P. 354, 356, comes closest to the line where it is said: "And if there is other evidence which measures up to the requirement of the Code (supra), tending to connect the defendant with the commission of the crime charged, then such testimony of the accomplice is to be considered by the jury, as is any other testimony, and must be given the weight to which the jurors may conclude that it is entitled. People v. Hoosier, 24 Cal. App. 746, 142 P. 514. The evidence tending to connect a defendant with the commission of the crime may be slight, and, when standing by itself, entitled to but little consideration. People v. McLean, 84 Cal. 480, 24 P. 32. The law does not require that the evidence necessary to corroborate the testimony of an accomplice shall tend to establish the precise facts testified to by the accomplice; and strong corroborative testimony is not necessary to support a judgment of conviction founded on the testimony of an accomplice. Even though circumstantial and slight, the evidence is, nevertheless, sufficient if it tends to connect the accused with the commission of the offense. People v. Martin, 19 Cal. App. 295, 125 P. 919. The defendant's own statements and admissions, made in connection with other testimony, may afford corroboratory proof sufficient to sustain a verdict. People v. Armstrong, 114 Cal. 570, 46 P. 611; People v. Sullivan, 144 Cal. 471, 473, 77 P. 1000. It is not necessary that the corroborating evidence should go so far as to establish by itself, and without the aid of the testimony of an accomplice, that the defendant committed the offense charged."

[9, 10] The foregoing quotation was quoted with approval by the Supreme Court in People v. Davis, supra, with the explanation that it was not intended to hold that the corroborating evidence was sufficient if it merely raises a suspicion of defendant's guilt. But, though evidence which merely creates a suspicion is insufficient because of the statutory presumption of innocence of crime, we must not overlook the weight of an inference which is "a deduction which the reason of the jury makes from the facts proved." Code Civ. Proc., § 1958. Hence, when the question of the sufficiency of the corroborating evidence is before the appellate court we cannot approach it in the same manner the jury would do, but we must assume that the jury drew all inferences from the facts proved as "the reason of the jury" might sanction. If, therefore, facts are in evidence which would reasonably support an inference that defendant was involved in the conspiracy alleged and the jury so found, it is not the province of the appellate court to weigh the evidence or to determine in its mind what weight it would give to such evidence.

[11, 12] The code section expressly states that the corroborating evidence "shall tend to connect the defendant with the commission of the offense." This does not mean that such evidence shall connect the defendant beyond all reasonable doubt. Such is the rule of People v. Martin, 19 Cal. App. 295, 301, 125 P. 919, which is quoted with approval in People v. Negra, supra. Therefore, unless the appellate court can say that the corroborating evidence is either incompetent or is, as matter of law, of such a character that it could not tend to connect defendant with the commission of the offense and could not reasonably support an inference of such connection, the finding of the jury on that issue should not be disturbed.

With this in view and bearing in mind that the alleged conspiracy consisted of the agreement to solicit bribes in consideration for the advancing of information of proposed raids so that the bribe givers might avoid arrest for violations of the law, we may examine the evidence of acts and declarations of the alleged conspirators to see if any of this evidence would tend to connect the appellants with the conspiracy.

[13] Addressing ourselves to the appeals of Collier and Davis, and referring to the issue of corroboration of accomplice Smith, we find in the evidence that these two appellants throughout the period of the alleged conspiracy called at Smith's home upon an average of twice a week and that frequently upon these calls they each received from Smith an envelope which Smith testified contained money received from bootleggers according to their prior agreement and which these appellants testified contained diagrams of stills operating in the county; that Mrs. Smith testified that on several occasions she saw her husband assorting money and placing it in separate envelopes immediately before Collier and Davis called, and that on one occasion she saw her husband deliver an envelope to each of these appellants; the witnesses Van Noy and Trevett testified that they saw Smith assorting money upon his library table and placing it in separate envelopes a short time before Collier and Davis called, and that Smith, Collier, and Davis then went into a bedroom where they remained for five or ten minutes. The only explanation of these transactions given by the appellants was that upon those occasions Smith gave them diagrams of stills, but they gave no explanation why a separate envelope should be given to each while both were working together or why they had not at any time during this entire period of six months delivered any of this information to their superior officers, but had on each occasion destroyed the location maps which they testified Smith had given them nor did they explain why during this entire period no still had been raided by them and no arrests made as a result of this information. By their denial that they had received any money from Smith on any of these occasions the case differs from People v. Davis (Cal. Sup.) 293 P. 32, where the court held that the testimony that money had been seen to pass through the hands of the accomplice was insufficient to corroborate his testimony because it should be presumed that the money was delivered for a legitimate rather than for a criminal purpose. From the weak and unsatisfactory explanations of these appellants as to the contents of the envelopes the jury was warranted in inferring that money did pass as Smith and his wife testified, and this inference would corroborate the testimony of Smith in that respect. Then bearing in mind that the theory of the prosecution was that the object of the conspiracy was that the conspirators would either fail to arrest or would give to the bribe givers advanced information of proposed raids so that all criminal evidence could be destroyed, we find the testimony of Mrs. Walker to the effect that habitually before these appellants started on a raid with a search warrant procured by the district attorney's office, Collier and Davis would lag behind the other officers and the latter would put in a telephone call which was usually "'make it at 7 o'clock'; 'it will be now' or the like." This information was generally conveyed to Smith who in turn relayed it to the party to be raided and his testimony that he received and conveyed this information was corroborated by other evidence. The explanation of the appellants of this testimony is nothing more than a complete denial, and here again the trial jury was called upon to weigh the evidence, and if the jury believed the testimony of Mrs. Walker and these other witnesses and disbelieved the testimony of the appellants in this respect it follows, of course, that Smith's testimony of these transactions was fully corroborated. Aside from the testimony relating to what happened in the sheriff's office as to "tip offs" of these raids, we find the direct evidence coming from Mrs. Smith that in the latter part of July she received a telephone call from Davis asking if her husband was in, and that upon being informed that he was not, Davis asked her to get in touch with her husband and tell him to telephone the Irvington Hotel and warn them to close up as the place was to be raided that night. It is also in the evidence that Mrs. Smith got in touch with her husband and he informed her that he could not telephone the hotel from where he was located, asked her to do so, that she did phone the hotel and that on the same night the place was raided and no evidence of the sale or possession of liquor found. It is also in evidence, coming from the testimony of Collier and Davis, that during this period they made numerous raids upon bootlegging establishments in the eastern portion of Alameda county, and that in 90 per cent. of such raids they found liquor and made arrests. It is significant, however, that during the entire period of the alleged conspiracy none of the bootleggers named by Smith as having paid for protection was raided excepting in one instance in which a federal raid was made against Schenone and another when a federal raid was made against Gardella, at which time he had been given advanced information and had destroyed all evidence of the sale or possession of liquor. In addition to this, there is the testimony of Pisani and Santucci of their conversations with Ormsby, an attorney at law, who urged the witnesses to construct and operate a still and assured them in the presence of Davis that they would be fully protected from the sheriff's office by the payment of a monthly sum for that purpose, and the testimony of Pisani as to the association of Collier with Ormsby in this enterprise. And then we find the undisputed evidence of

the association of Collier and Davis with Smith and Ormsby throughout this entire period; their frequent gatherings with their respective families in bootlegging establishments where liquor was being drunk, these places all being on Smith's list of the protected. Aside from this direct evidence (which is but a small portion of the corroborating testimony relied upon by the state), the respondent urges the circumstances that when Collier and Davis were called before the grand jury when it was making its investigation of the alleged conspiracy both were informed of the accusations made against them by Smith and neither denied the accusations, but both refused to testify upon the ground that their testimony might tend to incriminate them. The foregoing statement of the evidence is sufficient to corroborate the testimony of Smith as to the formation of the alleged conspiracy, and is such "as shall tend to connect the defendant with the commission of the offense," and it is unnecessary to outline the mass of other evidence which was offered for this purpose.

[14] It is strenuously argued by the appellants that we may not take the testimony of Mrs. Smith as corroborative of that of her husband because in relaying the "tip off" message to the Irvington Hotel she became an accomplice, but to hold her as an accomplice it would be necessary to hold that she was a party to the offense charged, which was a conspiracy to ask and receive bribes for certain purposes. But it does not appear that she had any knowledge of the conspiracy nor any knowledge of the relations between the conspirators or the proprietor of the Irvington Hotel. Her action in conveying the message to the hotel upon the request of her husband was consistent with an innocent obedience of her husband's commands, and though it is possible that the entire evidence may have been sufficient to warrant the jury in inferring an evil motive on the part of Mrs. Smith, such motive was certainly not presumed, and therefore the question of whether she was an accomplice was a fact to be left to the jury and not a question of law to be determined by the trial judge. In this connection the appellants attack the refusal of the trial judge to give their proposed instruction advising the jury that it must consider Mrs. Smith as an accomplice, and likewise attack the instructions which the trial judge gave to the jury defining an accomplice and advising the jury what was sufficient corroborative evidence of the testimony of an accomplice. There was no error in either respect. People v. Ward, 134 Cal. 301, 311, 66 P. 372; People v. Lawlor, 21 Cal. App. 63, 68, 131 P. 63.

[15-17] The appellant Collier criticizes the action of the trial court in admitting the testimony of Smith relating to conversations had with Smith, Davis and Gardella in the absence of Collier. This testimony all related to matters occurring after the formation of the conspiracy and was clearly admissible under section 1111, Penal Code, as interpreted in the cases heretofore cited. Smith's testimony relating to his conversations with Valponi, Croce, Peyser, Schenone, and others who were maintaining bootlegging establishments were all evidence of the transactions of a coconspirator in furtherance of the purposes of the conspiracy, and this testimony of Smith, like his testimony relating to the payments made by various bootleggers and his division of the proceeds among his coconspirators, was properly admitted. Likewise there was no error in admitting the testimony of Van Noy, Trevett and Mrs. Smith relating to Smith's division of the money in his home prior to the visits of Collier and Davis, because this was evidence of "an act" of one of the conspirators performed after the formation of the conspiracy.

[18] Considerable space is devoted to an attack upon the admission of the testimony of Pisani regarding his promise to pay to Ormsby $3,000 a month for protection in the operation of an illicit still, such protection being assured him by Ormsby in the presence of Davis. Of a similar character are the objections to the testimony of Tognotti, Santucci, and Roggi. The objections are two: That these transactions were not had in the presence of all the other alleged conspirators, and that they were evidence of separate and distinct offenses. The first objection is without merit as we have already said. As to the second objection the rule seems to be fully settled. In People v. Arnold, 199 Cal. 471, 250 P. 168, the Supreme Court, quoting from People v. Wilson, 76 Cal. App. 688, 245 P. 781, said: " 'In such cases, it is no objection that the evidence covers a great many transactions and extends over a long period of time, or that it may show the commission of other crimes. When the question is whether the accused was a party to a general conspiracy, distinct overt acts in furtherance of such a design may be given in evidence. People v. Collins, 64 Cal. 293, 30 P. 847; People v. Berry, 191 Cal. 109, 122, 215 P. 74; Commonwealth v. Scott, 123 Mass. 222, 25 Am. Rep. 81; Hall v. State, 3 Lea (Tenn.) 552. See, also, Commonwealth v. Stuart, 207 Mass. 563, 93 N. E. 825; State v. Roberts, 95 Kan. 280, 147 P. 828; Jenkins v. Commonwealth, 167 Ky. 544, 3 A. L. R. 1522, 180 S. W. 961, and Worden v. United States, 204 F. 1, 122 C. C. A. 315.' " And in the same decision, quoting from Commonwealth v. Scott, 123 Mass. 222, 25 Am. Rep. 81, the court said: " 'There being evidence sufficient to be laid before the jury to prove the conspiracy as to which the presiding justice was, in the first instance, to determine, it was competent for the government to put in evidence any acts of the several conspirators in furtherance of the common purpose of the conspiracy, either before or after the robbery was committed.'" And in People v. Schmidt, 33 Cal. App. 426, 445, 165 P. 555, 563, the District Court, quoting from People v. Olsen, 80 Cal. 122, 22 P. 125, said: "'Where several parties conspire or combine together to commit any unlawful act, each is criminally responsible for the acts of his associates or confederates committed in furtherance of any prosecution of the common design for which they combine. * * * Each is responsible for everything done by his confederates, which follows incidentally in the execution of the common design as one of its probable and natural consequences, even though it was not intended as a part' of the common design for which they combined." The court added as authorities for the rule, People v. Kauffman, 152 Cal. 331, 92 P. 861; People v. Creeks, 170 Cal. 368, 369, 149 P. 821; Spies v. People (The Anarchists' Case), 122 Ill. 1, 12 N. E. 865, 17 N. E. 898, 3 Am. St. Rep. 320.

[19] The testimony of similar transactions occurring in the latter part of August and in early September of the year 1927 was not inadmissible under the rule excluding acts and declarations of a coconspirator after the completion of the conspiracy. The indictment alleged the period of time of the conspiracy as from February 1, 1927, to August 20, 1927, but this was merely an approximation and was not a definite time limiting the period of the conspiracy. There was no evidence that the conspiracy ended precisely on August 20th, and, from the nature of the case, this was not such a conspiracy as would be "completed" by a definite overt act such as murder or robbery. Hence, evidence of transactions occurring within a few weeks following August 20th was not evidence of a separate isolated act or declaration of one of the conspirators occurring subsequent to the end of the "objective" of the conspiracy, within the rule of People v. Oldham, 111 Cal. 648, 44 P. 312, and similar cases. To the contrary, these acts and declarations were shown to have been "the ordinary and probable effect of the common design" of the conspirators, and evidence of such was admissible under the rule noted in People v. Lorraine, 90 Cal. App. 317, 327, 265 P. 893, 897, where the court say: "The common design of a criminal enterprise may extend, however, as appellant concedes, beyond the point of the commission of the act constituting the crime for which the alleged conspirator is on trial (People v. Opie, 123 Cal. 294, 55 P. 989; People v. Mazzurco, 49 Cal. App. 275, 193 P. 164; People v. Holmes, 118 Cal. 444, 50 P. 675; People v. Rodley, 131 Cal. 240, 63 P. 351); and, as declared in California Jurisprudence, vol. 5, p. 523." To the same effect is People v. Sampsell (Cal. App.) 286 P. 434.

[20] The application of the rule in the present case is that it was always the theory of the prosecution that the alleged conspirators were operating in the eastern section of Alameda county as a portion of a county-wide conspiracy headed by the sheriff of the county and involving many of his deputies and others officially connected with his office for the general purpose of collecting tribute from all those engaged in any unlawful business conducted in the county. Thus having proved the conspiracy alleged in the indictment it was competent for the state to offer in corroboration thereof the activities of Davis, Collier, Smith, and others as evidence of the ordinary and probable effect of the common design of the conspiracy alleged.

[21-23] The question involved here is not whether this testimony was competent because the general rule is that evidence of the separate acts and declarations of one coconspirator is admissible against all the other conspirators after the conspiracy has been established because each is criminally responsible for the acts of his confederates committed in furtherance of the common design. People v. Kauffman, 152 Cal. 331, 334, 92 P. 861; People v. Creeks, 170 Cal. 368, 374, 149 P. 821. But the real question involved in the point raised by this appellant is whether this testimony was relevant. The question of the relevancy of testimony is frequently confused with the question of the weight and sufficiency of that testimony to prove a particular issue. Evidence is relevant when no matter how weak it may be it tends to prove the issue before the jury. In Moody v. Peirano, 4 Cal. App. 411, 418, 88 P. 380, 382, it was said: "The tendency of modern decisions is to admit any evidence which may have a tendency to illustrate or throw any light on the transaction in controversy, or any weight in determining the issue, leaving the strength of such tendency, or the amount of such weight, to be determined by the jury; and, in determining the relevancy of evidence that may be offered upon an issue of fact, much depends upon the nature of the issue to sustain which or against which it is offered, and a wide discretion is left to the trial judge in determining whether it is admissible or not." It has frequently been said that "it is not often that the direct fact of an unlawful design which is the essence of a conspiracy can be proved otherwise than by the establishment of independent facts, bearing more or less closely or remotely upon the common design" (People v. Sampsell [Cal. App.] 286 P. 434, 437) and for this reason greater liberality is permitted in the admission of circumstantial evidence which would tend to prove the fact of the conspiracy, as well as that which would tend to corroborate the testimony of a coconspirator. Hence, any testimony which is relevant for these purposes and which is not too remote or incompetent should be received and the weight and sufficiency of the evidence should be left to the triers of the questions of fact. Accordingly, when the question of the common design of a criminal enterprise and the question whether that common design extended beyond the point of time of the actual commission of the act constituting the overt act alleged are matters in issue those questions are to be determined by the jury and any competent evidence which tends to prove the extent of the conspiracy and any competent evidence of acts or declarations tending to prove this common design is relevant to the issues before the jury. Such evidence even though it may tend to prove the commission of distinct criminal acts is not admitted under the rule permitting evidence of similar criminal acts but is admitted under the circumstances above stated for the purpose of proving the common design and extent of the conspiracy alleged. People v. Schmidt, 33 Cal. App. 426, 165 P. 555; People v. Lorraine, 90 Cal. App. 317, 265 P. 893; People v. Sampsell (Cal. App.) 286 P. 434.

[24] Objection is made to the admission of evidence relating to transactions between Smith and Sheriff Becker, Parker, and Davis after Smith had fled to Los Angeles. This testimony was presumably offered for the purpose of corroborating Smith's testimony as to his criminal association with the sheriff's office of Alameda county. It was all stricken out and the jury was instructed to disregard it. There was nothing in this testimony that was prejudicial to any of the appellants except as to appellant Davis, and as to him it was properly admitted. If any error occurred as to the other appellants through the admission of this testimony, that error was cured by the order striking out and the instruction to the jury to disregard it. Though the appellant Collier insists that the evidence was improperly admitted he does not show in what respect it was in any way prejudicial to him. This is not a case such as People v. Anthony, 185 Cal. 152, 196 P. 47, and similar cases, where the testimony admitted was such that it poisoned the minds of the jury to such an extent that the error could not be cured.

[25] These two appellants complain of the ruling permitting the evidence in rebuttal of the witness Barnes. Appellant Collier on cross-examination had been asked if he had been served intoxicating liquor in the Newark hotel during the period of the alleged conspiracy, and answered, "No." Barnes, who was a cook at the Newark, testified that both Collier and Davis had been served drinks in the hotel during that time and that, on the occasions when they raided the place, the proprietor removed the liquor and slot machine a short time before the raid occurred. The appellants insist that the impeachment was on a collateral matter. But it was not. The evidence disclosed that these two deputies, whose special duty it was to make arrests of those engaged in the illegal sale of liquor, frequented one of the bootlegging establishments which the witness Smith testified was on his list and that no arrests were made though violations of the law were known to these deputies. This testimony tended to corroborate the witness Smith and was relevant to that issue.

In so far as the appellant Collier and Davis are concerned, we find no error in the record and the judgment and order as to them should be affirmed.

As to the appellant Shurtleff, much of what has heretofore been said applies to his appeal, and it is not necessary to consider the points raised by him in detail. If we are correct in our interpretation of the evidence covering the formation of the conspiracy, the evidence linking this appellant with the conspiracy is sufficient. Whether that evidence was properly corroborated we will discuss later.

The first point raised by this appellant is that the verdict as to him is contrary to the law and evidence because overt act No. 9 alleged in the first count of the indictment is identical with count No. 4 of the indictment pleading a specific charge of bribery so far as the alleged acts of this particular appellant are concerned. The jury having found all appellants not guilty on count No. 4, it is now argued that this appellant is freed from the charge of conspiracy according to the rule stated in Oliver v. Superior Court, 92 Cal. App. 94, 267 P. 764. The case is not applicable to the situation here. The specific overt act charged to Shurtleff and of which he was found not guilty under count No. 4 was only one of many overt acts of the conspiracy as a whole. The conspirators having been found guilty of some of the alleged overt acts, as we have heretofore pointed out, all members of the alleged conspiracy could have been found guilty under count No. 1 and it was not necessary that each conspirator be found guilty of a specific overt act independent of the others.

Criticism is made of the rulings of the trial court in admitting the testimony of Pisani, Santucci and others, as heretofore mentioned, and in limiting that testimony to Collier, Davis, and Shurtleff and thereafter striking out portions of such testimony as to Shurtleff. This testimony was all admissible under the rules of law which we have heretofore discussed, and if Shurtleff's membership in the conspiracy was proved and corroborated this testimony was admissible as to him as well as to Collier and Davis. There was, therefore, no error in the admission of the testimony, but there was error in striking that testimony as to the appellant Shurtleff. This, however, is an error which was not prejudicial to him and of which he now cannot complain.

On the matter of corroboration, the case is different from that of the appellants Collier and Davis. The testimony is that soon after the formation of the conspiracy Davis insisted that Shurtleff be cut in on the profits and that payments were made to Shurtleff by Smith through the purchase of an automobile by Shurtleff, the monthly installments upon the contract of purchase being made by Smith out of funds received as a result of the conspiracy. Soon after Shurtleff had assumed office as a deputy sheriff and had been assigned chief criminal deputy, the district attorney of the county talked with him and informed him of rumors of corruption and bribery in connection with Smith and deputies in the sheriff's office. Notwithstanding this, Shurtleff frequently met Smith in the sheriff's office and discussed with him the raids and pretended raids made upon bootlegging establishments in the county. When called before the grand jury his explanation of the purchase of the automobile and of his dealing with Smith, Collier, and Davis was so weak and unbelievable that the jury must have inferred guilt from his own conduct. However, we are unable to find any direct or circumstantial evidence which is sufficient to corroborate the testimony of Smith in this connection within the rule of People v. Davis (Cal. Sup.) 293 P. 32, and cases there cited.

Other points raised by this appellant do not require consideration, but it should be said here that the criticism of the conduct of the district attorney is wholly without merit, and we may add that in a case of this character covering some six or seven weeks of trial with four defendants, each represented by one or more counsel, the lack of error and misconduct on the part of the district attorney is entitled to favorable comment.

[26] Little need be said regarding the case of appellant Gardella, inasmuch as the case must be reversed as to him because of the lack of corroborating evidence and the general principles and the questions of law which will arise on a retrial are not different from the general principles which have heretofore been discussed. In support of the judgment the respondent cites as corroborating evidence the testimony of Pauline Walker that Gardella was frequently in and about the sheriff's office, having conversations with Collier, Davis and sheriff Becker, and that on one occasion she telephoned him asking him why he had a truck load of liquor in front of his place, and that he told her not to worry because he was paying plenty of protection to the sheriff's office. The respondent cites as further corroborating testimony, this appellant's admission that he was raided by Collier and Stark of the sheriff's office but had received advanced information and had consequently destroyed all evidence; his testimony that Smith had tried to persuade him to buy stock in a paving company which was being organized by Parker who was a friend and associate of the sheriff; and the testimony of Mrs. Smith that she and her husband, in company with Becker and Parker and their respective wives, had been entertained by Gardella at which time intoxicating liquor was served. We are unable to find in this testimony any evidence which measures up to the requirements of the cases heretofore discussed, or that the testimony does more than create a suspicion of guilt of this appellant. For this reason the judgment and order as to him must be reversed.

For the reasons given it is ordered that the judgment and order in so far as they relate to appellants Collier and Davis are affirmed, and in so far as they relate to the appellants Shurtleff and Gardella, they are reversed with directions for a new trial.

We concur: STURTEVANT, J.; BURROUGHS, Justice pro tem.

On Petition for Rehearing.

PER CURIAM.

In his petition for a rehearing the appellant Collier finds fault with that portion of the opinion which relates to the admission in evidence of the testimony of the accomplice Smith relating to the acts and conversations of his coconspirators leading to the formation of the conspiracy. He argues that what we have said in the opinion is contrary to the rule of People v. Irwin, 77 Cal. 494, 20 P. 56; People v. Doble, 203 Cal. 510, 265 P. 184, and other cases cited. In our original opinion we endeavored to point out the distinction between the cases cited and the case at hand, and for the purpose of making our position more clear it is now ordered that the concluding sentence on page 6 [295 P. 901] of the typewritten opinion reading as follows: "Reading these sections together it seems clear that the purpose of the statute is that the act or declaration of a party could not be received in evidence as proof of a conspiracy with others until such conspiracy was established by that, when the matter at issue is the formation of the conspiracy, or the purposes for which the combination was made, evidence of the acts and declarations of the coconspirators among themselves and in their presence is admissible for the purpose of proving that issue" is hereby stricken out and the following is inserted in lieu thereof: "The offense charged in the indictment was that the defendants combined and agreed together, and with each other, to commit the crime of asking, receiving and 'agreeing to receive a bribe' in violation of section 68, Penal Code." This section declares the crime to be when an executive officer "asks, receives, or agrees to receive, any bribe, upon any agreement or understanding that his * * * action * * * shall be influenced thereby." Thus the agreement is the essential element of the crime charged as well as that denounced by the statute. This being so, the corpus delicti of the crime charged was the "agreement or understanding" made by the defendants and Smith whereby one or more of them undertook to ask for bribes, one or more agreed to accept bribes, and the sheriff's deputies undertook upon their part to permit their action as such officers to be influenced thereby.

[27-30] Now it must be apparent that when an agreement is not in writing parol evidence is admissible to prove its contents. And, when the agreement is in parol, evidence of the conversations of the parties tending to disclose the agreement made is evidence of the very fact to be proved and hence is evidence of the res gestæ. Hence, when the conspiracy charged in the indictment is an "agreement" to do or not to do a certain act, evidence of the conversations and acts of the conspirators which constitute the agreement is admissible to prove the agreement. Thus, when, as a part of the agreement, one or more of the conspirators undertakes to ask for a bribe, one or more agrees to accept a bribe, one or more agrees to do or not to do some act for the purpose of effectuating the compact, and one or more of the conspirators gives his assent to the compact either by express words or by actions from which such assent might be implied, evidence of such facts, when the agreement is in parol, is competent evidence of the acts or declarations which form "a part of the transaction" which is in dispute, and, as such is admissible under the express provisions of section 1850, Code of Civil Procedure. On the other hand, if a witness were asked to relate a conversation which he had had with one of the alleged conspirators such testimony would be hearsay and would not be admissible under section 1870, subdivision 6, Code of Civil Procedure, until after the conspiracy had been proved, and, by thus permitting evidence of the acts and declarations of a conspirator against his coconspirator, this subdivision becomes an enlargement of rather than a limitation upon the ordinary hearsay rule.

It is therefore ordered that the petition for rehearing of the appellant Collier be and the same is hereby denied.

It is further ordered that that portion of the original opinion commencing with the third paragraph on page 27 [295 P. 907] of the typewritten opinion "As to the appellant Shurtleff" and reading down to and including all the second paragraph on page 29 [295 P. 908] thereof and ending with the words "is entitled to favorable comment" be and the same is hereby stricken out; and that respondent's petition for a rehearing as to appellant Shurtleff be and the same is hereby granted.

It is further ordered that the petition of the respondent for a rehearing as to the appellant Gardella be and the same is denied.

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111 Cal.App. 411

ACME GRAVEL CO. v. BRYANT.

Civ. 7466.

District Court of Appeal, First District, Division 2, California.

Jan. 28, 1931.

Rehearing Denied Feb. 27, 1931. Hearing Denied by Supreme Court March 26, 1931.

1. Principal and agent 🔑99.

Agent has only such authority as principal, either actually or ostensibly, confers upon him (Civ. Code, §§ 2315–2317).

2. Principal and agent 🔑123(7).

Evidence *held* not to show actual authority or ostensible authority of materialman's agent to agree that sale price of materials should be paid partly in stock of building corporation (Civ. Code, §§ 2315–2317).

Appeal from Superior Court, City and County of San Francisco; Louis H. Ward, Judge.

Action by the Acme Gravel Company against J. A. Bryant. From a judgment for plaintiff, defendant appeals.

Affirmed.

Morgan J. Doyle and George D. Perry, both of San Francisco, for appellant.

John L. McNab, of San Francisco, for respondent.

LUCAS, Justice pro tem.

This action was brought by respondent against appellant to recover the sum of $2,153.88 for building materials furnished appellant by respondent. In his answer appellant admitted the purchase of said building materials, but alleged that said materials were delivered to him to be used in the construction of a certain apartment hotel in Oakland under an oral understanding and agreement that 75 per cent. of the sale price of said materials should be paid for in cash and that the balance should be paid for in the preferred capital stock of the building corporation engaged in erecting said apartment hotel. At the trial it was admitted that if appellant's contention was correct, respondent was entitled to $553.88 in cash and $1,600 worth of said stock; that this amount of cash and stock had been delivered to respondent prior to the commencement of the action, but that respondent had refused to accept the same.

The trial court found against the existence of the agreement relied upon by appellant. A motion for a new trial was made and denied, and appeal is taken from the judgment.

[1, 2] The sole question for this court to decide is whether or not the evidence is sufficient to justify the findings of the trial court and to justify its action in denying appellant's motion for a new trial.

Appellant produced but one witness, namely, Robert F. Morris, engineer and second in charge for appellant, who testified that one Nugent, salesman for respondent, solicited from him an order for the building materials in question and was told that to secure the order it would be necessary for respondent to take 25 per cent. of the value of the materials in stock; that Nugent advised he would have to take the matter up with his company; and that three or four days later he returned and stated in effect that the stock would be accepted as part payment. Thereupon deliveries began.

In answer to this, E. B. Kendall, vice president of the respondent corporation, testified that he had never heard of the claim that part of the materials were to be paid for in corporate stock until after the completion of the building in which they were used ; that no one on behalf of respondent had ever been authorized to accept other than cash in payment of materials; that it was the general order of the respondent corporation that any proposal for the taking of stocks or securities or anything out of the usual line of business must be taken up with the general office; that all employees were instructed not to agree to take stock in part payment for materials; that the respondent corporation had never engaged in any transaction with anyone for the acceptance of stock as such part payment; and that Nugent was only a salesman, and had no authority whatsoever as an officer of the company.

William H. Ford, president and sole owner of the respondent corporation, testified in effect that neither he nor anyone else in authority had ever authorized Nugent to negotiate a sale of materials for anything other than cash, and that he had never accepted anything but cash for materials; that as to the particular materials in question no one was authorized to take anything but cash in payment therefor; and that the first time the corporation ever heard of appellant's contention was after appellant had been pressed for payment of the amount due. He further testified that Nugent had admitted to him that while something had been said about taking stock as part payment for the materials, there was no agreement so to do. The said Nugent did not appear as a witness at the trial, his whereabouts being unknown.

It is appellant's contention that this evidence is sufficient to justify the conclusion that Nugent did enter into an agreement with appellant to take part payment in corporate stock, and that although by so doing he violated positive instructions, his acts were nevertheless binding upon his principal. The theory is advanced that one who employs another to make a sale becomes responsible for the methods which he adopts in so doing, and that, as was said in the case of Henry Cowell Lime & Cement Co. v. Santa Cruz County National Bank, 82 Cal. App. 519, 255 P. 881, 883, "where a principal makes it possible, through his acts, for his own agent to inflict injury, the result of such injury should not be passed on to innocent persons who have dealt with the agent in good faith under his apparent authority."

In the Cowell Case, however, the court further said that, "A loss through the trust and confidence placed by a principal in his agent should not be borne by those who were led to deal with the agent through the acts of the principal," and in holding the principal responsible for the loss referred to therein, pointed out with a great deal of particularity the different acts and transactions of the agent which had been either permitted or acquiesced in by his principal and which were sufficient to lead those with whom the agent was dealing to believe that he was clothed with ample power and authority. In other words, a case of ostensible agency was clearly established.

It is elementary that an agent has only such authority as the principal either actually or ostensibly confers upon him. Section 2315, Civ. Code.

"Actual authority is such as a principal intentionally confers upon the agent, or intentionally, or by want of ordinary care, allows the agent to believe himself to possess." Section 2316, Civ. Code.

"Ostensible authority is such as a principal, intentionally or by want of ordinary care, causes or allows a third person to believe the agent to possess." Section 2317, Civ. Code.

Here there is neither proof of actual authority nor of any act or omission on the part of the respondent corporation, or any of its officers, sufficient to establish ostensible authority.

The judgment appealed from is therefore affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

TAPLEY v. ABBOTT et al., State Board of Medical Examiners.

Civ. 7433.

District Court of Appeal, First District, Division 2, California.

Jan. 28, 1931.

Rehearing Denied Feb. 27, 1931. Hearing Denied by Supreme Court March 26, 1931.

1. Physicians and surgeons 🔑11(3).

Complaint before medical board charging physician in language of statute with committing "criminal abortion" is sufficient without alleging facts necessary for criminal complaint (Deering's Gen. Laws 1923, Act 4807, § 14).

2. Physicians and surgeons 🔑11(3).

Medical board, in considering complaint against physician for procuring criminal abortions, is not bound by physician's acquittal in Superior Court of charge of abortion (Deering's Gen. Laws 1923, Act 4807, § 14).

3. Physicians and surgeons 🔑11(3).

Complaint before medical board charging physician with procuring criminal abortions *held* properly amended to conform to proof by charging physician with agreeing to procure abortions (Deering's Gen. Laws 1923, Act 4807, § 14).

4. Physicians and surgeons 🔑11(3).

Medical board, in passing on charges of unprofessional conduct by physician, exercises quasi judicial function, and is not bound by technical rules of criminal pleading.

5. Physicians and surgeons 🔑11(3).

Evidence supported accusations against physician of offering to and procuring criminal abortions, resulting in death, sufficient to revoke license (Deering's Gen. Laws 1923, Act 4807, § 14).

6. Physicians and surgeons 🔑11(3).

In proceedings by medical board to revoke license, proof of physician's agreement to perform abortion before examining woman placed burden on physician of showing operation was necessary (Deering's Gen. Laws 1923, Act 4807, § 14).

Appeal from Superior Court, City and County of San Francisco; Walter Perry Johnson, Judge.

Certiorari by Fred B. Tapley to review an order of Clark L. Abbott and others, constituting the State Board of Medical Examiners, revoking petitioner's license to practice medicine. Judgment for defendants, and plaintiff appeals.

Affirmed.

Harold C. Faulkner, James B. O'Connor, and William A. Kelly, all of San Francisco, and W. E. Davies, of Marysville, for appellant.

Richard M. Lyman, Jr., of San Francisco, and Otto J. Emme, of Los Angeles, for respondents.

LUCAS, Justice pro tem.

This is an appeal from a judgment of the Superior Court affirming on writ of certiorari an order of the respondent board of medical examiners wherein they found appellant guilty of unprofessional conduct, and revoked his license to practice medicine and surgery in the state of California.

The complaint as originally filed and sworn to alleged that appellant "by means of instruments and medicinal preparations attempted to and did procure" two certain "criminal" abortions, from which in each instance death resulted. Prior to the conclusion of the hearing before the board, amendments were allowed to conform to the proof so that the complaint in each count alleged that appellant also "agreed and/or offered to" procure said abortions.

Appellant specifies four grounds for reversal, asserting that the decisions and proceedings of the board of medical examiners are void for want of jurisdiction, in that: (1) The complaint itself is fatally defective in omitting to state facts sufficient to show that appellant procured or aided or abetted or attempted or agreed or offered to procure a criminal abortion; (2) the board denied appellant "due process of law" by rejecting the defense that appellant had been acquitted by the Superior Court of Yuba county of one of the charges specified in said complaint; (3) the board without authority allowed amendments to the complaint by the insertion of new unsworn charges without according an opportunity to appellant to plead to or put the same in issue; and (4) there is no evidence to support any of the sworn charges of the complaint.

[1] Appellant's contention as to the insufficiency of the allegations, either before or after amendment, is that respondents were required to do more than to merely word the accusation in the language of the statute, that the words "criminal abortion" amount to no more than the legal conclusion of the pleader upon undisclosed facts, and that all of the facts necessary to the validity of a criminal complaint for criminal abortions should be alleged.

Both the District Court of Appeal and the Supreme Court of California, however, have held contrary to appellant's contention. In the case of Lanterman v. Anderson, 36 Cal. App. 472, 172 P. 625, the court held that a complaint filed before the state board of medi-

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

cal examiners charging a physician in the language of the act with committing a criminal abortion is sufficient without stating the facts enumerated in the Penal Code, for the reason that the language of the statute is sufficiently explicit to advise a person charged thereunder of the particular kind of unprofessional conduct of which he is accused. And in the case of Suckow v. Alderson, 182 Cal. 247, 187 P. 965, the Supreme Court similarly held.

[2] As to the second stated ground for reversal, the court is of the opinion that the respondent board was not bound by the action of the Superior Court in acquitting appellant of a charge of abortion based upon certain alleged acts of appellant complained of in the complaint herein, and that evidence of such acquittal was properly rejected.

"Judgments in criminal proceedings are generally not competent or conclusive in civil proceedings, and vice versa, not only because ordinarily there is not the necessary identity of parties, but also because the same rules of evidence and degree of proof do not prevail in the two classes of proceedings." 15 Cal. Jur. 114.

While there appear to be no decisions in California squarely in point, it has been held in at least one sister state (Colorado) that a board of medical examiners is not bound to accept as final a judgment of acquittal in a criminal court. State Board of Medical Examiners v. Noble, 65 Colo. 410, 177 P. 141. Furthermore, it is to be noted that the judgment of acquittal in the instant case, even if constituting a defense, would be an answer to but one of the acts complained of in the complaint filed against appellant.

[3] After a consideration of the third point raised on appeal, we believe it is likewise without merit. The jurisdiction of appellant was originally acquired by filing with the secretary of the board of medical examiners a sworn complaint charging appellant with having been guilty of unprofessional conduct, in that he actually procured two criminal abortions, following which a citation, made returnable at the next regular session of the board, was issued and served upon appellant. He was thereby notified of the unprofessional conduct with which he was charged, and given an opportunity to defend the action on its merits. In the course of the hearing, evidence was introduced tending to prove that appellant was guilty of offering and agreeing to procure the two criminal abortions, and the amendments allowed shortly before the conclusion of the hearing were made merely to conform to such proof.

[4] It is common practice to allow such amendments in civil cases. This is not so in criminal actions, but that proceedings before the state board of medical examiners are more closely akin to civil than to criminal proceedings is well established.

"In considering and determining the case of one who is charged with unprofessional conduct, the State Board of Medical Examiners * * * exercises a quasi-judicial function. * * * The proceedings of the board are not, however, governed by the technical rules of pleading and practice, and the analogies of criminal law may not be invoked. * * * Nor are the provisions of the Penal Code made applicable by reason of the fact that the conduct of the accused is described as 'criminal' abortion." 20 Cal. Jur. pp. 1063, 1064.

It may also be said that the charges of agreeing to perform criminal abortions were not so entirely foreign to the charges of actually performing such abortions as to take appellant by surprise or to jeopardize his right of defense. Appellant did not choose to testify in his own behalf either before or after the amendments were allowed, and his counsel rested his case and argued it without any request for a continuance or permission to file an amended answer or to produce further evidence.

[5] As to the last of appellant's contentions, respondents concede that, if there was no evidence to support the accusations, they were without jurisdiction to either adjudge appellant guilty or to revoke his license, but an examination of the record presented on review by no means shows it destitute of evidence to support the accusations.

In one of the cases complained of (that of a married woman), the husband testified that his wife told appellant that she was pregnant, and asked him if he could do anything for her. Appellant said he could, but it would cost her $50. The money was paid, and appellant took the woman into another room, where they remained together some fifteen or twenty minutes. After leaving appellant's office, the wife complained of pain in her abdomen. Three days afterwards she became very ill and was taken to a hospital, where she died some six weeks later. The attending physician testified that in his opinion her condition was due to an incomplete abortion. He also gave it as his opinion, gained from examinations and consultations had prior to her visit to appellant, that she was pregnant, and that there was no reason why she would not have been able to bear a child. The record before this court further reveals a canceled check, indorsed by appellant, which was said to have been given in payment of the operation, and it also contains the uncontradicted statement of the husband to the effect that appellant, on demand, returned to him the $50 after his wife died.

In the other case (that of a single woman), there is uncontradicted evidence of an agreement to perform an abortion. The evidence of the operation having been performed is practically the same as that of the first case, with the addition that one witness heard decedent groaning while she was in appellant's office. As to the criminal aspect of the operation, there is evidence of pregnancy, but none as to whether the operation was necessary in order to preserve life. The most that can be said on that subject is that neither appellant nor any one on his behalf made any pretense that such an operation was in fact necessary.

As to criminal actions for abortion, "there is a wide divergence of authority upon the question as to whether, under a statute such as ours, the burden of establishing that the abortion was actually necessary is an affirmative defense, or whether the proposition is to be negatived in the first instance by the prosecution." People v. Balkwell, 143 Cal. 259, 76 P. 1017, 1018. The courts have contented themselves with merely holding that, *if* the burden rested upon the prosecution, such burden was sufficiently met in the particular case under consideration.

[6] For the purpose of determining whether the respondent board in the case at bar had jurisdiction, it would seem reasonable to conclude that positive proof of appellant's agreement to perform an abortion before he had even seen or examined the woman should be sufficient to place upon him the burden of affirmatively showing that the operation was necessary.

The words "unprofessional conduct" in reference to the acts under discussion herein are defined in the Medical Practice Act (Deering's Gen. Laws 1923, Act 4807, § 14) to mean "the procuring or aiding or abetting or attempting or agreeing or offering to procure a criminal abortion."

It is the opinion of the court, from an examination of the record and a consideration of the facts above detailed, that there is ample evidence of appellant's unprofessional conduct in this regard to warrant the conclusion that the respondent board did not exceed its authority when it revoked appellant's license to practice medicine and surgery.

The judgment appealed from is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

211 Cal. 495

LARSON v. KING et al.

Sac. 4372.

Supreme Court of California.
Feb. 11, 1931.

1. Sales 🔑130(2).

Complaint in action for rescission of automobile purchase contract, alleging buyer was under influence of liquor, *held* to state cause of action.

The buyer in her complaint alleged that, when she was under the influence of intoxicating liquor and incapable of entering into any contract, the sellers induced buyer to enter into contract wherein sellers sold to buyer a certain automobile at certain price in excess of its real value; that, when buyer was sober and learned of fraud practiced on her, she demanded in writing that the contract be rescinded and offered to restore automobile to sellers, and demanded the return to her of the automobile she had delivered to sellers and cancellation of contract to pay balance of purchase price.

2. Sales 🔑130(3½).

In buyer's action for rescission of automobile purchase contract, findings *held* to support judgment of rescission.

The court found that the sellers, after retaking the automobile on the buyer's demand for cancellation of the contract on the ground that it was executed while she was under the influence of intoxicating liquor, resold the automobile for the reasonable value thereof and received sufficient to save sellers from loss without regard to transaction with buyer, and that sellers refused to redeliver automobile buyer had turned in as part payment.

3. Sales 🔑92.

Sellers, by accepting restoration of automobile and reselling it, worked rescission of contract by consent, and were not entitled to property and also price.

In Bank.

Appeal from Superior Court, Yuba County; H. D. Gregory, Judge.

Action by Edith Larson against J. F. King and another, doing business under the firm name and style of King & Williamson. Judgment for plaintiff, and defendants appeal.

Affirmed.

Erling S. Norby, of Marysville, for appellants.

Ray Manwell, of Marysville, for respondent.

WASTE, C. J.

The plaintiff filed in the court below a pleading, entitled "Second Amended Complaint for Rescission of Contract," in which it was alleged that, at a time when the plaintiff was under the influence of intoxicating liquor and incapable of entering into any contract, the defendants "induced plaintiff to enter into a contract wherein and whereby the said defendants sold to plaintiff" a certain Peerless automobile at a price far in excess of its real value, and as part payment took from plaintiff a Pontiac automobile then owned by her. "Within a few days thereafter * * * and when plaintiff was sober and learned of the fraud practiced upon her by defendants," she demanded in writing that the contract be rescinded, offered to restore the Peerless automobile to defendants, and demanded the return to her of the Pontiac automobile and a cancellation of the contract to pay the balance of the purchase price of the Peerless. The defendants accepted the return of the Peerless, but refused to redeliver the Pontiac to plaintiff or to cancel the contract.

The trial court, sitting without a jury, found these allegations to be true, except that plaintiff was not under the influence of intoxicating liquor at the time of the transaction, "but did at the time of executing the * * * contract * * * have drinks of intoxicating liquor in the place of business" of the defendants. It also found that the defendants, after retaking the Peerless automobile, resold it "for a sum of money equal to the reasonable value thereof, and sufficient to save said defendants incurring any financial loss, without regard to the transaction had with plaintiff." Judgment was entered for the plaintiff for the return to her of the Pontiac automobile, or its reasonable value in case a return could not be had, and directing cancellation of the contract. The defendants have appealed on the judgment roll alone, and are here contending that the complaint does not state a cause of action and that the findings do not support the judgment.

[1-3] The complaint states a cause of action. The findings support the judgment. By accepting a restoration of the Peerless automobile, the only thing of value the plaintiff had received, and reselling it, the defendants worked a rescission by consent. They are not entitled to the property and the price also. Boas v. Knewing, 175 Cal. 226, 229, 165 P. 690, L. R. A. 1917F, 462.

The judgment is affirmed.

We concur: SHENK, J.; RICHARDS, J.; SEAWELL, J.; CURTIS, J.; LANGDON, J.; PRESTON, J.

🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

211 Cal. 482

SAN LEANDRO CANNING CO., Inc., v. PERILLO et al.

S. F. 13387.

Supreme Court of California.

Feb. 7, 1931.

As Modified on Denial of Rehearing March 6, 1931.

1. Pleading 🔑214(1).

On demurrer, averments of complaint are taken as true.

2. Appeal and error 🔑1195(3).

Where evidence on retrial showed averments of complaint to be true, decision of appellate court on former appeal on demurrer to complaint *held* "law of case."

[Ed. Note.—For other definitions of "Law of the Case," see Words and Phrases.]

3. Limitation of actions 🔑100(7).

Statute of limitations *held* not to have commenced to run against directors' unauthorized payment of commission for sale of stock while they were in full control of affairs of corporation (Code Civ. Proc. § 338, subds. 1, 4, and § 359).

4. Licenses 🔑39.

Corporation could recover commissions paid directors for selling stock, where directors did not have broker's certificates (St. 1917, p. 680, § 14, as amended by St. 1925, p. 970, § 9).

5. Licenses 🔑38.

Where corporation had been granted permit to make sales of stock, individual directors of corporation could make sales without procuring broker's certificate but could not take commissions (St. 1917, p. 680, § 14, as amended by St. 1925, p. 970, § 9).

In Bank.

Appeal from Superior Court, Alameda County; John J. Allen, Judge.

Action by the San Leandro Canning Company, Inc., against L. Perillo and others. Judgment for defendants, and plaintiff appeals.

Reversed, with directions.

See, also, 84 Cal. App. 635, 258 P. 670.

Edwin H. Williams, of San Francisco, for appellant.

James M. Koford, of Oakland, for respondents.

RICHARDS, J.

The plaintiff, a California corporation, commenced this action against the defendants, who were its former directors, to require the latter to repay into the treasury of the corporation the sum of $19,551.76, alleged to have been the money and property of the corporation which had been illegally withdrawn from its treasury through the action of the defendants while they were the directors of the corporation, and which were alleged to have been so withdrawn and expended under the circumstances set forth in the plaintiff's second amended complaint. The original complaint was filed on March 21, 1924. The demurrer of the defendants to the second amended complaint was based upon two main grounds: First, that the complaint did not state facts sufficient to constitute a cause of action; and, second, that the plaintiff's cause of action as alleged therein was barred by the provisions of subdivision 4 of section 338, section 359, and subdivision 1 of section 338 of the Code of Civil Procedure. The trial court sustained the demurrer upon each of said grounds and entered judgment in the defendants' favor upon the declination of the plaintiff to further amend. The plaintiff appealed from this judgment to the District Court of Appeal, First District, Division 2, which reversed the judgment and ordered the demurrer to be overruled. San Leandro Canning Co., Inc., v. Perillo et al., 84 Cal. App. 635, 258 P. 670. In reversing the judgment the court expressly held that the action was not barred upon the date of the commencement thereof by any statute of limitations. This holding was apparently predicated upon the averments of the complaint to the effect that during all of the times mentioned in the complaint at which the moneys and property of the plaintiff corporation were asserted to have been illegally withdrawn by or through the acts of the defendants they (the defendants) were in full control of the plaintiff corporation as the directors thereof. The other matters adverted to by the appellate tribunal in its reversal of the judgment will be considered later in the course of this opinion. Upon the return of the cause to the trial court following such reversal the defendants filed their joint answer to plaintiff's aforesaid second amended complaint, in which, after specific denials of the substantial averments thereof, the defendants repeated their plea to the effect that the plaintiff's alleged cause of action was barred by the provisions of the several sections of the Code of Civil Procedure above set forth.

The cause went to trial upon the issues as thus framed, whereupon certain evidence was presented by the respective parties which formed the basis for the findings of fact and conclusions of law of the trial court. These facts, which are substantially undisputed, may be briefly summarized as follows: On or about November 8, 1920, the plaintiff was a California corporation having an unissued capital stock of $1,000,000, divided into 10,000 shares of the par value of $100 per share. It had at that time and thereafter up to a time shortly before the commencement of the present action a board of directors of seven members, the individuals composing which were the six defendants herein and another who was deceased at the time this action was commenced. These directors were during said period, as expressly alleged in said complaint and as expressly found by the trial court, in control of the affairs of the corporation and of the expenditure and disposition of the moneys and property thereof. The directors on or about said date entered into a plan to purchase the plant of another corporation for the sum of $135,000, to be paid for in corporate stock of the plaintiff, and in order to carry into effect such purpose to sell $150,000 worth of the treasury stock of the corporation. They therefore caused the corporation to apply to the state corporation department for a permit to issue and sell said treasury stock, which permit when issued, among other things, provided that the compensation or commission to be paid for the sale of said shares of stock should not exceed 15 per cent.; nor should any commission or compensation be paid in connection with any sale made within this state except to an agent or broker holding a certificate from the commissioner of corporations authorizing him to act as plaintiff's agent in making such sales; a true copy of the permit was to be exhibited and delivered to each prospective subscriber before his subscription should be taken. The permit authorized the sale of the stock for 25 per cent. cash, the balance of the purchase price to be evidenced by promissory notes payable on or before seven and one-half months from the date of said permit. Acting upon this permit, and in some cases in anticipation thereof, certain of the directors of the corporation undertook to make sales of the said treasury stock of the corporation to various persons without possessing any authorization from the state corporation department so to do in order to conform to the requirements of the aforesaid permit. The two directors who undertook so to do were Pelton and Faustina, who received, according to the findings of the trial court, as commissions on the sale of so much of said treasury stock as were made by them, the sum of $14,112, of which the sum of $12,009.50 was paid by the action of the defendants herein as directors of the corporation to their codirectors Pelton and Faustina before March 21, 1921, and the sum of $2,062.50 after March 21, 1921.

The court further found that the sum of $3,004.12 was paid as commissions to others than these two directors on account of similar sales of said stock. It would thus appear that the total sum paid out of the treasury of the corporation upon said sales of its treasury stock, according to the findings of the trial court, was $17,116.12. The total sum found to have been received by the corporation for the sale of its said treasury stock was the sum of $70,279.41, upon which, at the rate allowable for commissions under the terms of said permit, there would be payable to those legally entitled to receive the same the sum of $10,541.91. There are certain discrepancies in the foregoing findings of the trial court which may be corrected upon a retrial of the cause; as for example with respect to the total sum paid by or on behalf of the corporation to directors Pelton and Faustina as commissions for their services in selling said stock, the answer of the defendants expressly alleges that said directors received therefor the sum of $6,228.75 in cash, and also received from the corporation certain promissory notes of the face value of $10,000 on account of commissions for the sale of said stock. These two sums aggregate $16,228.75. The defendants undertake to evade the full effect of this admission upon the theory that the promissory notes so alleged to have been received by said two directors were property of the corporation as distinguished from money, and that for any unlawful transfer and receipt of said property the defendants cannot be held liable in this form of action. The evidence disclosed, however, that the promissory notes so taken over by these two directors consisted of installment notes made payable to the corporation by the purchasers of the stock which said directors undertook to sell under said permit, and that in many instances at least the payments made upon said notes were made to the corporation itself, and were by the action of its officers paid over to said directors, to whom said notes had already been assigned. The trial court properly treated these transactions as amounting substantially to a cash payment by the corporation to said directors as commissions for the making of said stock sales. The evidence upon the trial showed the total amount received by said two directors on account of said commissions to have been the sum of $16,858.25, and such should have been the finding of the trial court. If such had been the only errors occurring at the trial they might possibly be corrected upon this appeal without a retrial of the cause, but the trial court committed other and more vital errors in the course of the trial.

[1-3] When this cause was before the appellate tribunal upon the former appeal it was expressly, though quite too briefly, stated in its decision that the cause of action set forth in the plaintiff's complaint was not barred at the time of the commencement thereof by any statute of limitations. The unexpressed reason for this ruling was doubtless that set forth in the complaint, to the effect that during the course of the transaction out of which this controversy arose and

for a period of time up to within three years prior to the date of the commencement of the action the defendants were the directors of said corporation, and as such were in the full control of its affairs and finances. These averments of the complaint having been for the purposes of said decision taken to be true, it would follow, under what we deem to be a well-settled principle of law, that the statute of limitations does not commence to run against unlawful acts and expenditures made by or under the direction of the directors of the corporation while they were in full control of its affairs and of the expenditure of its funds. City of Oakland v. Carpentier, 13 Cal. 540, 552; Pacific Vinegar Works v. Smith, 152 Cal. 507, 514, 93 P. 85; Whitten v. Dabney, 171 Cal. 621, 629, 154 P. 312. Following the foregoing ruling of the appellate tribunal and upon the trial of the cause the undisputed evidence in the case showed the aforesaid averments of the complaint to be true. This being so, the holding of the appellate tribunal to the effect that this action was not at the date of the commencement thereof barred by any statute of limitations must be held to have become the law of the case, particularly in view of the fact that the trial court in its findings declared: "That the defendants were directors of said corporation and controlled its affairs and expended its money as such directors and the court so finds." Notwithstanding the foregoing state of the record and of its above finding of fact, the trial court, after declaring that the plaintiff was entitled to judgment against the defendants for the sum of $4,306.67, proceeded to hold: "With the exception of said sum of $4,306.67, all other amounts claimed by plaintiff in said complaint are barred by the provisions of section 359 and subdivisions 1 and 4 of section 338 of the Code of Civil Procedure." The judgment of the court based upon such unjustified conclusion was clearly an error, and this fact alone would seem to compel a reversal of this cause upon appeal. The trial court, however, committed another and equally vital error or series of errors during the trial of the cause.

[4, 5] When this matter was before the appellate court upon the former appeal, that tribunal undertook to indulge in a course of reasoning the effect of which was to arrive at the conclusion that, as to the averments of the complaint with respect to payments made to the directors Pelton and Faustina and to certain brokers within the limit of the 15 per cent. allowed to be paid as commissions under the terms of the permit to sell its stock issued by the corporation commissioner, the plaintiff was not entitled to recover the same in this form of action, even though it should be made to appear, as by the averments of the complaint it was made to appear, that said sales were made and said commissions paid in violation of the provisions of the Corporate Securities Act and of the permit issued thereunder, for the reason that the persons making such sales had not received the requisite certificate which would entitle them so to do. With this portion of the aforesaid opinion of the appellate tribunal this court was, however, apparently in disagreement since, upon petition for hearing in this tribunal, it was held that, while the decision of the District Court of Appeal reversing the former judgment of the trial court was correct in other respects which rendered it proper that the petition for hearing should be denied, this court proceeded to state (San Leandro Can. Co., Inc., v. Perillo, 84 Cal. App. 642, 258 P. 670, 673): "In denying the same, however, we withhold our approval as to that portion of said decision which indicates that upon the trial of said action the limit of the plaintiff's recovery would be the sum of $9,164.41. Upon the question as to what amount the plaintiff would be entitled to recover upon proof of the facts averred in his complaint we express no opinion." The clear import of this language would seem to be that of suggesting to the trial court that upon the trial of the cause which was to follow the reversal of the judgment the plaintiff should be permitted to make proof of those averments contained in its complaint to the effect that the payment of any commissions whatever to those making sales of the stock of the corporation covered by said permit were unlawful and were recoverable at the suit of the corporation in this form of action. When, however, upon the trial of this cause, the plaintiff proffered such proof the trial court refused to admit the same. The specific offer of the plaintiff which was thus refused had reference to the averments of paragraph 6 of the complaint, wherein it was in effect alleged that the directors of the corporation, who were and are the defendants in this action, had entered into a conspiracy among themselves to violate in certain ways therein set forth the provisions and limitations of the permit for the sale of said stock and had caused the same to be sold and the commissions resulting from such sales to be paid out of the funds and property of the corporation to the two directors Pelton and Faustina in violation of law and of the terms of said permit. Having refused to permit the plaintiff to make proof of the foregoing facts as set forth in detail in paragraph 6 of its complaint, the trial court made the following finding: "That an objection was sustained to the evidence offered as to the allegations of paragraph 6 of said complaint, and therefore no evidence was admitted in support thereof, and said allegations are found therefore to be untrue." Having made the foregoing finding, the trial court proceeded further to find: "That the damage sustained by said corporation herein was the sum of $7,883.25, and that of said amount $3,576.58 is barred by the pro-

visions of section 359 and subdivisions 1 and 4 of section 338 of the Code of Civil Procedure. That said $7,883.25 was money paid for commissions exceeding fifteen per cent of sales of said stock for cash." As a conclusion of law from the foregoing findings of fact the trial court found: "That plaintiff should have judgment against the defendants for the sum of $4,306.67, with interest at the rate of seven per cent per annum from the 21st day of March, 1921, and for its costs."

It seems clear to us that in thus limiting the plaintiff's proofs herein and in thus holding that as to the largest part of the plaintiff's cause of action it was barred by the provisions of the aforesaid statute of limitations, and in thus confining the recovery of the plaintiff to the sum of $4,306.67, the trial court has acted, not only in disregard of the law of the case with respect to the application of the statute of limitations, but also in disregard of the intimations of this court as to the proof which the plaintiff was entitled to make under the averments of its complaint, and as to the amount of recovery to which the plaintiff might be entitled upon the making of such proof. It is urged, however, by the respondent that, the corporation having been granted a permit to make sales of a certain amount of its treasury stock upon the terms and conditions stated therein, it was the right and duty of the individual directors of the corporation to engage in making such sales without the necessity of procuring the broker's certificate required by said permit in order to conform to the Corporate Securities Act (St. 1917, p. 673, as amended). This much may be conceded to be true, but it does not therefore follow that said directors because of the existence of such right and the performance of such duty would be entitled to withdraw from the funds and property of the corporation commissions for making such sales of stock in violation of the terms of the permit, which in conformity with the provisions of the Corporate Securities Act provided: "Nor shall any commission or compensation be paid in connection with any sale made within this state except to an agent or broker holding a certificate from the commissioner of corporations, then in effect, authorizing him to act as applicant's agent." To pay or receive commissions from the treasury of the corporation in violation of this provision of the permit and of the provisions of section 14 of the Corporate Securities Act (as amended by St. 1925, p. 970, § 9) would be clearly an unlawful act, and to thus disburse the funds and properties of the corporation a wrongful and illegal disposition thereof. Had the plaintiff been permitted to make its proffered proofs as to the circumstances and conditions under which sales of said corporate stock were made by the two directors essaying to make the same, and as to the withdrawal of the sum total of such commissions from the treasury of the corporation in payment of such commissions, the trial court would have been enabled to make findings conformably to our intimations in denying a hearing after the former decision.

The appeal herein having been prosecuted by the plaintiff from the limited form and amount of the judgment in its favor, it is ordered that the judgment shall be and the same is hereby reversed, with direction to the trial court to proceed with a retrial of the issues involved in this cause in conformity with the views expressed in this opinion.

We concur: WASTE, C. J.; SHENK, J.; SEAWELL, J.; LANGDON, J.; PRESTON, J.; CURTIS, J.

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211 Cal. 521

KECK et al. v. KECK et al.

Sac. 4342.

Supreme Court of California.

Feb. 16, 1931.

Corporations ⚷190.

Defendant stockholders could not complain that judgment requiring them to repay money to corporation was not conditional on plaintiff stockholder first paying money he owed.

In Bank.

Appeal from Superior Court, Tulare County; J. A. Allen, Judge.

Action by A. W. Keck and others against G. O. Keck and others. From an adverse judgment, the defendants appeal.

Affirmed.

D. E. Perkins, of Visalia, for appellants.

Power, McFadzean & Crowe, Power & McFadzean, and H. B. McClure, all of Visalia, for respondents.

PRESTON, J.

This is a family dispute centering around the control and management of a California family corporation organized in 1908 and known as the Keck Company. The father, G. O. Keck, and the brothers, A. W. Keck and Ralph D. Keck, complete the dramatic personæ. The latter, however, plays an unimportant role, leaving the father and the other son A. W. Keck as the principal actors. Both the father and the son Ralph D. Keck have died since judgment in this action and their respective personal representatives have been substituted as parties appellant.

The Keck Company has a capital stock of 1,000 shares of the par value of $100 each, and from the date of its organization until about the year 1919 it was an active concern engaged in extensive farming operations. It now owns real estate of the approximate value of $50,000. Since 1919 it has been a dormant corporation, but at that time it owned a considerable amount of liquid assets other than said real property. From its organization until the year 1922 it was under the active management of A. W. Keck. During that year, however, on account of both physical and mental illness he disappeared from the scene of action and remained away until about the year 1926, when he reappeared, apparently restored in both mind and body. In 1925 his place on the board of directors was filled, and, finding this out in 1926, as above mentioned, unfortunate differences in the family arose.

Prior to his illness, A. W. Keck had become indebted to the corporation for borrowed money, which said sum, together with sums advanced for his account during his illness, aggregated the total sum of $42,018.48. During the same period the father was a responsible member of a copartnership, known as Keck & Keck, composed of himself and the son Ralph D. Keck, which also became indebted to the corporation in the sum of $99,775.68, and the father individually became indebted to the corporation in the sum of $9,610.67. The said partnership had become practically insolvent and the son Ralph D. Keck had sold to his father his stock in the family corporation, so that at the period here involved the beneficial interest in the stock of said corporation was owned as follows: By the father 461½ shares, plus 77 shares; by A. W. Keck, 461½ shares. Although the latter's stock, with the exception of one share, stood in the name of A. W. Keck Company, a corporation, he was the sole owner of the A. W. Keck Company capital stock, so in reality the entire stock of the family corporation was owned by the father and said son, about 54 per cent. thereof by the father and about 46 per cent. thereof by the son.

In 1927, A. W. Keck, on behalf of himself and of the corporation owned by him, sued in equity on behalf of the Keck Company, naming as defendants said Keck Company, said partnership and his said father and brother, asking for an accounting between the said Keck Company and the other defendants, for judgment in favor of the corporation against all other defendants for the sums found due from them and for other ancillary relief not necessary here to record, except that a receivership was prayed for in order to prevent dissipation of the assets of said corporation. The defendants retaliated, charging that the plaintiff, A. W. Keck, was likewise heavily indebted to said corporation, Keck Company, and joined in the prayer for an accounting, following this with an offer to pay their indebtedness to said corporation when and after said plaintiff had first liquidated his obligation to it. The prayer was also that judgment be given in favor of the corporation and against A. W. Keck and the A. W. Keck Company.

Thereafter the case came to trial, an accounting was had by a referee and report made to the court, and as a result of such accounting the items of indebtedness above referred to were ascertained to be correct and are not here in dispute. Findings of fact were made in accordance with this accounting, followed by judgment in favor of the corporation and against G. O. Keck for the sum of $9,610.67, against G. O. Keck and Ralph D. Keck, copartners under the firm name and style of Keck & Keck, for the sum of $99,775.68 and against A. W. Keck in the sum of $42,018.48. Said judgment likewise enjoined the defendants from dissipating the assets of the corporation and from transferring the said partnership and assets thereof to it, or from borrowing from the corporation or loaning to themselves any of the assets thereof, and it concluded by holding the cause open for the purpose of entertaining a motion for the appointment of a receiver to enforce the decree, to protect the stockholders of said corporation and to carry out the other provisions of the judgment.

The defendants have appealed, although, as above stated, the judgment of the court below was practically in accord with the prayer of their answer. They make the sole contention for reversal that the court should have first required plaintiff A. W. Keck to pay and discharge his indebtedness to the corporation before judgment of any kind passed against them, attempting to call into operation the familiar principle in equity that he who seeks equity must first do equity. Appellants say that plaintiff may be or become insolvent, in which event they may be forced to pay the amounts due from them while he will not be required to pay the amounts due from him, but will thus be freed from his correlative obligation.

It is possible for a condition to arise out of this situation which might work to the disadvantage of the defendants, but we cannot see the necessity for making application of the equitable principle contended for, for the reason that the indebtedness from the respective parties to the corporation is admittedly correct and the judgment in the main is in accord with the prayer of the pleadings of all the parties. The action by plaintiffs really amounted to invoking the power of a court of equity to establish the rights and obligations of all the parties concerned. Moreover, the court has retained jurisdiction for the purpose of supervising the enforcement of its decree through the appointment of a receiver or other further proceedings in the matter and we feel that it has the power to prevent any threatened injustice in connection with the administration of this subject matter. While we regard it as unfortunate that a cause of this nature should reach the courts, still the clear duty of this court seems to be to uphold the action of the court below.

Accordingly, the judgment is affirmed.

We concur: WASTE, C. J.; CURTIS, J.; LANGDON, J.; SHENK, J.; SEAWELL, J.; RICHARDS, J.

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211 Cal. 491

REDMON et al. v. GRAHAM et al.

Sac. 4279.

Supreme Court of California.

Feb. 10, 1931.

1. Receivers 🔑71.

Where receiver is appointed in proceeding in unlawful detainer, he takes possession for benefit of lessor.

2. Landlord and tenant 🔑198.

Tenant is not liable for rent accruing while receiver in unlawful detainer is in possession.

3. Damages 🔑79(5).

Hotel lease provision that lessees' deposit was security for performance, to be forfeited as liquidated damages in event of breach, *held* "penalty" and void (Civ. Code, § 1670).

[Ed. Note.—For other definitions of "Penalty," see Words and Phrases.]

4. Landlord and tenant 🔑184(2).

To entitle lessor to retain deposit upon lessee's default, deposit must be given as absolute payment of rent in advance, not security for performance.

5. Landlord and tenant 🔑184(2).

Lease provision, providing for deposit as security for performance, to be applied on last three months' rent, *held*, under circumstances, security, not advance payment.

Lease was for term of fourteen years and ten months. It provided that at time of payment of first month's rent stated sum shall be deposited as security for performance by lessee of covenant contained in lease, lessee to have right to keep deposit as his own for liquidated damages in event of breach of covenant by lessee, and, should lessee perform all covenants, deposit could be applied for payment of last three months' rent. Lease further provided that deposit should be returned upon accidental destruction of premises.

6. Evidence 🔑450(4).

Lease provision providing for deposit as security for performance *held* unambiguous and parol evidence properly excluded.

In Bank.

Appeal from Superior Court, Yuba County; Eugene P. McDaniels, Judge.

Action by J. T. Redmon and another against A. C. Graham and others. From the judgment, plaintiffs appeal.

Affirmed.

W. P. Rich, Alvin Weis and Rich & Weis, all of Marysville, for appellants.

James P. Sweeney, of San Francisco, for respondent Graham.

Frank A. Duryea, of Marysville, for respondent Decaro.

Russell P. Tyler, of San Francisco, for respondent Johnson.

LANGDON, J.

This is an appeal by plaintiffs from a judgment of the superior court of Yuba county in an action for unlawful detainer.

Plaintiffs, the owners of a hotel, leased the same to defendants on December 31, 1926, for a period of fourteen years and ten months from January 1, 1927. Rental in the sum of $1,500 was payable on January 1, 1927, and on February 1, 1927, and thereafter the sum of $1,800 was payable on the first of each month for the remainder of the term. In accordance with the terms of the lease, which are hereinafter set forth in part, the additional sum of $5,400 was deposited with the lessor by the lessee.

Defendants failed to pay a part of the rent due for the month of June, 1928. Plaintiffs gave the proper notice to quit and then brought this proceeding in unlawful detainer, and being unable to serve defendants, applied for a receiver. On July 3, 1928, the court made an order appointing a receiver, who thereupon duly qualified and took possession of the premises. The trial was held on July 23, 1928, and judgment was rendered in favor of plaintiffs for rent due to the end of July, amounting to $2,700, together with the costs of the action, and, in addition, the lease was canceled and possession restored to plaintiffs. The sum of $477.56, being profits collected by the receiver up to July 31, 1928, was subsequently ordered paid to the defendants.

Plaintiffs were required by the judgment to deduct the amount of their recovery from the $5,400 previously deposited at the time of the execution of the lease; the balance was directed to be returned to defendants.

Plaintiffs contend on this appeal that the judgment was erroneous in requiring the return of the sum originally deposited with them, and in giving to defendants the profits collected by the receiver. They claim that they were entitled to retain the entire deposit, and in addition to receive judgment for the unpaid rent and the receiver's profits.

[1, 2] With respect to the money collected by the receiver, the claim of plaintiffs is clearly unfounded. It is true that where a receiver is appointed in a proceeding in unlawful detainer, he takes possession for the benefit of the lessor; but in such case, the lessee is no longer liable for rent. Telegraph Avenue Corp. v. Raentsch, 205 Cal. 93, 269 P. 1109, 61 A. L. R. 366; Gordon v. Harris, 94 Cal. App. 682, 271 P. 779. The judgment in this case was in favor of plaintiffs for rent for the months of June and July. Obviously, the lessors are not entitled to both the rent for July and the profits of the business for that month, and since the judgment for rent for that period was greater than the amount collected by the receiver, we cannot see that plaintiffs have the slightest cause for complaint. Moreover, the court's order was made upon a settlement of the receiver's account, after judgment had been entered in the main action. This order settling the account, though appealable (Cal. Code Civ. Proc. § 963), was never appealed from.

[3] The chief question presented by this case is whether the lessors were entitled to retain the deposit of $5,400, in addition to the judgment for unpaid rent. The determination of this question requires the interpretation of the following language in the lease:

"(o) It is further agreed by said lessee that he will, at the time the first month's rent is paid hereunder * * * pay to said Lessors, the sum of Five Thousand Four Hundred Dollars, this sum to be paid by said Lessors *as security for the performance by said lessee of the covenants herein contained* * * * and should he break any of the covenants * * * then the said Lessors *shall have the right to keep the same as his own for liquidated damages*, it being agreed by the parties hereto that in the event of the failure of said Lessee to perform the covenants herein contained, the damages to the Lessors would be irreparable and impossible to ascertain.

"Should the lessee perform all of the covenants herein contained * * * then said sum of Fifty-Four Hundred Dollars shall be applied as payment for the last three months' rent of the term of this lease." (Italics ours.)

In unmistakable language this provision states that the $5,400 deposit was made as security for the performance of the covenants of the lease, the sum to be retained, that is, forfeited by the lessor as liquidated damages in the event of breach by the lessee. It is settled in this state that such a provision in a lease is a penalty within the meaning of section 1670 of the Civil Code, and is void. Green v. Frahm, 176 Cal. 259, 168 P. 114; Knight v. Marks, 183 Cal. 354, 191 P. 531.

[4] Plaintiffs urge that this case comes within the exception to the above rule where the money is not deposited as security for the performance by the lessee, but is given as an advance payment of the rent on the last few months of the term. In such a situation it has been held that the lessor may retain the money upon default by the lessee. But it is essential that the money be given as an absolute payment of rent in advance, and not as a deposit to secure the performance of the lessee. Wetzler v. Patterson, 73 Cal. App. 527, 238 P. 1077; Curtis v. Arnold, 43 Cal. App. 97, 184 P. 510; Sinclair v. Burke (Or.) 287 P. 686.

[5] The provision in question does not, in our opinion, come within this exception to the rule. A reading of it discloses its plain and obvious purpose, namely, to permit the forfeiture of the sum paid, upon breach of covenant by the lessee. This right of forfeiture is made to cover the entire term. It is recognized, however, that in the event that the lessee fully performs, the sum must be returned. It is accordingly provided that "should the lessee perform all of the covenants," then the sum shall be applied as payment for the last three months' rent. This is in no sense an advance payment of the rent for that period. Until the end of the term, the money is held as security; and until that time it is uncertain whether the money shall be applied on the rent. This interpretation is strengthened by the further provision in the lease that the $5,400 should be returned to the lessee upon the accidental destruction of the premises. This is, of course, wholly inconsistent with the idea of an absolute payment in advance, with title to the money passing to the lessor. See Wetzler v. Patterson, supra.

[6] Plaintiffs finally argue that the lease was ambiguous in its language covering the deposit; that one interpretation leads to illegality, and that therefore the other interpretation should be adopted. They also attack the refusal of the court to permit the introduction of parol evidence to show the intended meaning of the provision. We are satisfied that the trial court acted within its

discretion in rejecting the offer of any such evidence. We are unable to perceive any ambiguity in the terms of the lease. The primary purpose of the provision for the deposit is clearly stated in the instrument, and under the law of this state, the provision is void.

The judgment is affirmed.

We concur: WASTE, C. J.; CURTIS, J.; PRESTON, J.; RICHARDS, J.; SHENK, J.; SEAWELL, J.

GILDERSLEEVE et al. v. INDUSTRIAL ACCIDENT COMMISSION et al.

S. F. 14055.

Supreme Court of California.

Feb. 16, 1931.

Rehearing Granted March 16, 1931.

1. Master and servant ⚷385(16).

Compensation Act requires denial of award for medical expense only when employee's refusal of medical attention is unreasonable (St. 1917, p. 836, § 9(a), as amended).

2. Master and servant ⚷417(7).

Finding that no sufficient tender of medical attention was made to employee could not be disturbed on appeal, where evidence was conflicting (St. 1917, p. 836, § 9(a), as amended).

3. Master and servant ⚷385(17).

Indemnity could not be reduced on ground that disability was aggravated by employee's refusal of medical treatment, where commission found no tender of treatment was made (St. 1917, p. 842, § 11(e).

In Bank.

Certiorari to Industrial Accident Commission.

Proceedings under the Workmen's Compensation Act by Charles H. Gildersleeve, employer, and the Fidelity & Casualty Company of New York, insurer, to be relieved of liability for medical expenses of Gilman F. O'Neill, injured employee. To review an order of the Industrial Accident Commission awarding compensation for hospital and nursing expenses, the employer and insurer bring certiorari.

Award affirmed.

R. P. Wisecarver, of San Francisco, for petitioners.

G. C. Faulkner and Edward O. Allen, both of San Francisco, and Wallace Rutherford, of Napa, for respondents.

PER CURIAM.

This is a petition by an employer and his insurance carrier to review an award of the Industrial Accident Commission.

The respondent O'Neill was employed by petitioner Gildersleeve as a laborer, and while so employed suffered a fractured spine. He received some medical treatment at the camp where he worked, and later was removed by his relatives to Napa. He placed his case in the hands of chiropractors, and received chiropractic treatment at the home of a private nurse. His recovery was only partial.

Petitioners, the employer and his insurance carrier, instituted proceedings to be relieved of liability for medical expense under the Workmen's Compensation, Insurance and Safety Act, section 9 (a) (St. 1917, p. 836, as amended), claiming that the employee had refused to accept a tender of medical and surgical treatment. The commission found this to be the fact, and made an order absolving petitioners from such liability. A writ of review having been obtained, the District Court of Appeal reversed the order, holding that from the record it appeared that "no tender of medical or surgical treatment was ever made by either the employer or insurance carrier." O'Neill v. Industrial Accident Commission, 91 Cal. App. 121, 266 P. 866, 868. New proceedings were then instituted by petitioners before the commission, and new testimony was taken on this issue. The commission concluded that the new evidence did not meet the conditions of a sufficient tender laid down in the opinion of the District Court of Appeal, and therefore made an order granting reimbursement to the employee for hospital and nursing expense. The cost of the chiropractic treatments was not included in the award on the ground that they were not proper treatment for the injury. Petitioners then sought a new writ from the District Court of Appeal, which was denied without opinion. Whereupon a hearing in this court was had.

The holding of the District Court of Appeal was upon the ground that although the record showed some offers of medical attention made to the relatives of the employee, no offer was made to him personally. Petitioners contend that the evidence taken at the second proceeding before the commission established a tender to the employee and a rejection thereof by him.

[1, 2] Upon an examination of the record we are satisfied that there is evidence to support the commission's finding. The testimony does show a recommendation of hospital treatment made by two of the physicians who

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

originally attended the employee, but it does not satisfactorily establish that these recommendations were authorized tenders made on behalf of the insurance carrier or employer. Moreover, they were made following a period in which the employee was badly neglected in the matter of medical attention, and it does not appear that the value and necessity of the prescribed treatment was made clear to him. The statute, of course, requires a denial of an award for medical expense only when the employee's refusal is unreasonable. In the face of conflicting evidence, and considering all of the circumstances, the commission concluded that there was no sufficient, unequivocal tender, and hence no unreasonable refusal, and this conclusion we cannot disturb.

[3] Petitioner also seeks a reduction of disability indemnity under section 11 (e) of the act (St. 1917, p. 842) on the ground that the disability now existing was caused or aggravated by unreasonable refusal to accept proper medical treatment. This issue, like the first, is determined by the finding of the commission that there was not a sufficient tender of such treatment.

The award is affirmed.

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211 Cal. 497

MONTGOMERY v. NELSON et al.

S. F. 13737.

Supreme Court of California.

Feb. 11, 1931.

1. Appeal and error ⇨927(3).

On appeal from judgment of nonsuit, evidence and every reasonable inference must be construed most favorably to plaintiff.

2. Municipal corporations ⇨808(2).

Advertising case on outside of building with window opening at bottom and extending over sidewalk when opened *held* "nuisance" (Civ. Code, § 3479).

[Ed. Note.—For other definitions of "Nuisance," see Words and Phrases.]

3. Master and servant ⇨332(3).

Where pedestrian injured head on window of advertising case being repaired by employee of third party, negligence of owner of case *held* for jury.

The facts disclosed that the window of the advertising case, which was on the outside of the building, opened from the bottom with hinges at the top thereof, so that the opened window extended out over the sidewalk. The employee of the third party making the repairs at the owner's request opened the window by placing one end of a rod, kept in the case by the owner for such purpose, against the window frame and the other against the case, causing the window to project over sidewalk approximately five feet two inches above the sidewalk level. While the window was in such position the pedestrian's head came in violent contact therewith, inflicting injuries.

In Bank.

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Action by Lilian Montgomery against E. P. Nelson and another, as individuals and as copartners doing business under the name of Nelson-Green, and the American Trust Company and another. From a judgment of nonsuit for the American Trust Company, the plaintiffs appeal.

Reversed.

Superseding opinion of District Court of Appeal in 290 P. 489.

James M. Wallace and Lovell & Lovell & Wallace, all of San Francisco, for appellant.

Ford & Johnson, and Fletcher A. Cutler, all of San Francisco, for respondent.

SEAWELL, J.

This appeal is from a judgment of nonsuit entered in favor of American Trust Company, a corporation. Said trust company conducts a banking business in its building located at the northwesterly corner of Grant avenue and O'Farrell street, a busy locality, in the city and county of San Francisco. The building is so constructed as to form a recess at the Grant avenue and O'Farrell juncture. This unoccupied space adds to the sidewalk width over which the public freely pass and repass. Within said recess and fastened to the building the trust company maintains a mechanical advertising device. The case which incloses this device is an ornamental structure, box-shaped, with its base resting upon the trust company's property. There is no barrier or marks distinguishing the space occupied by the case and immediately adjacent thereto from the sidewalk in general. It is approximately eight feet in height and a lesser dimension in width. The upper half of said case is finished with a plate glass through which the display is exhibited. This window is hung from the top by two hinges and opens upward and outward over the sidewalk. Its projection over the sidewalk when raised to a position perpendicular to the wall lines of the building is about two feet. The lower half of said case is of wood construction with double doors. Such appliances as are necessary or convenient for use in the maintenance of said device are kept in the lower portion of said case. A Mr. Waters, an employee of the trust company, originated the exhibits and installed the mechanical figures. On June 5, 1928, said device was out of repair and refused to function properly. Nelson and Green, copartners, from whom the exhibits were purchased, were notified of the mechanical trouble and they sent their employee, James Lowman, to put the mechanical device in working order. Mr. Lowman obtained the key to the case from the trust company. The trust company provided and kept in said case an iron rod approximately three feet in length which was used to keep the window raised when arranging or changing the exhibit, which was quite frequently done, and to repair the mechanical device as occasion might require. The window was raised by placing one end of the rod against the window frame and the other against the case. This arrangement raised the window to a horizontal position with the wall, causing it to project over the sidewalk about two feet at an elevation of approximately five feet two inches above the sidewalk level. Appellant, a stenographer by occupation, was on June 5, 1928, at about the hour of 1:30 p. m., on her way to a bank situate on O'Farrell street, and as she turned said corner on her journey her head came into violent contact with the overhanging window, thereby inflicting personal injuries upon her.

[1-3] Although there is no dispute of the fact that Nelson and Green employed the workman who negligently placed the window in a position which made it a menace to passers-by, nevertheless, the irresistible inference which flows from the evidence is that the workman made use of said appliance prepared and furnished by the trust company as a proper method of holding said window open in order to gain access to the interior of the case as its use should require. It further appears that red cloths were kept by the trust company in the case which were to be attached to each side of the window when open as warning signals. That circumstance is tantamount to an acknowledgment on the part of the trust company that a dangerous situation was created by the use of the rod in the manner described, and that additional precautions were reasonably necessary to avert personal injury to pedestrians. The workman Lowman first testified that he thought he used one of the red cloths as a warning signal, but finally admitted that he had no recollection on the subject. The appellant testified that she saw no such signal. This being an appeal from a judgment of nonsuit, all the evidence and every reasonable inference must be construed most favorably to appellant's case. The window projecting over the sidewalk constituted a nuisance. Section 3479, Civ. Code. The respondent knew that if the rod which it furnished for use was used in the manner in which it was designed to be used, and as it had been used on other occasions, it constituted a hazard to the safety of pedestrians. This being so, it should in some form or manner have signified its disapproval of its use, rather than to have impliedly, at least, encouraged it. This is a question which should have been submitted to the jury.

Judgment reversed.

We concur: WASTE, C. J.; RICHARDS, J.; PRESTON, J.; CURTIS, J.; LANGDON, J.; SHENK, J.

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211 Cal. 507

BORCHERS BROS. CO. v. CIAPARRO et al.

Sac. 4408.

Supreme Court of California.

Feb. 13, 1931.

Rehearing Denied March 12, 1931.

1. Landlord and tenant ⚷34(1).

Lease was construed as contemplating use of garbage in raising hogs, and that failure, without lessee's fault, to secure garbage conferred right of rescission at lessees' option.

> Lessees had contract with a city to collect garbage, establish ranch, and feed garbage to hogs. For purpose of carrying out such agreement, lessees leased from lessor a ranch, lease providing that premises were to be used to aid in performance of such garbage contract, and that if, for any reason, contract should be unenforceable or void, or if lessees should for period of fifteen days in any matter whatsoever be prevented from gathering garbage, or if, without any fault upon their part, lessees would be prevented by law from using premises for purpose of raising hogs, then, at their option, lease should be deemed canceled, and all liability of lessees cease. After period of more than one year, third party obtained injunction against lessees, directing them to restrain from shipping to or receiving at such ranch any garbage and from feeding it to hogs thereon.

2. Landlord and tenant ⚷34(5).

When, under rescission clause, lessees notified lessor of intention to rescind, result was rescission, and termination of lessee's liability under lease.

3. Landlord and tenant ⚷157(4).

Clause in ten-year lease that improvements by lessees should remain on premises after term *held* inapplicable to rescission under lease, without lessee's fault, during term.

> Such provision clearly spoke of lawful expiration of ten-year period or any extension thereof, and did not speak of situation obtaining in event of rescission by failure of consideration or operation of law prior to expiration of term.

4. Fixtures ⚷35(3).

Whether improvements erected by lessees were trade fixtures *held* fact question (Civ. Code, § 1019).

In Bank.

Appeal from Superior Court, Yolo County; J. O. Moncur, Judge.

Action in equity by the Borchers Bros. Company against Antonio Ciaparro and others. From a judgment in favor of defendants, plaintiff appeals.

Affirmed.

Superseding opinion in 287 P. 113.

Busick & Leeper, of Sacramento, for appellant.

A. G. Bailey, of Woodland, for respondents.

PRESTON, J.

Appellant corporation, as plaintiff, brought this action in the court below in equity to enjoin a threatened demolition of certain improvements which, as lessees, defendants had erected on plaintiff's real property of about fifty acres in Yolo county, California.

The substance of the complaint was that defendant lessees were threatening to abandon said property and had so notified plaintiff and were about to tear down and remove said structures. Issue was joined on this complaint, but later a supplemental complaint was filed which alleged that said improvements had already been destroyed by the defendants subsequent to the filing of the original complaint; that thereafter and on April 3, 1929, defendants abandoned the premises and plaintiff therefore prayed for damages for the value of said improvements. Defendants by answer admitted the relationship of landlord and tenant, the surrender of the premises, and the tearing down and removal of the improvements as alleged, but justified their act upon the ground that, under the terms of the lease itself and by mutual consent as well, the lease had been duly rescinded, and that, by reason of such fact, they were entitled as a matter of right to remove the structures placed on said property, same being trade fixtures within the rule promulgated by section 1019 of the Civil Code and removable without injury to the freehold.

The claims of defendants in this respect were sustained by the court below in its findings and judgment in their favor, from which judgment plaintiff now prosecutes this appeal. The background of this litigation must be examined to understand the respective positions of the parties.

In April, 1927, certain of the defendants entered into a written contract with the city of Sacramento whereby they undertook to collect all the wet garbage from the hotels, restaurants, hospitals, and clubs of said city and to convey the same in sanitary steel garbage wagons, under direction of the city manager of said city, to a place without the city, and, further, to establish a ranch at a point not nearer than ten miles to the city limits of said city, for the feeding of said garbage to hogs. For the purpose of carrying out their agreement with the city of Sacramento, said defendants leased from plaintiff corporation for the period of ten years and two months, for the sum of $30,500, at a monthly rate of $250, its said fifty-acre ranch in Yolo county and established thereon a large band of hogs of considerable value. For the period of one year or more, they fed said garbage so collected from said places in Sacramento to said swine, and, for the purpose of adequately carrying on said business, they constructed the improvements here in question.

However, one Ohaver, a citizen and resident near the location of said ranch, instituted in the superior court of Yolo county an injunction proceeding seeking to restrain the defendants from shipping to or receiving at said ranch any of said garbage. Thereafter and on July 25, 1928, said superior court issued an order granting a writ of injunction, directing defendants to refrain, until further order of the court, from shipping to or receiving at said ranch any garbage or similar material and from feeding it to hogs thereon. This judgment has become final. Ohaver v. Fenech, 206 Cal. 118, 273 P. 555.

In the present action, the court below found, among other things, that in January, 1929, defendants rescinded, canceled, and terminated said lease, and later, on the 3d day of April, 1929, surrendered possession of the premises; that defendants made many improvements and alterations thereon, consisting of new buildings, barns, electric power lines, office building, boar pens, shavings room, sheds, pump building, electric wiring and fixtures, bone platforms, railroad track and cars, brood sow pens, pipes and plumbing fixtures, floors and partitions in the old barns, alterations to existing buildings, and many other improvements and alterations, all of which were made for the purpose of carrying on the business of raising hogs on the leased premises and to advance the purpose for which the land was leased; that all of them could be removed from the premises without injury to the freehold; that all of them were trade fixtures, and, further, that on April 3, 1929, defendants abandoned, vacated, and surrendered said premises by and with the consent of plaintiff.

Appellant relies for reversal upon two propositions: (1) That the lease itself provides that the improvements shall go to the lessor and (2) that the alterations and improvements were not trade fixtures, but were permanent fixtures to the freehold itself.

[1, 2] The lease between the parties was in writing and the foundation therein for appellant's claims will be found in paragraphs 11 and 17 thereof, which read as follows:

"11. It is hereby agreed that, except for changes in the interior of structures now on said premises, any alterations in, or improvements on said premises, made or constructed by said lessees during said term, or extension thereof, shall remain on said premises after the expiration of said term or extension and said lessees shall not be responsible for the removal thereof."

"17. It is further understood and agreed that the premises hereby leased are to be used by the lessees to aid in the performance of a certain contract between them and the City of Sacramento, whereby they contract to gather garbage in said City from the 1st day of July, 1927, to and including the 30th day of June, 1937. It is, therefore, agreed by the lessor that if, for any reason whatsoever, said contract between the lessees and said City of Sacramento be, or shall be, or shall become, unenforceable or void, or if said lessees shall, for a period of fifteen days, in any manner whatsoever, be prevented from gathering the garbage in said contract with the City of Sacramento, referred to, or any portion thereof, or if without any fault upon the part of the lessees, said lessees are prevented by law, or pursuant to law, from using said premises for the purpose of raising hogs thereon, then, at the option of said lessees, this lease shall be deemed canceled and of no further force or effect, and all liability of the lessees hereunder shall cease."

In our judgment the above two questions may be easily disposed of. In the first place it seems too clear for argument that the parties had in mind when contracting the existence of the agreement between the city of Sacramento and the defendants, and, further, that the reasonable interpretation of paragraph 17, in connection with other provisions of the lease, is that if, for any reason, the lessees are prevented by law from "using said premises for the purpose of raising hogs thereon" in the manner contemplated, which is by the use of said garbage for food for said hogs, the lessees shall have the right to terminate the lease, and their liability thereunder shall cease. A reading of the entire paragraph 17 compels this conclusion. For example, note that, if the lessees were prevented from gathering the garbage for fifteen days under said contract, this would work a rescission of the lease, and note the statement that the lease is made in aid of the execution of the contract. These things speak loudly compelling the interpretation that the lease contemplated the use of the garbage in raising hogs on said ranch, and failure, without fault on the part of the lessees, to secure said garbage for that purpose, was sufficient to confer the right of rescission upon them at their option. We therefore hold that, when the defendant notified the plaintiff of their intention to rescind the lease, the necessary result of such action was a rescission and cancellation thereof. This brought into operation the provision, "all liability of the lessees hereunder shall cease."

[3] As for section 11, it is true that it provides that "except for certain changes * * * any alterations in, or improvements on said premises, made or constructed by said lessees during said term, or extension thereof shall remain on said premises after the expiration of said term or extension. * * *" But clearly this provision speaks as of the lawful expiration of the ten-year period or any extension thereof, and it does not speak of the situation which shall obtain in the event of rescission by a failure of consideration or by operation of law of the lease prior to the expiration of the term thereof. Consequently, we hold that this provision is inapplicable to the parties in their present situation. See Pringle v. Wilson, 156 Cal. 313, 104 P. 316, 24 L. R. A. (N. S.) 1090.

[4] The case then reaches this state: Were the improvements so removed by the defendants trade fixtures within the meaning of the law and removable without injury to the freehold? This is largely a question of fact. The court has found affirmatively upon it, and we see no reason which would permit the disturbing of its finding.

It therefore follows that the judgment of the court below must be, and it is hereby, affirmed.

We concur: WASTE, C. J.; CURTIS, J.; LANGDON, J.; SHENK, J.; RICHARDS, J.; SEAWELL, J.

CLARK v. McCLURG.*

Civ. 6405.

District Court of Appeal, Second District,
Division 1, California.
Feb. 3, 1931.

Rehearing Denied Feb. 20, 1931. Hearing Granted by Supreme Court April 2, 1931.

1. Appeal and error 🔑930(4).

Appellate court *held* required to assume jury in awarding exemplary damages found slander was uttered and libel published with malice in fact, in view of instructions.

> The trial court instructed that award of exemplary damages depended directly and solely on presence of malice in fact in the mind of defendant, and that if malice in fact was present, jury might give exemplary damages, and if such malice was absent, jury could not allow exemplary damages.

2. Libel and slander 🔑120(1).

Language being libelous per se and published with malice in fact, exemplary damages could be awarded without awarding actual damages.

3. Libel and slander 🔑120(1).

To sustain verdict for exemplary damages for libel or slander, it is enough that plaintiff is entitled to actual damages, even if not awarded.

4. Libel and slander 🔑93.

Denying nonsuit on ground defamatory communication was privileged *held* not error, where answer contained no such defense (Civ. Code, § 47).

Appeal from Superior Court, Los Angeles County; Walton J. Wood, Judge.

Action by Margaret Clark against Lilian Sanford McClurg. Judgment for plaintiff, and defendant appeals.

Affirmed.

Wolfson & Swarthe and Louis L. Swarthe, all of Los Angeles, for appellant.

Grant B. Cooper and Herman D. Greenschlag, both of Los Angeles, for respondent.

HOUSER, J.

In separate counts of a complaint plaintiff sought damages against defendant on account of alleged libel and slander, respectively. The following verdict was returned by the jury:

"We, the jury in the above-entitled action, find for the plaintiff and assess her damages in the sum of ——— ($———) dollars as actual damages and the sum of five thousand ($5,000) dollars as punitive damages, making a total of five thousand ($5,000) dollars, this 20th day of September, 1928."

From the ensuing judgment defendant has appealed to this court.

[1] The first point presented by appellant as a sufficient reason for reversal of the judgment is that because by its verdict the jury failed to assess any actual damages, the attempted assessment of punitive damages was "against the law; contrary to law and void."

If, on the trial of an action of the character of that here under consideration, the evidence should disclose the undisputed fact that an alleged slander per se was uttered through inadvertence or mistake in the identity of the slandered person to one who neither believed in the truth of the slanderous words nor repeated them to any person other than to the person who was slandered, and then only at the request or solicitation of such person—from which it would seem apparent that no actual damage resulted from the slanderous utterance—it may seem an anomaly in the law that, notwithstanding the fact that the plaintiff would not be entitled to recover a judgment as for actual damages other than for a nominal sum of money, nevertheless a judgment based on a verdict for substantial punitive damages should be sustained. But in the instant case, among other statements of the law which were given by the trial court to the jury for its guidance in determining what damages, if any, should be awarded to the plaintiff in the action, the following appears:

"* * * The award of exemplary damages depends directly and solely upon the presence of malice in fact in the mind of the defendant. If it was present they may be given. If it was absent they cannot be allowed. * * *"

Taking such instruction into consideration, and assuming (as we should) that the jury gave heed to it, the conclusion must follow that because the jury awarded punitive damages to the plaintiff, it must have found that with "malice in fact" the defendant gave utterance to the slander and published the libel against plaintiff.

[2, 3] Although throughout the several jurisdictions of the United States a lack of uniformity prevails in the decisions with reference to the question of whether a judgment founded solely upon an award for punitive damages may be sustained (37 C. J. 127; 33 A. L. R. 384, and authorities there respectively cited), and although some of the adjudications emanating from the appellate tribunals of this state (Lewis v. Hayes, 165 Cal. 527, 132 P. 1022, Ann. Cas. 1914D, 148; Warfield v. Krueger, 96 Cal. App. 671, 274 P. 764; Chavez v. Times-Mirror Co., 72 Cal. App.

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*Hearing granted 9 P.2d 505.

694, 237 P. 1085; Pickwick Stages v. Board of Trustees, 54 Cal. App. 730, 215 P. 558; Wright v. Baldwin, 47 Cal. App. 147, 190 P. 377) present indications of a rule to the contrary, the opinion in the case of Childers v. San Jose Mercury Printing & Pub. Co., 105 Cal. 284, 38 P. 903, 45 Am. St. Rep. 40 contains a direct statement of the law in substance that where, as in the instant case, the alleged libel or slander is libelous per se, an award of exemplary damages is not dependent upon an award of actual damages. The instant case presents a stronger situation, in that the language of which complaint was made was not only libelous per se, but as well, according to the implied finding by the jury, it was uttered and published by defendant with "malice in fact." Since it would appear that in order to sustain a verdict for exemplary damages it is enough that the plaintiff was entitled to actual damages, even if not awarded by the verdict, it follows that the point suggested by appellant is not well taken.

[4] On the trial of the action, after plaintiff had rested her case in chief, defendant presented a motion to the trial court to the effect that an order of nonsuit be entered as against the plaintiff. The ground of the motion was that as to each count contained in the complaint the communication or publication respectively alleged to have been uttered or published by defendant was privileged within the provisions of section 47 of the Civil Code. The motion was denied, and appellant herein presents for consideration of this court the question of whether, in making such ruling, prejudicial error was committed by the trial court.

As to the first count in the complaint, since the answer thereto contained no defense that the communication of which complaint was made was privileged, it is plain that no error occurred in the order to which attention has been directed. Besides which condition the circumstances shown by the evidence were such that no privilege could attach to the situation in question. Relating to the second count, and as to which the defense of privilege was presented in the answer, on examination of the record herein it is equally clear that the contention of appellant cannot prevail. Assuming that the alleged libel was of such a character that, within the terms of the statute, its publication was privileged, nevertheless, because of the facts and circumstances surrounding its publication, the evidence was sufficient to justify the submission to the jury of the question of whether the privilege accorded to defendant was deemed to have been lost by reason of the fact that the libel was published by defendant maliciously and without reasonable or probable cause for believing that such publication constituted a true statement of facts.

Regarding the further contention by appellant that the verdict was for an excessive amount, and consequently must have been rendered under the influence of passion and prejudice, it need only be said that, considering the evidence relating to each of the two counts in the action, together with that part of the evidence which disclosed the social and financial standing of each of the parties to the litigation, it cannot be said that "the amount awarded is so grossly excessive as to shock the moral sense, and raise a reasonable presumption that the jury was under the influence of passion or prejudice." Wilson v. Fitch, 41 Cal. 363, 386.

The judgment is affirmed. The appeal from the order denying defendant's motion for new trial is dismissed.

We concur: CONREY, P. J.; YORK, J.

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111 Cal. App. 632

PEOPLE v. MOORE.

Cr. 2035.

District Court of Appeal, Second District,
Division 1, California.

Feb. 9, 1931.

Criminal law ⚷1171(1).

Prosecutor's attempt in cross-examining defendant to ascertain whether defendant would permit prosecution to call defendant's husband as witness *held* not prejudicial (Pen. Code, § 1322).

> On cross-examination of defendant, district attorney asked her whether she would waive privilege of forbidding husband to testify in case, and defendant's counsel's objection was overruled, whereupon district attorney again asked witness to tell jury and court whether she would object to husband testifying, and she replied, "I will do as my attorney says." On rebuttal district attorney called defendant's husband as witness, and objection to his testimony was sustained, and court instructed jury that such witness was not a competent witness.

Appeal from Superior Court, Los Angeles County; B. Rey Schauer, Judge.

Madeline H. Moore was convicted of an offense, and she appeals.

Affirmed.

Moses C. Davis, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for the People.

CONREY, P. J.

As presented to the court by appellant, the appeal herein is based solely upon the contention that the district attorney, in the trial of the case, was guilty of misconduct prejudicial to the defendant. The conduct of which appellant complains had relation to an attempt made by the district attorney to ascertain whether or not the defendant would permit the prosecution to call the defendant's husband and obtain his testimony as a witness for the people. "Neither husband nor wife is a competent witness for or against the other in a criminal action or proceeding to which one or both are parties, except with the consent of both. * * *" Pen. Code, § 1322.

The victim of the alleged assault was one Dr. Cooley. The defendant, having become a witness in her own behalf, admitted that both she and her husband were present at the time and place when the shots were fired by which Dr. Cooley was wounded, but denied that the shooting was done by her. On cross-examination the district attorney asked her whether she would waive the privilege of forbidding her husband to testify in this case, and permit him to testify as a witness if called as a witness for the people. Counsel for defendant objected to the question, but that objection was overruled, whereupon the question was repeated in these terms: "Go ahead, Mrs. Moore, and tell the jury and the court whether or not you object to your husband testifying in this case as a witness for the People?" Her answer was: "I will do as my attorney says."

On rebuttal, after the defense had closed, the district attorney called defendant's husband as a witness and asked him if he was willing to testify as a witness for the people if his wife would give her consent for him so to testify. The witness replied in the affirmative. Thereupon counsel for the defendant objected to testimony from this witness, and declined to waive the statutory privilege. Thereupon the court instructed the jury that said witness was not a competent witness and instructed the jury to disregard "the entire testimony of this witness, even his being sworn as a witness." An assignment of misconduct was then made, upon the ground that the district attorney in bringing this witness before the court in the manner described had done this for the purpose of prejudicing the minds of the jury.

We are of the opinion that it was unfair to the defendant for the district attorney, as a part of the cross-examination of the defendant, to interject the questions to which we have referred and call upon the witness to "tell the jury and the court" whether she would object if her husband was called as a witness. An answer to such inquiry could easily have been obtained from the defendant or her attorney, in a far less conspicuous manner. The defendant should not have been required to "tell the jury" about her objection to the examination of her husband as a witness against her. But there is nothing in the statutes which requires that such inquiries, preliminary to the calling of a witness, shall be secret or not in the presence of the jury. The ordinary method would be to offer the husband as a witness by requesting that he be sworn and by asking questions. If no objection was made on the part of the defendant, she would have been presumed to have consented. People v. Singh, 182 Cal. 457, 483, 188 P. 987. But if she did object, the fact of her unwillingness would be manifest to the jury, with whatever incidental effect her refusal to give consent might have upon them. Giving to the matters complained of the most liberal interpretation in favor of the defendant, they fall short of constituting that serious and prejudicial misconduct which in this case will justify a reversal of the judgment.

The judgment is affirmed. The order denying motion for a new trial is affirmed.

We concur: HOUSER, J.; YORK, J.

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111 Cal. App. 649

CAMPBELL v. JULIAN MERGER MINES et al.

Civ. 6467.

District Court of Appeal, Second District, Division 2, California.

Feb. 10, 1931.

Rehearing Denied March 11, 1931. Hearing Denied by Supreme Court April 6, 1931.

Licenses ⚿39.

Buyer could not recover amount paid for corporate stock, where he was equally guilty of wrongdoing with seller in violating laws.

> Evidence disclosed seller had promised buyer commission on stock in question, and that buyer knew seller had no authority from corporation commissioner to sell the stock, and that buyer was equally culpable with seller in purchasing stock in violation of Corporation Securities Act.

Appeal from Superior Court, Los Angeles County; Percy Hight, Judge.

⚿For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Action by John Lawrence Campbell against Julian Merger Mines and another. From a judgment for defendants, plaintiff appeals.

Affirmed.

Roger Marchetti and Frank H. Snyder, both of Los Angeles, for appellant.

David H. Cannon, of Los Angeles, for respondents.

IRA F. THOMPSON, J.

This action was brought in the form of the common count for money had and received to recover from the defendants $5,000 paid by plaintiff for 5,000 shares of the capital stock of the corporate defendant Julian Merger Mines. Judgment was rendered in favor of the defendants, and the plaintiff appeals.

It is not necessary to recite the evidence in detail. There is some evidence to the effect that the defendant C. C. Julian told plaintiff that while he did not have a permit from the corporation commissioner to sell the stock, he had a federal permit; that is, that the company was "incorporated under the laws of the District of Columbia, or something to that effect." The plaintiff also testified that the defendant C. C. Julian promised him a commission on the stock he might sell, but that although this stock was really purchased for his friend Samuel Kleinman he received no commission thereon. The stock was issued in plaintiff's name. His counsel during the cross-examination interposed and said: "I offered to stipulate that at the time of the 5000 stock transaction in evidence that this plaintiff knew that the Julian Merger Mines had no authority from the corporation commissioner to sell the stock and that in this transaction he was equally culpable with the Julian Merger Mines in purchasing the stock contrary to the Corporation Securities Act." Defense counsel replied: "I will accept the stipulation and stop my examination right now."

The stipulation carries us further than the fact that plaintiff knew that the defendant corporation had no permit. It connects up with the testimony concerning commissions and unequivocally says that the plaintiff is equally guilty of wrongdoing with the defendant. We need not consider in the present action what would have been the outcome had his participation been limited to a purchase with knowledge only of the nonexistence of the permit. Under the circumstances here, he was not entitled to recover, and the case of Domenigoni v. Imperial Live Stock, etc., Co., 189 Cal. 467, 209 P. 36, 39, is squarely in point. It is there said: "The entire transaction was an attempt to circumvent the law. The notes and agreements were each of them made in violation thereof, and are therefore against the policy of the law, as he claims, and void. * * * In such a case the court will give no relief even if the point is not raised by either party."

Judgment affirmed.

We concur: WORKS, P. J.; CRAIG, J.

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111 Cal. App. 537

O'BANION v. CALIFORNIA CANNING PEACH GROWERS et al.

Civ. 4348.

District Court of Appeal, Third District, California.

Feb. 3, 1931.

Appeal and error ⚷634.

Where mere inspection of record showed appellant was entitled to no relief, motion to dismiss appeal was not proper remedy, but order appealed from should be affirmed (Code Civ. Proc. §§ 953a, 954; Rules of Supreme and District Courts of Appeal 1, § 1, rules V and VI).

Appeal from Superior Court, Sutter County; H. D. Gregory, Judge.

Action by Ernest F. O'Banion against California Canning Peach Growers and others. From the judgment, plaintiff appeals.

Affirmed.

Loyd E. Hewitt, of Yuba City, for appellant.

Bradford Webster, of Oakland, for respondents.

Mr. Justice pro tem. McDANIEL delivered the opinion of the court.

The respondent moved to dismiss this appeal upon the following grounds, to wit: (1) No transcript on appeal nor points and authorities in support of the appeal have been filed herein. (2) Proceedings initiated by appellant under section 953a, Code of Civil Procedure, were terminated adversely to appellant in the trial court on motion of respondent.

An appeal was taken from the trial court's order and judgment terminating proceedings. That judgment was affirmed in this court November 1, 1930. A rehearing therein having been denied, the judgment has now become final. O'Banion v. Cal. Canning Peach Growers, etc., 292 P. 975.

A mere inspection of the record herein will show that the appellant did not perfect his appeal and is entitled to no relief upon that

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

appeal. Rules of the Supreme and District Courts of Appeal 1, § 1, rules V and VI; sections 953a and 954, Code Civ. Proc. In cases where a mere inspection of the record shows that appellant is entitled to no relief, it has been held that a motion to dismiss an appeal is not the proper remedy, but a motion to affirm the order appealed from should be granted.

In Hibernia Sav. & Loan Soc. v. Doran, 161 Cal. 118, 118 P. 526, in which case a mere inspection of the record disclosed that appellant was entitled to no relief, it was held that, as a matter of convenience, the court could entertain a motion to dismiss, saying in the concluding part of the opinion: "Ordinarily it can matter little whether the form of the order made in the premises be one of dismissal, or one of affirmance for lack of proper record. In the present case, however, jurisdiction over the appeal having been vested under the new system by the notice given by appellant to the clerk, the proper order would be one of affirmance of the order upon appeal for lack of record showing error." See, also, Barnabee v. Hunstock, 42 Cal. App. 659, 183 P. 951; Knox v. Schrag, 18 Cal. App. 220, 122 P. 969.

It therefore is ordered that the judgment of the lower court herein be, and the same is hereby, affirmed. Remittitur forthwith.

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111 Cal. App. 614

PEOPLE v. QUINN (two cases).

Cr. 2018, 2019.

District Court of Appeal, Second District, Division 1, California.

Feb. 7, 1931.

1. Witnesses ⚷344(2).

Evidence of particular wrongful act is inadmissible to impeach witness, except evidence that witness had been convicted of felony (Code Civ. Proc. § 2051).

2. Witnesses ⚷345(1).

Requiring defendant's witness to testify that he was in jail on charge of robbery *held* error (Code Civ. Proc. § 2051).

3. Criminal law ⚷450.

Where defendant's alibi was that he was in jail at time of robbery, jailer's testimony that defendant could have escaped, committed robbery, and returned without being caught, *held* improperly admitted.

4. Criminal law ⚷696(9).

Court's refusal to admonish jury that evidence stricken should not be considered *held* error.

5. Criminal law ⚷369(1).

Admitting evidence that after robbery for which defendants were being prosecuted was committed defendants were arrested for carrying concealed weapons, and thereafter booked on suspicion of robbery, *held* error.

6. Criminal law ⚷369(1).

Evidence that, when defendants were arrested for carrying concealed weapon, gun was found in automobile which defendants were operating, *held* inadmissible in robbery prosecution.

7. Criminal law ⚷572.

If defendant introduces sufficient alibi evidence to raise reasonable doubt as to his guilt, he is entitled to acquittal.

8. Criminal law ⚷814(19).

Instruction that, if either defendant committed robbery or if either aided commission, jury should find both guilty, *held* error, where each was separately charged.

Appeal from Superior Court, Los Angeles County; C. P. Vicini, Judge.

Roy Vernon Quinn and Charles Lee Quinn, in separate prosecutions tried simultaneously, were convicted of robbery with prior conviction of a felony, and each appeals.

Reversed in each case.

Charles J. Orbison and Don S. Irwin, both of Los Angeles, for appellants.

U. S. Webb, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for the People.

HOUSER, J.

By a separate information, each of the defendants was charged with the crime of robbery; also, with a prior conviction of a felony. By stipulation of the several interested parties, the two actions were tried simultaneously. From a judgment of conviction, as well as from an order by which his motion for a new trial was denied, each of the defendants has appealed to this court.

The details of the story of the commission of the offense for which the defendants were placed on trial do not materially differ from those attending any other robbery of recent years in this vicinity. It is only in the remarkable facts which were presented to the jury in the defense of the defendants that one may realize the possibility, if not the probability, that an injustice to the defendants may have resulted from the judgment of the court.

A restaurant in the eastern portion of the city of Pasadena was the scene of the robbery. At the trial of the action the proprietor of the restaurant, his wife, and each of two patrons of the establishment identified each of the defendants as one of the persons who committed the robbery. However, such identification of defendant Charles Lee Quinn was somewhat weakened, particularly by the fact that at least as to two of such witnesses, on an occasion following the date of the robbery, when afforded a most favorable opportunity to identify said defendant, they failed to recognize him or to associate him with the commission of the offense. A part of the evidence introduced by defendants consisted of an unquestioned showing that on the date when the crime was committed, and covering a period of many days both preceding such date as well as subsequent thereto, defendant Roy Vernon Quinn was serving a sentence, and during all such time was supposedly incarcerated, in a jail in the city of Los Angeles. However, it appeared in evidence that the so-called "honor jail" in which Roy Vernon Quinn presumably was confined at the time when the robbery occurred consisted of a large room on the ground floor of a one-story building having ordinary windows which had no iron bars to prevent the escape of defendant therefrom, but that, as a sort of "precaution," defendant, together with several other prisoners who occupied the same "honor jail," were guarded night and day by two officers who at intervals, and especially at 10:30 o'clock p. m. and 7 o'clock a. m. of each day, "checked" the defendant as being present in the jail—from which it would follow that the only apparent possibility that defendant Roy Vernon Quinn personally participated in the commission of the offense for which he was on trial was that at some time between the hours of 10:30 o'clock p. m. and 7 o'clock a. m. of the following day he escaped from the "honor jail" in which he was confined in the city of Los Angeles, made the necessary preparation to commit the crime, went to the restaurant in the eastern part of the city of Pasadena where the crime was committed at about 1:30 o'clock a. m., returned to, "broke into," the "honor jail" from which previously he had escaped and resumed his character as an inmate thereof, all without the knowledge, acquiescence, or consent of either of the two guards who presumably were watching the window and the door exits of the jail for the purpose of detecting and frustrating any escape therefrom which might be attempted by any person incarcerated therein, if not of preventing any unlawful or clandestine entrance thereof.

In the defense of Charles Lee Quinn, testimony was given by several witnesses which tended to establish for him an "alibi," in that, if such witnesses spoke the truth, the impossibility of his guilt was satisfactorily established.

But especially in view of the verdict returned by the jury, which presumably was concurred in by the judge of the trial court, in addition to such a unique situation was the added testimony of a man named Abbott, who at the time of the trial in question was being held in custody in the Los Angeles county jail awaiting his own trial on a charge of robbery, to the effect that he and an unnamed companion together committed the robbery for which defendants Roy Vernon Quinn and Charles Lee Quinn were then on trial, and that neither of such defendants participated in any way in its commission. Such an extraordinary situation as regards the evidence in a criminal action should demand a corresponding attention by a reviewing court to the reasons assigned by the appellants for a reversal of the judgment against them.

[1, 2] Over the objection of counsel for defendants, the prosecution was permitted to ask the witness Abbott the following question: "What charge are you in jail now on?" to which the witness answered, "Robbery."

Although, in itself, the fact that the witness voluntarily testified that it was he, together with an unnamed companion, who committed the robbery for which defendants were then on trial, might place him in such an unenviable light that his credibility as a witness might have been seriously questioned, nevertheless, the defendants in the instant action were entitled to the benefit of the rule which for the purpose of impeachment forbids "evidence of particular wrongful acts, except * * * that he had been convicted of a felony." Section 2051, Code Civ. Proc.; People v. Hamblin, 68 Cal. 101, 8 P. 687; People v. Un Dong, 106 Cal. 83, 39 P. 12; People v. Warren, 134 Cal. 202, 66 P. 212; People v. White, 142 Cal. 292, 75 P. 828. Had the jury not been placed in possession of evidence of the fact that at the time when the witness gave his testimony he was then an inmate of the county jail awaiting his trial on a charge of robbery, it is possible that the jury might have had a reasonable doubt as to the guilt of the defendants in the instant action, which necessarily would have resulted in their acquittal.

[3, 4] In describing the jail in which defendant Roy Vernon Quinn supposedly was confined at the time when the robbery in question was committed, the head jailer at the prison made the following statement: "This jail is a big open jail, three big rooms, they are all larger than this, about twice the size of the court room, there is windows all around this place, and there are two men that watches these men nights and days, they are checked in and out, but as far as knowing whether they are really there all the time or not, one can get away from us very easy."

A motion made by defendants to strike the "conclusion" of the witness was denied. Identical action was taken by the trial court as to a subsequent statement made by the witness that it was "possible for a man to get out of there in the middle of the night and come back in the morning and not be missed." However, other statements made by the witness, to wit, that "I have had men get away from there and come back," and that "it is possible. I have caught them doing it," by order of the court were stricken from the record.

From a consideration of the foregoing, it is plain that the answers of the witness, to which objections made by counsel for defendants were overruled, not only were conclusions of the witness, but as well that the further conclusions of the witness to which attention had been directed, and which were ordered stricken from the record, but had the effect of accentuating the other conclusions which were left undisturbed for the consideration of the jury. It is further manifest that, because of the asserted reason that one of the statements had been "stricken out," the conduct of the trial court in refusing to admonish the jury that "that evidence shall not be considered," added to the prejudice of the defendants. No argument should be necessary to establish the point that, after the conditions surrounding the incarceration of defendant Roy Vernon Quinn had been fully described by the witness, the ultimate question of whether sufficient evidence had been presented to create in the "mind" of the jury a reasonable doubt of whether said defendant was in jail at the very time that the crime was committed was one solely for determination by the jury, unaided by any suggestion by the witness that, because others had been able to do so, it was possible that the defendant Roy Vernon Quinn might have escaped the jail, committed the robbery, and thereafter returned to the jail, without the knowledge of any one charged with the duty of keeping him continuously in prison during the time of his sentence thereto.

[5, 6] Over the strenuous objection of counsel for defendants, the prosecution was permitted to introduce evidence to the effect that, several weeks after the crime for which defendants were on trial was committed, the defendants were originally arrested on a charge of carrying concealed weapons and thereafter "booked on a suspicion of robbery." Also, that when so arrested the defendants were in possession of an automobile in which a "gun" was found. No connection was shown between either or any of such facts and the crime for which defendants were on trial, or with any fact relevant thereto. Following their discharge from custody on the charge of carrying concealed weapons, which was preferred against them at that time, defendants were rearrested and were then charged with the commission of the robbery of which they were convicted in the instant case. That the evidence to which objection was made was inadmissible is ruled in each of the authorities to which attention hereinbefore has been directed. In addition thereto, especially as to the inadmissibility of evidence that at the time defendants were arrested on a charge of carrying concealed weapons a "gun" was found in an automobile which defendants were operating, see People v. Milburn, 89 Cal. App. 526, 265 P. 285.

[7] Further complaint is made by appellants that the trial court committed prejudicial error as against defendants by modifying a certain instruction offered by them and thereafter giving to the jury the instruction as thus modified. The instruction in question dealt with the so-called "defense" of an alibi.

With the exception that, as requested by defendants, no words of the instruction were italicized, it was as follows: "The court instructs the jury that if you do not believe from the evidence that the defendants were present at the time and place when and where the offense, if any, was committed, but that they were at some other and different place or places, *or if you have a reasonable doubt as to whether this is the case*, then you will find them not guilty. *The defendants are presumed to be innocent until their guilt is established by legal evidence beyond a reasonable doubt, and if you have a reasonable doubt of their guilt you will acquit them.*"

All the words italicized in the foregoing instruction were stricken by the trial court, and, as thus modified, the instruction was given to the jury. In effect, the essential difference between the first part of the instruction requested by defendants and that given by the trial court was that, had the former instruction been given, in substance the jury would have been told that, if from the evidence the jury had a reasonable doubt as to whether at the time the robbery was committed defendants "were at some other and different place or places" than that at which the crime actually occurred, they were entitled to an acquittal; whereas by the instruction as modified and thus given to the jury it was informed that, "if you do not believe from the evidence that the defendants were present at the time and place when and where the offense, if any, was committed, but that they were at some other and different place or places, then you will find them not guilty."

It thus will be seen that the element of "reasonable doubt" as to the whereabouts of defendants at the time the crime was committed was omitted from the instruction given to the jury. The authorities of this state are unanimous in the declaration of the law that as to the "defense" of alibi, if the defendant introduces sufficient evidence to raise a reasonable doubt as to his guilt, he is entitled to an acquittal. People v. Winters, 125 Cal. 325, 57 P. 1067; People v. Roberts, 122 Cal. 377, 55 P. 137; People v. Garrett, 93 Cal. App. 77, 268 P. 1071; People v. Mar Gin Suie, 11 Cal. App. 42, 57, 103 P. 951.

[8] It is further contended by appellants that prejudicial error was committed by the trial court in giving to the jury, at the request of the people, the following instruction: "The Court instructs the jury that if you believe from the evidence beyond a reasonable doubt, that the defendants or either of them feloniously took from the person or the immediate presence of *Robert Mullins*, the property, or any part thereof, as charged in the Information, by means of *force used upon Robert Mullins*, as charged in the Information, or aided, abetted and assisted any other person or persons to so feloniously take from the person or the immediate presence of the said *Robert Mullins*, the property or any part thereof as charged in the Information, by means of force or fear and against the will and consent of the said *Robert Mullins* as charged in the Information then you should find the defendants guilty."

On reading the foregoing instruction, at once it will be noted that its gist consists in a statement that, if *either* of the defendants committed the robbery in question, or if *either* of them aided or abetted any other person in its commission, then the jury should find *both* of the defendants guilty. It should be remembered that the defendants were not charged jointly, but that each of them was separately charged with the commission of the offense, and that the "defense" of "alibi" of one defendant rested upon an entirely different state of facts and circumstances from that presented by his codefendant. It was altogether possible that one of them was guilty of the offense of which he was charged and at the same time that his codefendant was wholly innocent. But in the instruction of the trial court, if "*either* of them feloniously took from the person or the immediate presence" of the victim of the robbery the property, or any part thereof, as charged in the information, or "aided, abetted and assisted" any other person in the commission of the offense, it would become the duty of the jury to "find the *defendants* guilty." The prejudicial effect of such an instruction is most obvious.

It becomes unnecessary to consider either of several other alleged errors which defendants assert were committed on the trial of the action.

The judgment, and the order denying the motion of each of the defendants for a new trial, are reversed.

We concur: CONREY, P. J.; YORK, J.

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111 Cal. App. 605

PEOPLE v. BARNES.

Cr. 1609.

District Court of Appeal, First District,
Division 2, California.
Feb. 6, 1931.

Rehearing Denied Feb. 21, 1931.

1. Witnesses 🔑267.

Warning by trial judge to defendant's counsel that he should curtail cross-examination *held* not erroneous.

2. Criminal law 🔑1166½(12).

Any error of trial judge in warning counsel to curtail cross-examination was cured by immediately admonishing jury to disregard remarks.

3. Witnesses 🔑267.

Warning of trial judge to defendant's counsel that he should curtail cross-examination was not erroneous limitation.

Defendant's counsel was merely admonished that it was duty of court to expedite business and to prevent cross-examination upon immaterial and irrelevant matters and to prevent repetition of questions already asked, and was then directed to proceed with cross-examination with that warning, while record disclosed that cross-examination was continued thereafter at considerable length.

4. Criminal law 🔑656(9).

Warning of trial court to defendant's counsel to curtail cross-examination on immaterial and irrelevant matters was not erroneous as expressing opinion on weight of testimony.

5. Criminal law 🔑483.

Expert witness was not required to make scientific investigation of documents presented to him in order that he might form and give expert opinion (Code Civ. Proc. §§ 1881, 2065).

6. Criminal law 🔑483.

Refusal to compel expert witness to answer inquiry requiring examination of instruments to determine handwriting *held* not erroneous (Code Civ. Proc. §§ 1881, 2065).

7. Criminal law 🔑808½.

Instruction on presumption of innocence and reasonable doubt in language of statute was sufficient (Pen. Code, §§ 1096, 1096a).

8. Criminal law 🔑761(2).

Proposed instruction, in forgery prosecution, respecting defendant himself being victimized, requiring assumption that defendant had testified falsely, *held* properly refused.

Jury had been instructed that it was not sufficient to find that defendant had attempted to pass a fictitious or forged instrument, but it must find that he either forged instrument or had knowledge of its condition at time it was passed, so that as much of proposed instruction as was material was given, and in so far as it related to defendant himself being victimized, it was based on assumption that defendant had testified falsely in respect thereto and would have been prejudicial to him.

9. Criminal law ⚷829(1).

Refusal of proposed instruction, subject-matter of which was fully covered by other instructions given, *held* not error.

10. Criminal law ⚷372(1).

Evidence of other crimes tending to show that crime for which defendant is being tried is part of general plan or system of criminal acts is admissible.

Appeal from Superior Court, City and County of San Francisco; J. J. Trabucco, Judge.

Joseph Barnes was convicted of forgery, and he appeals.

Affirmed.

William B. Hornblower and Fabian D Brown, both of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Ralph O. Marron, Deputy Atty. Gen., for the People.

NOURSE, P. J.

Defendant was tried upon an information charging the crime of forgery. The jury returned a verdict of guilty, and from the judgment upon the verdict and from the order denying his motion for a new trial the defendant has appealed upon a typewritten record.

The facts of the case upon which the jury's verdict of guilt was based are that the defendant on February 17, 1930, opened an account with the Bank of America at 631 Market street in San Francisco under the name of Joseph Barnes, and gave as his address the Dale hotel in San Francisco. The proprietor of that hotel identified the defendant as the same man who came to his hotel on February 17 and gave his name as Joseph Barnes and asked that his mail be held for him. On the following day the defendant opened an account with the Farmers' & Merchants' Bank at Oakland under the name of Henry Gail and gave as his address 412 Tenth street, Oakland. The proprietress of a rooming house at that address identified the defendant, Joseph Barnes, as the person who came to her house on that date, gave his name as Henry Gail, and requested her to hold mail coming to that address under the name of Henry Gail.

Immediately following the opening of these two accounts, the defendant deposited cashier's checks in the Bank of America to the credit of Joseph Barnes and in the Oakland bank to the credit of Henry Gail, and on April 22, 1930, a check in the sum of $8,600 bearing the name of George K. Jensen was deposited in the Bank of America to the account of Joseph Barnes and bore his indorsement. Upon the bank's discovery that the name of Jensen was a forgery, the defendant was arrested and executed a large number of exemplars of his handwriting in the presence of the police officers. A handwriting expert called on behalf of the people testified that the indorsement on the $8,600 check, the signature which the defendant made on the register of the rooming house at 412 Tenth street, and other documents introduced in evidence, were in the handwriting of the defendant. The witness Chauncey McGovern was called as a handwriting expert by the defendant and testified that he had made a thorough examination of all these documents and had at first reported that they were all in the handwriting of the defendant, but upon further examination he had come to the conclusion that the indorsement upon the check in suit and some of the other documents offered were not in the defendant's handwriting. Aside from these conflicting opinions of the handwriting experts, the evidence of defendant's guilt is clear and convincing and the point is not made on this appeal and it could not well be made in view of the record that the evidence is insufficient to sustain the verdict.

[1, 2] The first attack upon the judgment is the criticism of the trial court in limiting defendant's cross-examination of the handwriting expert called by the state. The state had put in evidence thirty-five exhibits upon which this witness had given his opinion. The defendant proceeded to cross-examine this witness at great length upon each one of the exhibits and was finally warned by the trial judge that he should curtail his cross-examination. The defendant now objects, first, to the language used by the trial court in giving this admonition, and, second, to what he asserts to have been a denial of his right to continue the cross-examination. The language of the court was merely an expression of the legal rule found in People v. Rader, 136 Cal. 253, 68 P. 707, where it is said that it is the right and duty of the trial court to expedite business by curtailing cross-examination upon immaterial and irrelevant mat-

ters. It seems to be mere sophistry to say that a court is in error in stating a well-settled rule of law before the jury, particularly in view of the presumption that the jurors are presumed to know the law, but if any error was made in this respect it was immediately cured by the action of the trial judge in admonishing the jury to disregard his remarks.

[3] The second point is based upon a misconception of the action of the trial judge. Defendant's counsel was merely admonished that it was the duty of the court to expedite business and to prevent cross-examination upon immaterial and irrelevant matters and to prevent repetition of questions already asked. He was then directed to proceed with his cross-examination with that warning. There is nothing in this language which justifies the assumption that the defendant was then directed to cease the cross-examination, and the record discloses that the cross-examination was continued at considerable length thereafter.

[4] Two other points are now raised in this same connection, both of which are based upon misconceptions of the action of the trial court. It is argued that in the court's statement that it was its right and duty to expedite business and to curtail cross-examination upon immaterial and irrelevant matters, it thereby expressed an opinion upon the weight of the testimony brought out in the cross-examination, and it is also argued that in this connection the trial judge was instructing the jury upon matters of fact. As we have heretofore said, the trial judge was merely expressing, in a general way, a fixed rule of law as to his duty and was not in any sense commenting upon or expressing any opinion as to the weight of the testimony before him.

[5] It is argued that the trial court erred in not ordering the witness McGovern to answer an inquiry as a handwriting expert on behalf of the defendant. The defendant insists that this witness did not come within the class of the privileged as specified in section 1881, Code of Civil Procedure, and that having been duly subpœnaed and in court, he was bound to answer questions propounded to him, this duty being imposed upon the witness by section 2065, Code of Civil Procedure. With this we agree, but the rule does not apply when the defendant has demanded that the witness perform a duty which the statute has not imposed upon him—that he go to the trouble of making a scientific investigation of the documents which were presented to him in order that he might form and give an expert opinion as to the author of the respective writings. This is a duty which a party cannot impose upon an unwilling witness. The rule in this state is found in People v. Conte, 17 Cal. App. 771, 122 P. 450, 455, 457, where the court held that the doctor having been sworn as a witness could have been required to answer such pertinent questions as might have been put to him notwithstanding that they might call for expert testimony, but that, "We know of no rule of law which would have authorized the court to compel him to go to the trouble and perhaps some expense of scientifically investigating the cause of the marks on the rock for the purpose of qualifying himself to give expert testimony on that subject." Thus, where a doctor has made a medical examination of a party and has formed an opinion as to the physical injuries suffered, he may be required to testify as to the opinion which he has formed, based upon the facts disclosed by such examination (Berge v. Superior Court, 154 Wash. 144, 281 P. 335), and this duty is imposed upon the witness notwithstanding that the party calling him has not compensated him for his examination as an expert or other than by the ordinary witness fees received for attendance upon the court (McClenahan v. Keyes, 188 Cal. 574, 206 P. 454).

[6] In presenting the point on this appeal the appellant assumes that the witness had made the necessary examination of the various writings and had then formed an opinion as to their authorship. The state assumes that the witness had not made such an examination and that the questions propounded to him by appellant's counsel required him to make such an examination before he would be able to give an intelligent answer. To understand the situation it is necessary to review the circumstances leading up to the ruling of the court complained of. Soon after appellant was arrested, he made a number of exemplars in the presence of police officers, and these, with checks, cashier's checks, hotel registers, and other documents were delivered to McGovern for the purpose of examination. All these were photographed and enlargements made from the negatives, and after an examination McGovern reported to the police authorities that they had all been written by the appellant. He was called as a witness for the defense and testified very positively that upon a second examination of these documents he was satisfied that the appellant had not written any of the so-called forgeries, that is to say, none of the checks which were in evidence, but that he did believe that the appellant had written a slip at the Oakland bank receipting for a certified check. The witness was then withdrawn and the appellant placed on the stand a witness who identified a letter purporting to have been written in Los Angeles by one James A. Lewis, without date, regarding a sale of an automobile. The same witness on cross-examination told a peculiar story of her travels with Mr. Lewis, finally

leaving him in Chicago. The defendant went on the stand, gave somewhat of a similar story about his travels with Lewis and their registering in hotels in Los Angeles and San Francisco, none of which he could remember, and that he last heard of Lewis a few days before his arrest. McGovern was recalled to the stand and asked to look at the letter offered as Defendant's Exhibit No. 3 for identification, and was then asked if there was any similarity between the handwriting of that letter and that of the man who wrote the forged checks. To this question objection was made and sustained. The question was then reframed and limited to a comparison of Defendant's Exhibits Nos. 4 and 5, these exhibits being photographic enlargements of the $8,600 check and of a check drawn upon the Oakland bank in the name of Henry Gail. The witness testified that he had seen and compared both. He was then asked if, after comparing these exhibits, he found any similarity to the handwriting on the letter with Defendant's Exhibits Nos. 4 and 5. He refused to express an opinion, claiming ethical grounds, and the record then contains a running discussion in which the attorneys for both sides and the witness took part and during which counsel for appellant asked the witness whether he had "formed an opinion" to which the witness answered that he had. If this inquiry, which as we have said was a part of a running discussion in open court, had been framed with the particularity that such question should have been framed, we would conclude that the witness came within the rule of the cases above cited, and should have been required to answer the question. However, it does not appear that the question to which this answer was given related to all the exhibits and the letter or whether it related merely to Defendant's Exhibits Nos. 4 and 5. It appears that the witness had not seen the letter prior to his appearance on the stand and that he had not, therefore, given it any examination, or at least the examination which he had given to all the thirty-seven exhibits which were under discussion. Naturally, if he were an expert in handwriting and found it necessary to make two minute examinations of these other exhibits from photographic enlargements in order to determine their similarity he had not qualified himself to give an expert opinion as to the letter, and the trial court was, therefore, not in error in refusing to compel him to express his opinion on that subject. The unsatisfactory condition of the record is illustrated by the motion made by defendant to correct the record, a motion which was made and denied at the time of the motion for a new trial. At that time appellant asked to correct the record so that it might show that the question propounded to witness McGovern was for the purpose of proving by that witness that the exemplar, Defendant's Exhibit No. 3 for identification, was written by the same person and is in the same handwriting as the alleged forged instrument and the other people's exhibits, except No. 3. The motion was denied, and we are bound, therefore, by the record which fails to disclose whether the witness had made an examination of the letter and had formed an opinion as to the similarity of the handwriting of the letter to that of Defendant's Exhibits Nos. 4 and 5.

We are, however, forced to the conclusion that if the court erred in refusing to compel the witness to answer, it was not prejudicial error because the answer most favorable to the appellant would have been that these two exhibits and the letter were all written by the mysterious Mr. Lewis. However, the witness, having previously testified that those two exhibits had not been written by the defendant, it could have served the defendant no purpose to have this witness testify that in his opinion they were written by Lewis, particularly when all the testimony relating to this man tended unmistakably to show that he was a mere creature of the imagination. On the other hand, if the answer of this witness had been that in his opinion the two exhibits had not been written by Lewis, it would not have aided the defendant's case in any respect.

To restate the matter the prosecution had offered testimony tending to prove that the forged check and the other thirty-four people's exhibits had been written by the defendant. The witness McGovern had testified that the check and some of these exhibits (those corresponding to Defendant's Exhibits Nos. 4 and 5) had not been written by the defendant. There was, therefore, a conflict between these two witnesses on that point. It would not have aided the defendant in any respect if the witness McGovern had expressed the opinion that these Exhibits Nos. 4 and 5 had been written by Lewis or by John Doe. Such testimony would merely have been cumulative of that which he had already given. In presenting the point the appellant merely argues that the trial court was in error in refusing to compel the witness to testify. He has not pointed out how the assigned error could have prejudiced his case in any manner.

[7] The appellant complains of the refusal to give his proposed instruction on the presumption of innocence and reasonable doubt. The jury was instructed in the language of section 1096, Penal Code, and this was sufficient. Section 1096a, Pen. Code.

[8, 9] He also complains of the refusal to give a proposed instruction reading: "If you believe from the evidence that the defendant himself was victimized and believed the instrument to be genuine, etc." The jury had been instructed that it was not sufficient to

find that the defendant had attempted to pass a fictitious or forged instrument but it must find that he either forged the instrument or had knowledge of its condition at the time it was passed. Thus, so much of the proposed instruction as was material was given. In so far as the proposed instruction related to the defendant himself being victimized and believing the instrument to be genuine there is no evidence upon which this could be based, the defendant himself having testified that he had never seen the forged instrument. Thus his proposed instruction was based upon the assumption that he himself had testified falsely and would have been prejudicial to him. As to the three other proposed instructions, refusal to give which is assigned as error, in so far as they related to matters material to the issues the subject-matter was fully covered by other instructions given.

[10] Finally, it is argued that the court erred in permitting the introduction of evidence as to a transaction not charged in the information. The assignment is based upon the evidence of the Oakland transaction in which the operations of the defendant were conducted in the name of Henry Gail. This evidence was all admissible under the rule which permits the introduction of evidence of other crimes when such evidence tends to show that the crime for which a defendant is being tried is part of a general plan or system of criminal acts pursued by the defendant. People v. Frank, 28 Cal. 507, 517, 519; People v. Calpestri, 54 Cal. App. 45, 47, 200 P. 1054; People v. Sindici, 54 Cal. App. 193, 196, 201 P. 975; People v. Derrick, 85 Cal. App. 406, 411, 259 P. 481; People v. Eppstein (Cal. App.) 290 P. 1054; 1 Greenleaf on Evidence (16th Ed.) pp. 71, 74, and note p. 73.

The judgment and order are affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

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111 Cal. App. 640

MT. SHASTA POWER CORPORATION v. McARTHUR et al.

Civ. 3852.

District Court of Appeal, Third District, California.

Feb. 9, 1931.

Rehearing Denied March 11, 1931. Hearing Denied by Supreme Court April 6, 1931.

Costs 🔑190.

Where litigants, pursuant to order, each paid one-half of cost of original transcript of testimony ordered by court, and plaintiff subsequently ordered several additional copies at reduced rates, defendant could not have his costs reduced (Code Civ. Proc. § 274).

Appeal from Superior Court, Shasta County; H. D. Burroughs, Judge.

Action by the Mt. Shasta Power Corporation against Roderick McArthur and another. From an order settling plaintiff's cost bill and refusing to strike out certain items, defendants appeal.

Affirmed.

See, also, 292 P. 549.

Jesse W. Carter, of Redding, and Annette Abbott Adams, of San Francisco, for appellants.

William B. Bosley, Thomas J. Straub, Jones & Dall, and Athearn, Chandler & Farmer, all of San Francisco, and Chenoweth & Leininger, of Redding, for respondent.

Mr. Justice PLUMMER delivered the opinion of the court.

This cause is before us upon an appeal from an order settling plaintiff's cost bill and refusing to strike out certain items. The record shows that, in an action tried in the superior court of the county of Shasta, both the plaintiff and the defendants were awarded their costs, and, at the conclusion of the trial, both the plaintiff and the defendants filed their cost bills in which they set out as an item of costs the expense of one-half of the transcript of the testimony taken in the cause just referred to, which transcript was ordered by the court under the provisions of section 274, Code of Civil Procedure.

The record shows that at the beginning of the trial the court ordered that an original transcript of the testimony be made by the reporter from day to day, and the expense thereof charged to the respective parties in equal proportions, to wit, at 10 cents a folio, being 20 cents a folio for the transcript ordered by the court. The record further shows that at the time of the making of the order just referred to the plaintiff and the defendants also ordered one copy each of the transcript, at a cost of 6½ cents per folio. On the following day the record shows that the plaintiff desired two extra copies of the testimony, which copies the reporter agreed to furnish the plaintiff, as follows: One extra copy for 4 cents per folio and one extra copy for 3 cents per folio.

One-half of the total cost of the original transcript of the testimony ordered by the court amounted to the sum of $675.48. The plaintiff, and also the defendants, in their cost bills, set forth an item of cost in the sum above named, and costs were allowed the respective parties in the sum mentioned, for and on account of the original copy of the transcript of the testimony ordered by the court.

The contention is now made that under the third paragraph of section 274, Code of Civil Procedure, the appellants should have paid only 4 cents per folio as their portion of the costs of the original copy ordered by the court. This contention is based upon the fact that, after the court had ordered the original copy, and the parties hereto had each agreed to take a copy at 6½ cents per folio, the plaintiff ordered two additional copies, and therefore five copies in all were made by the reporter, and only 8 cents per folio should have been charged for the original copy, and that the defendants have overpaid costs for the original copy in the sum of 6 cents per folio which should have been borne by the plaintiffs by reason of the fact that the plaintiffs obtained two extra copies at a reduced rate. The provision of the section relied upon reads as follows: "For transcription for one copy, twenty cents per one hundred words; for two copies made at one time, fifteen cents each per one hundred words; for three copies made at one time, eleven cents each per one hundred words; for four copies made at one time, nine cents each per one hundred words; and for five or more copies made at one time, eight cents each per one hundred words."

In basing their argument upon this section the appellants overlook the fact that only one copy was ordered by the court; that the court ordered an original transcript of the testimony to be made and charged, respectively, one-half to the parties in this action. Whatever agreements or orders were made by the parties to this action, they were independent, separate, and distinct from the order made by the court. It would hardly be contended that, if an outsider entered into an agreement with the reporter to obtain a transcript of the testimony, this would have anything to do with the cost of the original transcript ordered by the court. Had the court ordered five or more copies to be made, then and in that case no greater charge than 8 cents per folio could have been made for any of the copies. Likewise, had any one of the parties involved in this action ordered from the reporter five or more copies, the reporter could not legally have charged more than 8 cents per folio for such copies. The fact that, after agreeing to and furnishing each of the respective parties one copy of the testimony for 6½ cents per folio, the reporter agreed with the plaintiff to furnish extra copies for 4 cents and 3 cents per folio, has no bearing upon the costs of the original transcript ordered by the court, and the defendants are not disadvantaged in the least by reason of the fact that they did not order extra copies. The additional copies ordered by the plaintiff and the cost thereof constituted an independent transaction between the plaintiff and the reporter. It appears that the reporter did not charge all that he might have charged under the section of the Code, but that does not affect the transaction in the least, as there is nothing in the section to prohibit charging less than the law allows.

A reference to the case of Barkly v. Copeland, 86 Cal. 493, 25 P. 3, 4, confirms what we have heretofore stated. In that action the court had ordered an original transcription, chargeable one-half to the respective parties, and, thereafter, one of the parties obtained additional copies and inserted the expense thereof in the cost bill. The court in dealing with this question used the following language: "By the order of the court, this half of the fees thus paid by the defendant in the first instance became a necessary part of the costs and disbursements incurred by him in defense of the action. He was therefore entitled to recover it from his adversary against whom he obtained judgment. As to the second item, * * * paid by the defendant for the second transcription, he could not recover that, or any part of it, from the plaintiff, as neither the latter nor the court had ordered it, but the defendant alone. * * * 'The party ordering the reporter to transcribe any portion of the testimony or proceedings must pay the fees of the reporter therefor.'" The record shows in this case that the respective parties were charged, and had paid the amounts apportioned by the court order for the original transcription. The remaining copies were matters of private agreements. If the costs were excessive, action only would lie against the reporter.

A number of other questions were argued by counsel, such as the question of estoppel, but we do not think such questions necessary to be considered for a determination of this action.

The order of the trial court is affirmed.

FIRKINS v. ZURICH GENERAL ACCIDENT & LIABILITY INS. CO., Limited.

Civ. 4005.

District Court of Appeal, Third District, California.

Feb. 10, 1931.

Rehearing Denied March 12, 1931. Hearing Denied by Supreme Court April 6, 1931.

1. Insurance 🔑151(1).

Rider attached to automobile liability policy should be reconciled with policy so as to carry out parties' intentions.

2. Automobiles 🔑195(1).

Where automobile operator's license was issued to son of 14 on parent's application, mother *held* equally responsible with father for damages caused by automobile driven by son with mother's permission.

3. Insurance 🔑437.

Under automobile liability policy and rider, insurer *held* liable for accident occurring while insured's son of 14 was driving automobile with permission of insured's wife.

> The automobile liability policy contained the provision that it should not cover any automobile while driven by any person under the age fixed by law or under 16 years of age, but to the policy there was attached, as a part thereof, an amendment or rider containing the provision that the policy to which the indorsement was attached was extended to apply to any person legally responsible for the operation thereof, provided such use or operation was with the permission of the named insured, or if the named insured is an individual, with the permission of an adult member of the named insured's household.

Appeal from Superior Court, San Joaquin County; D. M. Young, Judge.

Action by Andrew J. Firkins against the Zurich General Accident & Liability Insurance Company, Limited. Judgment for defendant, and plaintiff appeals.

Reversed, with directions.

Nat Brown and Chas. H. Epperson, Jr., both of Stockton, for appellant.

Len H. Honey, of Stockton, and J. Hampton Hoge, of San Francisco (A. Dal Thomson, of San Francisco, of counsel), for respondent.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

This is an appeal from a judgment entered against the plaintiff upon sustaining a demurrer to the amended complaint and denying leave to amend.

The complaint alleges that Mr. and Mrs. A. Delmuto were insured by the defendant insurance company against damages accruing on account of an accident in the operation of their Durant automobile. The insurance policy, which was issued in the name of A. Delmuto, is attached to the complaint as an exhibit. It is further recited that, upon application for this insurance policy, the owners of the machine told the representative of the defendant that "neither of them drove * * * said automobile, but that said automobile would be driven by Leo Delmuto, their son * * * (who) was of the age of fourteen years, and that they desired the policy so written as to cover the driving of said automobile by said fourteen year old minor"; that the usual form of a policy was thereupon issued including the following clause: "This policy shall not cover in respect of any automobile, * * * while driven or manipulated by any person under the age fixed by law, or under sixteen years of age in any event." To this policy there was attached, as a part thereof, an amendment or rider containing the following provision: "The policy to which this endorsement is attached is hereby extended to apply to any person * * * legally responsible for the operation thereof, provided such use or operation is with the permission of the named assured, or if the named assured is (an) individual, with the permission of an adult member of the named assured's household. * * *"

It is then alleged that this plaintiff subsequently recovered a judgment for $3,409 against Mrs. A. Delmuto, as damages resulting from a collision with the Durant machine belonging to Mr. and Mrs. A. Delmuto, while it was being operated by their minor son, Leo; that said judgment is in full force, no part thereof having been satisfied; that A. Delmuto is dead and his said widow is insolvent and unable to pay said judgment. The complaint then prays for judgment against the defendant as a surety. A demurrer to the amended complaint on the ground that it fails to state facts sufficient to constitute a cause of action was sustained denying leave to amend. From this judgment the plaintiff has appealed.

The demurrer was erroneously sustained. Under the provisions of the insurance policy it seems clear that the surety company is liable for damages accruing from an accident incurred with the insured automobile while it is operated by "any person * * * with the permission of an adult member of the named assured's household." It is not denied that Mrs. A. Delmuto was the wife of the assured named in the policy, nor that she was an adult member of his household. It is not denied that the minor son Leo was driving the automobile with her permission. These facts are conceded.

The respondent, however, contends that the rider which contains the preceding clause must be construed and reconciled with the clause in the body of the policy which provides: "This policy shall not cover * * * any automobile * * * while driven * * * by any person * * * under sixteen years of age."

[1] It is true that the provisions of a rider which is attached as a part of an insurance policy should be construed and reconciled with all the provisions of the instrument with respect to the same subject-matter so as to carry out the intentions of the contracting parties thereto. Burr v. Western States Life Ins. Co. (Cal. App.) 288 P. 444; 2 Cooley's Briefs on Ins. (2d Ed.) p. 1011; Old Colony Life Ins. Co. v. Hickman, 315 Ill. 304, 146 N. E. 132; Ætna Ins. Co. v. Sacramento Stockton S. S. Co. (C. C. A.) 273 F. 55, 58; 32 C. J. 1159, § 270; 14 R. C. L. 934, § 107.

The respondent argues that the evident purpose of the clause in the policy with respect to the age of the chauffeur was to limit the liability of the insurance company to accidents occurring while the machine was being operated by one who was sixteen years, or more, of age, and that the surety company was not liable when the machine was being operated in violation of law.

[2, 3] At the time of the accident which resulted in the judgment against Mrs. Delmuto, the insured car was not being operated by a chauffeur contrary to law. It is alleged in the complaint in this case that an "operator's license numbered 108835 was issued to one Leo Delmuto by the Motor Vehicle Department of the State of California, * * *" that the "application for said license was signed by A. Delmuto and Mrs. A. Delmuto, father and mother respectively of said Leo Delmuto." The signing of this application by Mrs. Delmuto made her equally responsible with her husband for damages caused by the car while it was driven by their said son. She authorized him to drive the car.

There appears to be no difficulty in reconciling the language of the policy with that of the rider on the subject of liability on account of the age of the chauffeur. It may be reasonably construed to mean that the surety company shall not be liable upon the policy "while [the machine was] driven or manipulated by any person * * * under sixteen years of age" unless such minor was operating the car "with the permission of an adult member of the named assured's household," in which event the company is liable. To construe the language of this instrument otherwise would defeat the apparent intent of the parties and render the quoted language of the rider valueless. We have no doubt the foregoing interpretation of the insurance policy is in accordance with the intention of the parties and that the defendant is not exempt from liability for an accident which occurred while the 14-year old son of Mr. and Mrs. Delmuto was driving the car.

Since the rider was attached to the policy to extend the liability of the company to cover "any person * * * legally responsible for the operation" of the insured car, and Mrs. Delmuto was personally responsible for the damages since she had authorized the issuing of an operator's license to her son and thereby assumed the liability, and a judgment had been regularly procured against her for the amount of such damages, under the terms of the insurance policy the judgment creditor may maintain this action against the policy for the satisfaction of the judgment. The insurance company was originally liable for this damage under the terms of the policy.

The demurrer was therefore erroneously sustained. The judgment is reversed, and the trial court is directed to overrule the demurrer to permit the defendant to answer.

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111 Cal. App. 559

BEARD et al. v. STATE BOARD OF EMBALMERS AND FUNERAL DIRECTORS et al.

Civ. 7828.

District Court of Appeal, First District, Division 2, California.

Feb. 4, 1931.

1. Licenses 🔑5.

Legislature may require applicant for license to practice profession, to be graduate of school of certain standard.

2. Constitutional law 🔑48.

Statute susceptible to two constructions, one consistent with, and other inconsistent with, Constitution, must be construed in harmony with constitution.

3. Licenses 🔑7(1).

Statute requiring applicant for embalmer's license to be graduate of school of certain standard *held* constitutional (St. 1929, p. 259, § 5).

St. 1929, p. 259, § 5, requiring that the applicant must have completed a full course of instruction in an embalming school of class A as rated by the "Conference of Embalmers," examining boards of the United States, was constitutional, although it could be construed as unconstitutionally requiring completion of a course in an embalming school which had been rated class A by the conference, since such statute was also susceptible of construction which merely required the completion of a course of study in an embalming school of the same type as those rated class A by the conference, and as so construed was constitutional.

4. **Licenses** 🔑22.
Mandamus 🔑10.

Petitioners, not alleging in their applications that they had completed course of study in embalming school of proper standard, were not entitled to license and could not compel board of examiners to examine petitioners for embalmers' license (St. 1929, p. 259, § 5).

Original proceedings in mandamus on the application of Hawley W. Beard and others to compel the State Board of Embalmers and Funeral Directors, and others, to examine petitioners for license as embalmers.

Writ denied.

Nat Schmulowitz, Geo. B. Harris, and Edward M. Leonard, all of San Francisco, for petitioners.

U. S. Webb, Atty. Gen., and Charles A. Wetmore, Jr., Deputy Atty. Gen., for respondents.

SPENCE, J.

This is an original proceeding in mandamus. Upon the filing of the petition an order was issued requiring respondents to show cause why a peremptory writ should not issue to compel respondents to examine petitioners for licenses as embalmers under chapter 140, Statutes of 1929 (page 258).

The sole question here involved is whether that portion of section 5 of the act relating to the requirement that the applicant "must have completed a full course of instruction in an embalming school of the class A type as rated by the 'Conference of Embalmers' examining boards of the United States" is constitutional.

From the allegations of the petition it appears that petitioners have treated this provision as unconstitutional and have made no effort to comply with its requirements. They allege that they filed their applications upon the forms prescribed by the board showing themselves to be otherwise qualified under the act, but deleted therefrom all reference to the completion of a course in an embalming school of the class A type as rated by the conference. From the further allegations of the petition it appears that petitioners have completed a course in an embalming school, but it is not alleged that said school is of the class A type as rated by the conference nor is it alleged that they showed in their applications to the board that they had completed a course in a school of that type or any embalming school. In our opinion the provision of section 5 above referred to is constitutional and petitioners have failed to show that they are entitled to the relief prayed for.

[1-3] It is well settled that the Legislature in demanding some standard of efficiency of those applying for licenses to practice a profession may in its judgment require applicants to be graduates of a school, the standards of which shall be in no particular less than those prescribed by an association or board of national significance. Ex parte Gerino, 143 Cal. 412, 77 P. 166, 66 L. R. A. 249; Arwine v. Board of Medical Examiners, 151 Cal. 499, 91 P. 319. Petitioners contend, however, that the statute must be construed to require the completion of a course in an embalming school *which has been rated class A by the conference*, and as so construed the statute is unconstitutional. Respondents contend that it should be construed to require the completion of a course in an embalming school *of the same type as those rated class A by the conference* and as so construed the statute is constitutional under the rule established by the authorities above referred to. It may be conceded that the statute is open to the construction placed upon it by petitioners, but in our opinion it is equally susceptible to the construction placed upon it by respondents. Being susceptible to two constructions, one consistent with and the other inconsistent with the provisions of the Constitution, it is fundamental that it be so construed as to make it harmonious with the Constitution and comport with the legitimate power of the legislature. 5 Cal. Jur. 615, 617.

[4] The statute being constitutional and petitioners having failed to allege in their applications that they had completed a course of study in an embalming school of the class A type as rated by the conference, the order to show cause is discharged, and the petition denied.

We concur: NOURSE, P. J.; STURTEVANT, J.

111 Cal. App. 430

HOLAHAN et ux. v. McGREW et al.

Civ. 4241.

District Court of Appeal, Third District, California.

Jan. 28, 1931.

Rehearing Denied Feb. 27, 1931. Hearing Denied by Supreme Court March 26, 1931.

1. Pleading 🔑205(5).

Pedestrian's complaint against owner and contractor for injuries inflicted by falling canopy *held* sufficient, in absence of special demurrer on grounds of uncertainty.

> The complaint of the pedestrian, suing for injuries caused by the dislocating of a cross-timber supporting a temporary canopy erected over sidewalk, charged the negligent construction of the canopy, so as to permit portions thereof to project over the traveled portion of the street, and that a bus came in contact with and struck the canopy, causing heavy timbers to fall on the pedestrian.

2. Appeal and error 🔑231(2).

Right to complain on appeal for uncertainty of complaint *held* waived, where demurrer did not charge specific uncertainty.

3. Pleading 🔑403(4).

If pedestrian's complaint was uncertain in not pleading exact part of canopy which was struck by bus, defect *held* cured by answer.

> The pedestrian brought suit for injuries caused by dislocating of cross timbers supporting temporary canopy, and the defendants by answer denied that they negligently or carelessly constructed or maintained the canopy, or that portions thereof unnecessarily or otherwise projected out over and obstructed the paved portions of the street so that pedestrian was injured.

4. Appeal and error 🔑193(6), 882(3).

When uncertainty in complaint is not raised by demurrer, but issue is tendered by answer and case tried on that theory, judgment will not be reversed.

5. Appeal and error 🔑1170(3).

Technical defects in complaint, which do not result in miscarriage of justice, are cured by Constitution (Const. art. 6, § 4½).

6. Municipal corporations 🔑819(1).

In pedestrian's action against owner and contractor for injuries inflicted by falling canopy when struck by bus, evidence *held* to support judgment for pedestrian.

7. Municipal corporations 🔑818(3).

In pedestrian's action for injuries caused by falling canopy, evidence that cross timbers similar to ones struck by bus protruded beyond curbing *held* competent.

> Evidence of the presence of other similar protruding timbers in the immediate vicinity of the timbers struck by the bus was competent to show that a reasonably prudent driver should have observed the cross timbers and anticipated the danger of coming in contact with one at the very point he proposed to stop the bus to receive passengers.

8. Appeal and error 🔑1050(1).

Error, if any, in admitting evidence, *held* harmless, where other witnesses testified to same facts without objection.

9. Appeal and error 🔑216(1).

If evidence that cross timbers of canopy, similar to timbers struck by bus and causing injury to pedestrian, protruded beyond curbing, was competent only against bus company, owner and contractor not requesting limitation of application of evidence could not complain.

10. Appeal and error 🔑1064(1).

In pedestrian's action for injuries inflicted by falling canopy struck by bus, instruction on public nuisance *held* not to constitute reversible error.

> The court instructed the jury in effect that any structure which projected over public street so as to interfere with travel constituted a public nuisance, and that the maintenance of such an illegal obstruction would constitute negligence per se, but that negligence, whether it was violation of law or whether it was any other kind of negligence, was of no consequence unless it was proximate cause of injury.

11. Municipal corporations 🔑822(1).

In pedestrian's action for injuries inflicted by falling canopy struck by bus, instruction interpreting ordinance respecting construction of canopy *held* not erroneous.

> The ordinance was construed as favorably to the defendants as they were entitled to have it interpreted, and the jury was clearly charged that, even though they found that the ordinance had been violated and that such violation constituted negligence per se, they must further find that failure to conform to the ordinance was the proximate cause of the accident before they were entitled to find for plaintiffs.

12. Trial ⚷260(1).

Rejecting requested instruction fully covered by other instructions *held* not error.

13. Appeal and error ⚷882(12).

Defendants could not complain that court accepted defendant's construction of ordinance involved and charged jury accordingly.

14. Municipal corporations ⚷800(1).

Violation of canopy ordinance, although negligence per se, would not be actionable unless it also constituted proximate cause of injury to pedestrian.

15. Municipal corporations ⚷821(19).

In action by pedestrian against owner and contractor for injuries inflicted by falling canopy struck by bus, whether alleged violation of canopy ordinance was proximate cause of accident *held* for jury.

16. Appeal and error ⚷932(1).

Appellate court assumed that jury allowed maximum sum authorized by instruction as damages for future medical care; verdict being general.

17. Damages ⚷185(1).

Evidence *held* not to authorize award of damages for future medical care to injured plaintiff.

Appeal from Superior Court, Los Angeles County; Henry M. Willis, Judge.

Action by John Holahan and wife against Charles T. McGrew and others. Judgment for plaintiffs, and defendants appeal.

Modified, and, as so modified, affirmed.

See, also, 295 P. 1059.

Culver & Nourse, of Los Angeles, for appellants.

Frank H. Jaques and Fred E. Helwig, both of Long Beach, for respondents.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

This is an appeal on the part of the individual members of C. T. McGrew & Sons, a copartnership, together with the partnership and the Commonwealth Building & Loan Association of Long Beach, from a joint and several judgment for damages for personal injuries sustained by Mrs. Holahan. Her injuries were caused by the dislodging of a cross timber supporting a temporary canopy which was erected over a sidewalk for the protection of pedestrians pending the construction of a building at Long Beach.

The Commonwealth Building & Loan Association owns lots 2 and 4 of block 104 of the city of Long Beach, fronting 50 feet on Pine avenue. The defendant C. T. McGrew & Sons, a copartnership, was engaged in constructing a building on these lots. Pursuant to the provisions of a city ordinance which was in force, a canopy was built for the protection of pedestrians over the sidewalk in front of the building which was being erected on Pine avenue. This canopy was constructed by placing upright timbers about eight feet in height along the borders of a fifteen-foot sidewalk. The outer timbers were flush with the curbing at the edge of the street. Cross timbers were insecurely fastened with eight-penny nails at the top of these upright posts to support the roof of the canopy. These cross timbers were permitted to protrude beyond the curbing over the paved street a distance of about eight inches. A portion of the space adjacent to the street beneath this canopy was reserved for the use of pedestrians. The defendant West Side Transit Company, a corporation, owned and operated a line of auto busses for transporting passengers to various parts of the city of Los Angeles. These busses were accustomed to stop every half hour of the day to receive and discharge passengers at the very point on Pine avenue where this canopy had been constructed. About 3 o'clock in the afternoon of January 7, 1927, the respondent, Frances Holahan, with other passengers, stood beneath this canopy waiting for the bus. Driving close to the curbing at this point, for the purpose of receiving passengers, the top of the autobus struck the protruding end of this timber, knocking it from the upright posts, and dislodging other timbers. A plank two by twelve inches in size struck Frances Holahan, fracturing her shoulder and causing other bruises and contusions, from which she suffered great pain. She incurred considerable expense for hospital and medical treatment on account of these injuries. An action for damages was instituted against the owner of the property, the contractor, and the company which operated the autobus line, as joint tortfeasors. The cause was tried with a jury. A verdict was rendered against the defendants for the sum of $4,724. A joint and several judgment was thereupon entered against each of the defendants, from which this appeal has been perfected.

These appellants contend that the complaint fails to state a cause of action against either of them, that the evidence fails to support the judgment, and that the court erred in instructing the jury with respect to the law of the case.

[1, 2] The appellants contend that the complaint fails to state facts charging them with negligence in the construction of the canopy which proximately caused the accident. There is no merit in this contention. The

complaint appears to be sufficiently specific. It first recites that, "said defendants * * * negligently and carelessly constructed said canopy so that portions thereof unnecessarily projected out over and obstructed the paved portion of said Pine avenue traveled by vehicles. * * *" The following paragraph then alleges: "The defendants * * * so carelessly and negligently constructed said canopy that vehicles traveling upon the paved portion of said Pine avenue came in contact with and struck said canopy, causing said canopy to be in a * * * weakened condition." In the next paragraph it is asserted that, while the canopy was in this weakened and defective condition, the defendant West Side Transit Company, by its agent, negligently operated one of its busses so that it "came in contact with and struck said canopy, causing said canopy to collapse and said heavy timbers to fall with great force upon plaintiff. * * *"

It is true that the real defect which caused the accident was the cross timber which extended beyond the curbing. These protruding timbers were a part of the frame which supported the canopy. The top of the bus came in contact with one of these protruding timbers, knocking it from its support and dislodging from the canopy other planks, one of which struck and injured Mrs. Holahan. There is evidence that this cross-timber which was struck and dislodged by the bus was merely nailed to the upright posts with two eight-penny nails. There is no evidence that other machines had previously struck this canopy and thus weakened it. The real negligence which appears to have caused the accident, and upon which the plaintiffs rely in support of the judgment, is the insecure manner in which the cross timber was nailed to the upright posts, and the fact this timber was permitted to extend beyond the curbing. This was the very point where the busses were accustomed to stop for passengers. The contractor should have anticipated the danger of protruding timbers.

It will be observed the first paragraph above quoted specifically charges the negligent construction of the canopy so as to permit "portions thereof" to project out over the traveled part of the street. The second paragraph above quoted, which refers to the weakened condition of the canopy caused by machines striking it, may be disregarded as surplusage. It is harmless. The third paragraph specifically charges that the bus of the defendant West Side Transit Company "came in contact with and struck the canopy causing * * * heavy timbers to fall with great force upon plaintiff." The protruding timber was a part of the canopy. The complaint might have been more specific in stating just what part of the canopy the bus struck to cause the falling of the timbers. The allegations of the complaint were, however, sufficiently specific in the absence of a special demurrer on the ground of uncertainty. A demurrer was filed in which it was averred that the complaint was "ambiguous and uncertain." But no specific uncertainty was charged. The appellants therefore waived the right to complain for the first time on appeal that the complaint fails to specifically state the exact part of the canopy which was struck by the bus.

[3] If the allegations of the complaint are uncertain in this regard, that precise issue was tendered, and the defect was cured by the allegations of the answer. An amendment to the answer was filed by leave of court. It avers: "These answering defendants deny that they negligently or carelessly constructed or maintained the canopy * * * or that portions thereof unnecessarily or otherwise projected out, over and obstructed the paved portion of the said Pine avenue, * * * (so) that plaintiffs were injured or damaged." Moreover the case was tried on the theory that the dislodging of the protruding timber was the proximate cause of the accident.

[4] Even though the allegations of a complaint may be defective regarding the facts constituting the proximate cause of accident, when the uncertainty is not raised by demurrer, but, on the contrary, the issue is clearly tendered by the averments of the answer, and the case is tried upon that theory, the judgment will not be reversed on appeal for such defect, for the reason that the defendants are not prejudiced thereby. Oles v. Kahn Bros., 81 Cal. App. 76, 253 P. 158; Martin v. Pacific Gas & Elec. Co., 203 Cal. 291, 298, 264 P. 246; 21 Cal. Jur. 280, § 195.

[5] Since there is no miscarriage of justice in the present case, the provisions of article 6, § 4½, of the Constitution, will also cure the technical defect of which the appellants complain.

[6] It is claimed the evidence fails to support the judgment. It must be conceded there is no substantial evidence indicating that a general defective or weakened condition of the canopy caused the accident. There is, however, ample evidence to sustain the implied finding of the jury that the cross stringers were attached to the upright posts so as to permit them to protrude beyond the curbing over the paved portion of the street a distance of about eight inches, and that the dislodging of one of these timbers by contact with the bus caused the injuries which were sustained by Mrs. Holahan.

Mr. Virgil Abbott, who drove the bus of the defendant West Side Transit Company at the time of the accident, testified:

"I struck a timber on the canopy there and knocked it down.

"Q. Where did that (timber) come in contact with the bus? A. Right at the top of the door. * * * About two inches," from the top of the door. "It (the timber) was a 2x4 nailed onto a 4x4 upright * * * posts. * * * They (the posts) were around close to the curb line. * * * It (the cross-timber) was fastened to the 4x4 post with two eight-penny nails. * * *

"Q. What distance would you say that 2x4 projected? * * * A. Seven or eight inches, I guess. * * *

"Q. Did you see any boards fall upon Mrs. Holahan, a timber? A. I didn't exactly see them fall, on her, no, but I know they came down. * * * She wasn't knocked down. * * *

"Q. When you approached this stop on that occasion, do you recall whether or not the cross-piece you have described was at the point where you usually stop for passengers? A. Right at that place, yes. * * *

"Q. Did you see any evidence there of that timber having come in contact with the door? A. Yes. * * * I seen a little piece of wood sticking up there where it hit the door and a little paint scraped off."

Margaret Maes, who was a stranger to Mrs. Holahan, testified that she observed the accident. She said:

"I saw the bus driving up there. * * * Just as he drove past I heard a noise like a grinding or a scraping. I looked up and saw a timber sticking out and the friction of the bus moved that timber. * * * I saw what appeared—really looked like two boards. I think it must have been two boards falling down. * * * I saw the bus striking that timber, and moving that timber caused the sliding of some boards. * * * I saw the * * * timber sticking out as it struck the bus.

"Q. How far did that stick out from the post? A. * * * About seven inches at least. * * *

"Q. How high was it from the walk? * * * A. Oh, perhaps eight feet. The carpenter sawed it off afterwards."

Mr. Rickard, a patrolman in the police department of the city, testified:

"I think there were several planks sticking out in the street. * * * One in particular I noticed was (protruding) about two feet. * * *

"Q. How high was that from the pavement? * * * A. About even with the top of the ordinary bus. * * *

"Q. How far were they projecting out in the street? * * * A. About eight inches, such a matter. * * * One (of these cross-timbers) was knocked down."

Pearl Poe, a carpenter who was working on the canopy at the time of the accident, testified: "I was working on the north end of canopy, on the top of same, when the bus struck the canopy, the top of bus leaning in struck upright post and cross-piece, knocking cross-piece out at one end. * * * I saw the scaffold board one end (of which) was on cross-piece that (the) bus struck, slide down the same and strike an old lady on the head." The foregoing evidence adequately supports the judgment in spite of the conflict which exists regarding some of these facts.

[7] The appellants contend that the court erred in admitting, over their objection, evidence of the fact that other similar cross timbers of this canopy also protruded beyond the curbing. The objection that this evidence is immaterial was raised only on one occasion, when the witness Abbott, who drove the bus, was asked generally if he did not observe "the condition of the canopy, such as any timbers projecting out into the street." Several other witnesses testified without objection that other cross timbers extended beyond the curbing. Mrs. Maes and Mr. Rickard so testified. These witnesses were thoroughly cross-examined by the defendants on this subject. There was no effort on the part of the appellants to preserve this objection in its application to other witnesses, nor to confine it to any particular defendant. We are of the opinion this evidence of other similar protruding cross timbers in the same canopy was competent and material, at least so far as it applies to the alleged negligence of the agent of the West Side Transit Company. The entire canopy was one structure. The roof was supported by upright posts set along the curbing a few feet apart. At the tops of these upright posts these protruding cross timbers were nailed. The question as to whether the particular cross timber, with which the bus came in contact, extended beyond the curbing, was the vital issue of the case. Abbott, the driver of the bus, denied that he saw the protruding end of this timber with which he came in contact before his machine struck it. If other similar protruding timbers of the same structure were plainly visible to the driver of an approaching vehicle, there is greater reason to assume that a cautious driver should have seen that particular timber. The more numerous these protruding timbers, the greater likelihood there would be that the driver of an approaching vehicle should have seen and avoided the danger. The evidence of the presence of other similar protruding timbers in the immediate vicinity was competent to show that a reasonably prudent driver should have observed them and anticipated the danger of coming in contact with one at the very point where he proposed to stop his machine.

[8] Moreover, having permitted other witnesses to testify to the same facts without objection, the evidence became harmless. 2

Cal. Jur. 1020, § 607; Bower-Venus Grain Co. v. Smith, 84 Okl. 105, 204 P. 265; 3 C. J. 815, § 730. In the authority last cited, it is said: "Appellant cannot complain of the admission of evidence over his objection, where evidence of the same tenor was admitted without objection."

[9] Assuming, without so determining, that the challenged evidence regarding the protruding of cross timbers other than the particular one which caused the accident was competent only against the defendant West Side Transit Company, the other defendants may not complain, for the reason there was no request to thus limit the application of the testimony. Evidence may be incompetent as to one of several joint tort-feasors and competent as to others. If such evidence is competent as to any one of several defendants to the same action, it is admissible, and a general objection to its competency is not available on appeal to any party to the action in the absence of timely application to limit it to the party against whom it is competent. 3 C. J. 823, § 733; Wigmore on Evidence (2d Ed.) p. 159, § 13; Delger v. Jacobs, 19 Cal. App. 197, 125 P. 258; Outlook F. E. Co. v. Am. Surety Co., 70 Mont. 8, 223 P. 905, 911.

[10] We find no reversible error in the giving of certain instructions with relation to a public nuisance. The jury was charged in effect that any structure which projected over a public street so as to interfere with travel constituted a public nuisance, and that, in the absence of legal authority, no one had a right to construct or maintain such an obstruction. The jury was further instructed that the maintenance of such an illegal obstruction to a public street would constitute negligence per se, but that "negligence, whether it is a violation of a law, or whether it is any other kind of negligence is of no consequence unless you find such negligence was the proximate cause of the injury." These instructions appear to correctly state the law. Possibly they serve no useful purpose in this case, since the plaintiffs were not relying upon proof of a public nuisance to establish negligence per se, but were relying upon proof of the maintenance of cross timbers of the canopy which overhung the street so as to come in contact with the bus. If the maintenance of this protruding cross timber became the proximate cause of the accident, and Mrs. Holahan was free from contributory negligence, she was entitled to recover damages which resulted from that unwarranted situation, whether that portion of the canopy which overhung the street constituted a public nuisance or not. There was evidence that these cross timbers did overhang the street a distance of at least eight inches, and that one of them was struck and dislodged by the bus. The jury was fully and fairly instructed regarding the doctrine of contributory negligence and every other issue in the case. These instructions were harmless. They were certainly not prejudicial and do not constitute reversible error.

[11, 12] It is also claimed prejudicial error resulted from an instruction which was given to the jury interpreting the provisions of a city ordinance with respect to the construction of the canopy over the sidewalk in its relation to a lamp post which was situated in the outer portion of the walk near the curbing. This contention is without merit. The ordinance was construed by the court as favorable to the defendants as they were entitled to have it interpreted. The jury was also clearly charged that, even though they found that the ordinance had been violated and that such violation constituted negligence per se, they must further find that the failure to conform to the ordinance was the proximate cause of the accident before they were warranted in finding a verdict for the plaintiffs. This was a correct statement of the law. The giving of this instruction was therefore not erroneous. The ordinance contained this clause: "Canopies * * * shall be placed and maintained in the outer portion of the space between the property line and the curb and inside of any public utility poles, lamp posts or trees adjacent to the building site." After quoting the preceding clause the court said: "By this latter provision * * * it is meant that that portion of such canopy which would be next to any pole, lamp post or tree standing in such sidewalk adjacent to such building site must be placed inside such pole, lamp post or tree, and on the outer portion of the space between the property line and such pole, lamp post or tree, and that all other portions of such canopy must be placed on the outer space between the property line and the curb. * * *" This construction of the ordinance clearly means that in the immediate vicinity of a point where a power pole, lamp post, or tree intervenes between the property line and the curbing, the canopy must not extend toward the curbing beyond such object, but must be confined to the space between the property line and the pole or lamp post, and that the remaining portion of the walk not so obstructed by a pole or post must be covered with a canopy extending from the property line to the curbing. The uncontradicted evidence shows this is the very manner in which the canopy was constructed. At the only point where a lamp post stood the canopy was cut out from the curbing so that it did not extend beyond the post. This is the construction of the ordinance contended for by the appellants in another instruction which was offered by them and rejected. There was no error in rejecting this last-mentioned instruction, for the reason it is fully covered by the preceding charge.

[13] For the same reason there was no error in refusing to permit the defendants to

offer evidence that this was the construction placed upon the ordinance by the agents of the city. The court accepted the defendants' construction of the ordinance and charged the jury accordingly. Whether this construction of the ordinance is correct or not, the appellants may not complain.

[14] While it is true that a violation of this canopy ordinance would constitute negligence per se (Martin v. Shea, 182 Cal. 130, 187 P. 23; 45 C. J. 723, § 105), the violation of the ordinance would not be actionable unless it also constituted the proximate cause of the accident (Henderson v. Northam, 176 Cal. 493, 168 P. 1044; Michael v. Key System Transit Co., 98 Cal. App. 189, 276 P. 591; 45 C. J. 902, § 479). In the text of Corpus Juris last cited it is said: "The rule that no liability attaches unless the negligent act or omission was the proximate cause of injury is applicable where the act or omission complained of constituted a violation of some statute or ordinance, even though such violation is held to be negligence per se."

[15] It was the province of the jury to determine whether there was a violation of the canopy ordinance, and, if so, whether such violation was the proximate cause of the accident. Baillargeon v. Myers, 180 Cal. 504, 182 P. 37; 19 Cal. Jur. 734, § 140.

In the present case there was no contention on the part of the plaintiffs that the appellants were guilty of negligence on account of the mere violation of the ordinance in extending the canopy to the curb line without regard to the intervening lamp post, or in cutting out the canopy at the point where the lamp post stood. The appellants were therefore not prejudiced by the giving or refusing of instruction on this subject.

[16, 17] Finally, objection is made to an instruction which was given to the jury regarding the elements of damages which might be considered by them in the event they found that the plaintiffs were entitled to recover. Among other elements of compensation, the jury was charged that "in estimating the amount of such damages you may consider * * * such cost of sanitarium treatment and care which it is reasonably certain that they (the plaintiffs) may sustain hereafter, if any, not exceeding $1,000.00." While it is true there is some evidence to support the plaintiffs' claim that Mrs. Holahan was permanently injured as a result of the accident and that "her nervous system has been practically wrecked," there is no evidence to indicate that future medical treatment or hospital services would aid her condition. Nor is there any evidence of the probable cost of such future care and treatment. Under the foregoing instruction with respect to damages, we must assume the jury may have included in their general verdict of $4,724 the maximum sum of $1,000 to cover the cost of future medical care and treatment. To that extent the judgment is not supported by the evidence. There is no means by which this court is able to determine what sum the jury allowed as compensation for future treatment. We must therefore assume they may have allowed the maximum sum of $1,000 which the court instructed them they were authorized to award.

The respondents suggest this court has the discretion to modify the judgment in this respect. The judgment is accordingly modified by striking therefrom said sum of $1,000. As so modified, the judgment for the remaining sum of $3,724 is affirmed. The appellants may recover only one-half of their costs.

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111 Cal. App. 443

HOLAHAN et ux. v. McGREW et al.

Civ. 4258.

District Court of Appeal, Third District, California.

Jan. 28, 1931.

Rehearing Denied Feb. 27, 1931. Hearing Denied by Supreme Court March 26, 1931.

1. Automobiles 🔑201(8).

If owner and contractor were negligent per se in constructing canopy protruding beyond curbing, such fact did not relieve bus company striking canopy from liability to pedestrian struck by canopy, if company was also negligent.

2. Negligence 🔑15.

Where concurring negligence of different parties produces injuries, both may be liable as joint tort-feasors.

3. Automobiles 🔑245(6).

In pedestrian's action for injuries inflicted by falling canopy struck by bus, negligence of bus driver *held* for jury.

4. Negligence 🔑61(2).

One relying on observance of ordinance by another may not complain of its violation while he is guilty of negligence.

Appeal from Superior Court, Los Angeles County; Henry M. Willis, Judge.

Action by John Holahan and wife against Charles T. McGrew, the West Side Transit Company, and others. Judgment for plaintiffs, and the last-named defendant appeals.

Affirmed.

B. P. Gibbs and Walter W. Little, both of Los Angeles, for appellant.

Frank H. Jaques and Fred E. Helwig, both of Long Beach, for respondents.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

This is a separate appeal on the part of West Side Transit Company from a joint and several judgment for damages for personal injuries sustained by Mrs. Holahan which were caused by the dislodging of a timber used as a part of a canopy which was constructed over a sidewalk for the protection of pedestrians.

The facts of the case are related in greater detail in the opinion this day filed (295 P. 1054), in the same case which determines the appeal from this judgment on the part of the other defendants.

The defendant Commonwealth Building & Loan Association of Long Beach owns two lots at the corner of Pine avenue and Broadway, in the city of Long Beach, upon which it was engaged in constructing a building. The defendant C. T. McGrew & Sons had the contract for this structure. Pursuant to a city ordinance, a canopy had been erected, for the protection of pedestrians, over the sidewalk in front of the building. The canopy did not conform to the specifications required by the ordinance. Several cross timbers extended beyond the curbing, over the street, a distance of from three inches to two feet. At the point where this canopy was maintained during the construction of the building, busses were accustomed to stop to receive and discharge passengers. At 3 o'clock on the afternoon of January 7, 1927, the plaintiff Frances Holahan was waiting beneath this canopy for a bus. This appellant, West Side Transit Company, was engaged in operating a system of autobusses for the purpose of transporting passengers in that vicinity. Virgil Abbott was the driver of one of these busses. At the time mentioned he turned the bus in close to the curbing at this canopy to stop for passengers. This appears to have been his first trip since the completion of the canopy. He claims that he did not observe any of the timbers which extended beyond the curbing over the street. Opposite the very point where he was accustomed to stop, a cross timber, which was nailed to the upright posts about eight feet above the street, protruded beyond the curbing a distance of eight inches. The top of the bus struck this timber, knocking it from the posts to which it was nailed. This dislodged other planks, one of which struck Mrs. Holahan, breaking her shoulder and otherwise injuring her. Suit for damages was brought against all the defendants jointly. The cause was tried with a jury. A joint and several judgment for the sum of $4,724 was rendered against them. From this judgment the West Side Transit Company perfected a separate appeal.

It is asserted by this appellant that the court erred in refusing to grant its motion for a nonsuit, that this appellant is free from negligence, and that the contractors' violation of the ordinance in the construction of the defective canopy amounted to negligence per se, constituting it an insurer against injuries resulting therefrom.

[1-3] The jury found a verdict against the owner of the property, the contractor who constructed the canopy, and this appellant as joint tort-feasors. Assuming that the canopy was constructed in violation of the city ordinance and that both the owner and the builder of the canopy were therefore guilty of negligence per se which proximately caused the accident, this does not necessarily relieve the transit company from liability, provided it was also guilty of negligence which directly contributed to the injuries sustained by Mrs. Holahan.

The rule of law is well established that, even though different parties may not act together with a common purpose which results in injury to another, if their concurring negligence produces the injuries complained of, both may be liable for damages as joint tortfeasors. 19 Cal. Jur. 664, § 90; Buttrick v. Pac. Elec. Ry. Co., 86 Cal. App. 136, 140, 260 P. 588; 45 C. J. 895, § 476. The fact that one of the tort-feasors may be guilty of negligence per se, for violation of a statute or ordinance, does not relieve the other, provided his acts or omissions, concurring with those of the first wrongdoer, proximately cause the injuries complained of. Under such circumstances both would be equally liable. In the present case the negligent construction of the canopy so as to permit timbers to extend beyond the curbing, which resulted in an accident and caused injuries to one who was lawfully at that place and free from contributory negligence, renders the owner of the property and the contractor liable for negligence. At the same time the driver of an autobus who carelessly and negligently operated his machine so as to strike one of these protruding timbers and dislodge other planks which fell upon and injured a pedestrian standing beneath the canopy, would also impute negligence to the owner of the bus which he was driving. When several similar timbers of the canopy, in the immediate vicinity, extended over the street within plain view of the driver of a machine, it would become his duty to exercise care, in driving his machine up to the curbing, to make a reasonable allowance for such protruding timbers. It was the province of the jury to determine whether the driver saw such protruding timbers or whether, in the exercise of ordinary care as a reasonable person, he should have seen and avoided them. Carroll v. Central Counties Gas Co., 74 Cal. App. 303, 240 P. 53; 19 Cal. Jur., p. 729, § 138. Approaching a structure of that sort bordering on the street, the exercise of ordinary care would prompt a driver who proposed to stop his machine at that point to look for dangerously protruding timbers. The verdict of the jury infers that they found the driver of the autobus guilty of negligence in that regard. There is ample evidence to support this finding.

The respondents argue that, except for the negligence of the contractor in violating the canopy ordinance and extending the cross-timbers beyond the curbing over the street the accident would not have occurred. It is equally true that, except for the careless act of the driver of the bus in failing to observe these protruding timbers and in running the machine so close to the curbing as to come in contact with this particular protruding timber, the accident would not have occurred.

[4] The appellant asserts that the driver of the bus had a right to assume the contractor would not violate the ordinance and extend timbers beyond the curbing so as to obstruct the street. But this assumption that one will not violate the law does not excuse another for blindly driving into danger without using his eyes to observe the obstruction which is plainly visible. One who relies upon the observance of a statute or ordinance by another may not complain of its violation while he himself is guilty of negligence which concurs directly in the cause of the injuries. Carroll v. Central Counties Gas Co., 74 Cal. App. 303, 309, 240 P. 53. In 19 California Jurisprudence, p. 596, it is said: "One who is himself not negligent is entitled to rely upon the presumption that others will exercise due care, so that it is not negligence to fail to anticipate danger which can come only from a violation of law or duty upon the part of another. * * * But reliance upon this presumption does not excuse one who is himself negligent."

The evidence in this case is ample to support the implied finding that this appellant was guilty of concurrent negligence which proximately caused the injuries sustained by Mrs. Holahan. The motion for a nonsuit was therefore properly denied.

The judgment is affirmed.

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111 Cal. App. 500

WALLACE v. WALLACE.

Civ. 82.

District Court of Appeal, Fourth District, California.

Feb. 2, 1931.

1. Pleading 🔑18.

Complaint for money due under property settlement *held* not demurrable because not disclosing whether based on foreign judgment or on contract, where demurring party was not misled.

2. Divorce 🔑331.

Foreign divorce decree *held* not subject to collateral attack as providing for maintenance outside issues of divorce complaint.

3. Judgment 🔑505.

Judgment granting greater relief than demanded is not void nor susceptible to collateral attack, although excess relief is erroneous and subject to direct attack.

4. Judgment 🔑222.

Generally, judgment for money must state sum with certainty.

5. Divorce 🔑331.

Decree providing for future payments of alimony, enforcement of which is not entirely within courts' discretion, is within full faith and credit clause of federal Constitution as to installments past due (Const. U. S. art. 4, § 1).

6. Divorce 🔑331.

Right to alimony installments, though contingent on husband's earnings, became vested on becoming due, and foreign decree therefor was not invalid for uncertainty.

7. Divorce 🔑331.

Foreign decree adopting language of property settlement between parties *held* not invalid for uncertainty, where agreement was submitted to court for incorporation in decree.

8. Divorce 🔑331.

Foreign divorce decree providing for payment as alimony of percentage of husband's salary *held* not objectionable as operating on property outside court's jurisdiction where salary was earned.

9. Divorce 🔑331.

Foreign divorce judgment incorporating property settlement providing for payment of percentage of husband's salary *held* not void as attempted assignment of future salary.

10. Divorce 🔑331.

Property settlement merged in foreign judgment for divorce sued on *held* not void as agreement in aid of divorce.

Appeal from Superior Court, San Bernardino County; Benjamin F. Warmer, Judge.

Action by Nell Leone Wallace against Oliver G. Wallace. Judgment for plaintiff, and defendant appeals.

Affirmed.

Charles Bagg, of San Bernardino, and Philip Cohen, of Los Angeles, for appellant.

Surr & Hellyer, of San Bernardino, and John B. Surr, of Berkeley, for respondent.

JENNINGS, J.

The defendant, Oliver G. Wallace, has appealed from a judgment rendered against him in the amount of $3,184 and costs. The language of the decree from which defendant appeals is as follows: "It is ordered, adjudged and decreed that plaintiff, Nell Leone Wallace, have and recover from the defendant Oliver G. Wallace the sum of $3184.00 and that said defendant pay said plaintiff said sum of $3184.00 for her support and maintenance pursuant to the provisions of the property settlement agreement between them, dated January 26th, 1924, as approved, confirmed and made a part of that certain Interlocutory Decree dated September 15th, 1924, rendered in the Superior Court of the State of Washington for King County, in the action then pending between plaintiff and defendant, said action being numbered 176218 of the files and records of said court, and because of the salary earned by the said defendant to and including July 27th, 1929."

The record discloses that on January 26, 1924, the parties to this action entered into an agreement at Seattle, King county, Wash., which agreement stated that it was made for the purpose of settling the property rights of the parties thereto. This agreement, after providing for the transfer and conveyance of certain personal property and the payment of certain moneys by the husband to the wife, contains the following provisions with respect to the payment of certain sums for the maintenance of the wife: "That in addition to the sums hereinbefore set forth, the party of the second part does hereby agree that he will pay to party of the first part for her support and maintenance until such time as she shall remarry, the following sums, to wit: (a) The sum of One Hundred Seven Dollars and Fifty Cents ($107.50) a week when and while the salary of the second party is Four Hundred Dollars ($400.00) a week; (b) One fourth of the weekly salary earned by the party of the second part when and while his weekly salary is less than Four Hundred Dollars ($400.00) a week." The record also discloses that on August 12, 1924, the plaintiff, Nellie L. Wallace, filed an action for divorce against the defendant, O. G. Wallace, on the ground of cruelty, praying for a dissolution of the marriage and for an order that the defendant, O. G. Wallace, pay to her the sum of $100 for payment to her attorneys for the prosecution of the action and for her costs and for such other and further relief as should seem just to the court in the premises. To this complaint, on August 15, 1924, the defendant filed an answer. The action came on for hearing in the superior court of the state of Washington for King county on September 15, 1924. The findings of the court recite that the plaintiff appeared in person and by her attorney and that the defendant appeared by his attorney and that the state of Washington was represented by the prosecuting attorney of King county. The findings also contain a recital that the plaintiff and defendant in the action had theretofore entered into an agreement as to property rights and alimony which had been submitted to the court. In its conclusions of law based upon the findings of fact the court provided that the contract and agreement regarding property rights and alimony theretofore entered into between the parties be embodied in the decree to be entered in the action. The interlocutory decree signed by the judge of the court on September 15, 1924, ordered and decreed "that the agreement heretofore made between the plaintiff and defendant covering the property rights and provisions for alimony and costs of this action, a copy of which is attached hereto and made a part hereof, be and the same hereby is approved and confirmed and made a part of this interlocutory decree, and that the defendant pay the plaintiff costs herein and an attorney's fee of $100.00." Attached to and forming a part of the decree is a copy of the agreement entered into between the parties on January 26, 1924. On March 16, 1925, a final decree of divorce was signed by a judge of the superior court of the state of Washington for King county, in which final decree the entry of the interlocutory order of divorce on September 15, 1924, was recited, and the court, finding that the defendant had been duly and regularly served with summons in the action by personal service in the state of Washington and that the court had jurisdiction over the person of the defendant and the subject-matter of the action, confirmed its previous findings of fact and conclusions of law and its interlocutory order and decreed that the marriage theretofore existing between the plaintiff and defendant be finally dissolved and that the plaintiff be granted an absolute divorce from the defendant.

The complaint filed by the plaintiff in the present action is entitled a complaint for money. It contains recitals relative to the intermarriage of the parties, their entering into the agreement for property settlement on January 26, 1924, the institution of the action for divorce in the state of Washington, the appearance in such action of the defendant, the entry of the interlocutory decree of divorce by the Washington court, the fact that there was no modification or reversal of such decree and that there had been no appeal from it, due performance by the plaintiff of all conditions of said property settlement agreement, the rendition of the final decree of divorce on March 16, 1925, in the state of Washington, and the specific provisions contained in said property settlement agreement relating to the payment of money for the maintenance and support of plaintiff. The complaint further alleges that defendant made the payments provided for in the property settlement agreement up to April 7, 1928. Finally there are allegations respecting the total earnings of the defendant subsequent to April 7, 1928, and the amount claimed by plaintiff in accordance with the provisions of the property settlement agreement, and the judgment in the divorce action. To this complaint the defendant interposed a demurrer both general and special, the special demurrer being on the grounds that the complaint is ambiguous, unintelligible and uncertain for the reason that it could not be ascertained therefrom whether the action was based on a contract or was an action upon a judgment. In due time this demurrer was overruled. Thereafter the defendant filed his answer in which he admits the filing of the complaint for divorce in the state of Washington, his appearance in the divorce action in said state and his filing of an answer to the plaintiff's complaint in said suit, the entry of an interlocutory decree for divorce on September 15, 1924, attacks the jurisdiction of the Washington court to render a decree requiring the payment of any sums to the plaintiff as alimony or for her support, admits that the plaintiff has never remarried, admits that by the terms of the property settlement agreement he agreed to make the payments specified for the support and maintenance of the plaintiff, sets out specifically in detail the weekly salary earned by him at specified intervals subsequent to April 7, 1928, denies that the sum claimed by the plaintiff is due her, for the reason that the property settlement agreement executed by the parties was void as being contrary to the public policy of the state of Washington, where it was executed and contrary to the public policy of the state of California, and alleges seven further defenses to the plaintiff's complaint.

[1] Counsel for appellant attacks the judgment of the trial court on a number of different grounds which we will attempt to consider and discuss seriatim. It is first contended that the demurrer to the complaint should have been sustained on the ground that it is impossible to discover from the complaint whether the present action is one on a judgment rendered in the state of Washington or is an action based upon a contract. This objection is without merit unless it appears that the demurring party was misled by the defects in the pleading. Stein v. United Railroads of San Francisco, 159 Cal. 368, at page 370, 113 P. 663. Inasmuch as the appellant filed his answer which, as he declares, required eight separate defenses because of the uncertainty of the complaint, it is obvious that he was not misled by the alleged defects in the pleading.

[2, 3] Appellant further objects that the action in the state of Washington was for divorce only and for attorney's fees; that no reference to any property settlement agreement is to be found in the complaint for divorce; that in the divorce complaint there is no allegation of need for financial support by the plaintiff; and that therefore that portion of the decree of the Washington court providing for the payment of any sums for plaintiff's maintenance was outside the issues, beyond the jurisdiction of the court, and void. This contention may not be successfully maintained. A judgment granting relief in excess of that demanded in the complaint is not a void judgment nor is it thereby rendered susceptible to collateral attack (Cohen v. Cohen, 150 Cal. 99, 88 P. 267, 11 Ann. Cas. 520; Parker v. Parker, 203 Cal. 787, 266 P. 283), although the granting of excess relief is erroneous and may form the basis for direct attack (Bennett v. Bennett, 50 Cal. App. 48, 194 P. 503).

[4, 5] The third ground of objection is that the judgment of the Washington court in the divorce suit, in so far as it provides for the payment of alimony, is too indefinite and uncertain in its terms to form the basis of an action. This objection is not without merit. The trial court unquestionably adopted the theory that the action was one brought upon a foreign judgment. The decree rendered by the superior court in the state of Washington is not a judgment for a definite sum. Such a decree may therefore appear to be vulnerable to the objection here urged, for the general rule is that where the judgment is for money it must be stated with certainty (1 Freeman on Judgments [5th Ed.] par. 84) and the money judgment should specify the amount (14 Cal. Jur. p. 956). But a decree that provides for the payment of alimony periodically in the future is necessarily indefinite to some extent. Nevertheless, where the decree provides for the future payments of fixed installments of alimony and there has been no modification of it prior to the maturity of such installments and its enforcement is not by the law of the state where it is rendered left so completely within the discretion of the courts of that state that they may annul or modify it, such a decree is, as to installments past due and unpaid, within the protection of the full faith and credit clause of the federal Constitution. Sistare v. Sistare, 218 U. S. 1, 30 S. Ct. 682, 686, 54 L. Ed. 905, 28 L. R. A. (N. S.) 1068, 20 Ann. Cas. 1061. In the Sistare Case, supra, the Supreme Court of the United States uses the following language: "Generally speaking, where a decree is rendered for alimony, and is made payable in future install-

ments, the right to such installments becomes absolute and vested upon becoming due, and is therefore protected by the full faith and credit clause, provided no modification of the decree has been made prior to the maturity of the installments, since, as declared in the Barber Case [21 How. 582, 16 L. Ed. 226], 'alimony decreed to a wife in a divorce of separation from bed and board is as much a debt of record, until the decree has been recalled, as any other judgment for money is.' "

[6, 7] So under the provisions of the decree of the Washington court it would appear that the right to weekly installments, even though the amount of such installments was contingent upon the amount earned weekly by the appellant, became absolute and vested upon becoming due. A decree that merely adopts the language of a property settlement agreement entered into between the parties should not be held invalid for uncertainty, particularly when the agreement is submitted to the court by the parties or their legal representatives for the express purpose of having it incorporated in the decree. D'Arcy v. D'Arcy, 89 Cal. App. 86, 264 P. 497. Under such circumstances, as the court said in the case of D'Arcy v. D'Arcy, supra, the rule laid down by Mr. Justice Shaw, in the case of Title Ins. & Trust Co. v. Miller & Lux, 183 Cal. 89, 190 P. 433, 440, should be applied, and the objection that the decree is invalid for uncertainty should not be allowed.

The interlocutory order of the superior court in the state of Washington was not subject to modification by the court. Remington's Compiled Stats. of Washington, § 988; Ruge v. Ruge, 97 Wash. 51, 165 P. 1063, L. R. A. 1917F, 721; State ex rel. Hansen v. Superior Court of Washington in and for Pierce County et al., 131 Wash. 13, 228 P. 702. Furthermore, a final decree of divorce which confirmed the interlocutory order was rendered on March 16, 1925, and no appeal lies from such final judgment. Remington's Compiled Stats. of Washington, § 988—1.

[8] Appellant further complains that the ruling of the trial court holding that the present action is one brought to recover on a foreign judgment produces the result that the decree of the Washington court is permitted to operate on property without its jurisdiction since the divorce decree incorporates and confirms the property settlement agreement by whose provisions appellant agreed to pay respondent for maintenance one-fourth of the weekly salary earned by him when his salary is less than $400 per week and the evidence shows that the only salary affected is salary earned in the state of California. Such an objection is untenable. The clear meaning of the language adverted to is that appellant agreed that he would pay for respondent's maintenance an amount equal to one-fourth of his weekly salary when it should be less than $400 a week. This meaning is manifest since the language of the agreement is "The party of the second part does hereby agree that he will pay * * * the following sums."

[9] It is further urged that the judgment of the Washington court which forms the basis for the present action is void as to that part of it which provides for the payment by appellant of money for respondent's maintenance because the property settlement agreement incorporated in the decree of the Washington court is an attempted assignment of future salary arising from an employment not at the time in existence or in contemplation. This objection is without merit. The property settlement agreement is an executory contract. It does not purport to create an assignment.

[10] Finally it is urged that the trial court erred in holding that the present action was one based upon a foreign judgment and that the action is in reality one based upon the property settlement agreement of the parties which is subject to the attack proposed by appellant that it was an agreement entered into in contemplation of divorce, in aid of divorce, and therefore contra bonos mores. This point must also be decided adversely to appellant's contention. The agreement was merged in the judgment which was rendered by a court of competent jurisdiction. It is supported by the conclusive presumption that every fact necessary to sustain it was properly brought before the court. Julier v. Julier, 62 Ohio St. 90, 56 N. E. 661, 78 Am. St. Rep. 697.

For the reasons hereinabove set forth, the judgment of the trial court should be affirmed, and it is so ordered.

We concur: BARNARD, P. J.; MARKS, J.

B. NICOLL & CO. v. NATIONAL SURETY CO. et al.

Civ. 4248.

District Court of Appeal, Third District, California.

Jan. 26, 1931.

Rehearing Denied Feb. 25, 1931. Hearing Denied by Supreme Court March 26, 1931.

1. Appeal and error ⟹1047(3).

In action on contractor's bond, striking out of testimony showing street improvement proceedings were had in accordance with 1911 statute *held* harmless error (St. 1911, p. 730; St. 1919, p. 487).

> While the ruling was error in that surety on the bond had the right to show under what act the improvement was being done, and though complainant showed that improvement was had in accordance with St. 1911, p. 730, reversal was not required, where there was no question but that the work done and contracted to be done was a public improvement as to which St. 1919, p. 487, applied.

2. Municipal corporations ⟹346.

That statute requiring bond from street work contractors gave materialmen broader remedy than statute requiring bond of public work contractors did not affect validity of bond given under latter statute by street work contractor (St. 1911, p. 738, § 19; St. 1919, p. 487, §§ 1, 2).

> St. 1911, p. 738, § 19, requires street work contractors to file bond in sum not less than one-half of total amount to inure to benefit of persons performing labor on, or furnishing materials to be used in work of improvement, and Public Works Act (St. 1919, p. 487, § 1), specifies that every contractor to whom is awarded contract for improvement of building, road, excavating, or other mechanical work shall file bond in sum not less than one-half total amount payable by terms of contract, conditioned that if contractor fails to pay for materials, or other supplies or for performance of work, surety will pay same, and section 2 provides for filing of claim within time prescribed by Code Civ. Proc. § 1187.

3. Municipal corporations ⟹346.

Bond of street work contractor *held* to be statutory bond (St. 1919, p. 487).

> The bond began with recital of Act May 10, 1919 (St. 1919, p. 487), and in stating condition of obligation, specifically referred to Public Works Act 1919 approved May 10, 1919, and provided that if contractor or subcontractor failed to pay for any materials, provisions, provender, or other supplies, or teams used in, upon, or about performance of work contracted to be done, or for any work or labor done thereon, surety would pay same.

4. Municipal corporations ⟹347(1).

Materials for street improvement were furnished and used in "public work or improvement" so that sureties were liable on bond given under statute respecting public works (St. 1919, p. 487).

> [Ed. Note.—For other definitions of "Public Work," see Words and Phrases.]

5. Municipal corporations ⟹347(1).

Street improvement contractor's surety *held* estopped to question filing of claims where procedure followed language of bond (St. 1919, p. 487).

Appeal from Superior Court, Los Angeles County; Dailey S. Stafford, Judge.

Action by B. Nicoll & Company against the National Surety Company and another. From a judgment for plaintiff, defendant named appeals.

Affirmed.

Arthur M. Ellis and Thomas S. Bunn, both of Los Angeles, for appellant.

C. E. Spencer, of Beverly Hills, and Alfred E. Dennis, of Los Angeles, for respondent.

PLUMMER, J.

The plaintiff had judgment on a surety bond executed by the appellant for and on account of materials furnished the defendant George A. Simpson Company, in the performance of certain work. From this judgment the surety company appeals.

The complaint alleges the furnishing of materials and the failure of the Simpson Company to pay therefor. The questions before the court are whether the action can be maintained, and whether, under the circumstances, the surety company is bound by its obligation.

So far as material for our consideration, the complaint and the undertaking set out therein executed by the surety company are as follows:

"That on or about the 5th day of August, 1926, in the County of Los Angeles, State of California, Geo. A. Simpson Company, as contractor, entered into a contract with T. R. Mini, as street superintendent of the city of Burbank, California, wherein and whereby said Simpson Company agreed to do and perform certain work and labor and furnish certain materials for the said city of Burbank for the improvement of that certain street in said city known and designated as Winona Avenue from the street in said city known as Hollywood way to the westerly limits of the city of Burbank, by grading and paving the same and installing water pipes therein in pursuance of and in accordance with the resolution of intention of the Board of Trustees of the said city of Burbank, numbered 785, adopted on or about April 1, 1926. That on said day the defendant herein did make, execute and deliver unto the said city of Burbank and the said street superintendent thereof, a bond to secure the payment of all materialmen, laborers and mechanics who might thereafter perform work and labor or furnish material to the said Geo. A. Simpson Company on said work, in the penal sum of $15,000.00; that said bond was filed in the office of the city clerk of said city and was approved by the Board of Trustees of said city of Burbank on August 5, 1926; that said bond is in words and figures as follows, to-wit:

"National Surety Company of New York
"Capital and Surplus over $14,000,000
"Contractor's Bond

"Under act covered in Chapter 303, 1919 Statutes May 10, 1919.

"Know all men by these presents: That Whereas Geo. A. Simpson Company, of Burbank, State of California, as contractor and principal, has this day entered into a contract with T. R. Mini, Street Supt. City of Burbank, as per plans and specifications thereof now on file in the office of the said city of Burbank, and to perform all work and furnish all the material in accordance with the specifications therefor, as is more fully set forth in said contract, to which said contract reference is hereby made; and

"Whereas, an act of the legislature of the State of California, entitled 'An act to secure the claims of materialmen, mechanics or laborers employed by contractors upon the said State, municipal or other public works, covered in Chapter 303, 1919 Statutes, approved May 10, 1919,' and its amendments, requires such contractors to file with the body by whom such contract was awarded a good and sufficient bond to secure the claims to which reference is made in this act, now these presents

"Witnesseth, That the said Geo. A. Simpson Company, as contractor and principal, and National Surety Company of New York, as surety, are held and firmly bound unto all materialmen who may furnish material or supplies to the said contractor, for the said work contracted to be done, and all mechanics and laborers who may perform work and labor of any kind or nature, in the sum of Fifteen Thousand and 00/100 ($15,000.00) gold coin of the United States, being not less than one-half of the total amount payable by the terms of this contract, for which payment, well and truly to be made, we bound ourselves, or heirs, executors, administrators, successors and assigns, jointly and severally by these presents.

"Sealed with our seals and dated this 28th day of July, A. D. 1926.

"The condition of the above obligation is such, that if the above bounden contractor in said contract, or his or its sub-contractor, fails to pay for any materials, provisions, provender or other supplies, or teams used in, upon or about the performance of the work contracted to be done, or for any work or labor done thereon of any kind, the surety on this bond will pay the same, in an amount not exceeding said sum hereinbefore specified, provided that any and all claims shall be filed and proceedings had regarding the same, as provided for by the terms of said act; otherwise, this bond shall be null and void.

"Geo. A. Simpson Company
"[Signed] Geo. A. Simpson, Pres.
"National Surety Company,
"[Signed] By Geo. D. Marcy,
"Its Attorney in Fact."

The bond was duly acknowledged by the parties thereto. The claim of the plaintiff was filed within the time as prescribed by the act of 1919, but not within the time prescribed by the act of 1911.

[1] Upon this appeal it is contended by the appellant that the bond executed by it is valid under the terms of the act of 1911, and must be construed as a bond given only under that act, and therefore that the plaintiff has no standing in court by reason of not having filed its claim within the time limit therein specified. The language used by the appellant in this particular is as follows: "Considering the bond as a 1911 act bond, as the appellant represents it is, the bond is a valid contract, but the failure of the plaintiff to file his claim with the superintendent of streets within thirty days after the date of the recording of the assessment, was fatal to recovery thereunder."

The appellant sets forth in its answer a portion of the resolution adopted by the board of trustees of the city of Burbank, as follows: "Section 6. That the proceedings for the aforesaid improvement shall be had and taken under and in accordance with the act of the legislature of the State of California, designated and known as the 'Improvement Act of 1911, approved April 7, 1911,' and all acts supplementary thereto, or amendatory thereof." And in support of its answer attempted to introduce testimony showing that the proceedings relative to the improvement on Winona avenue were taken and had in accordance with the provisions of said act. This testimony was all stricken out by the trial court, and the act of the court in so doing is assigned as error. We agree with the appellant that the ruling of the court in this particular was erroneous. The appellant had a right to show under what act the improvement was being done, the amount of the contract, and other particulars which might be taken into consideration in determining whether the bond executed by the surety company could be held enforceable. This view, however, does not necessitate a reversal of the judgment. While it may be conceded that there is sufficient in the complaint to lead to the conclusion that the improvement was had under and in accordance with the provisions of the act of 1911 (St. 1911, p. 730) and that the bond in this case was not given in literal accordance with the provisions of section 19 of the act of 1911, as it read at the time of the execution of the contract and bond involved herein, there is no question but that the work done and contracted to be done on Winona avenue was a public improvement. Following the admission and argument in support of appellant's theory that the bond must be construed only as a bond given under the act of 1911, appellant contends that the recitals in the bond that it was executed in pursuance of the Public Works Act, approved May 10. 1919, must be disregarded; and also it is further argued that if the bond is construed as given under the act of 1919, then it is not valid for any purpose.

[2-4] While it has been held frequently that mere recitals in a bond or undertaking that it is given in accordance with a certain act will be disregarded if it appears from the undertaking that it was given under a different act, such cases however, are not pertinent here. The bond in question begins with the recital of the Act of May 10, 1919 (St. 1919, p. 487), commonly called the "Public Works Act," which recital, if standing alone, might be disregarded, but when we come down to the condition of the obligation, we find specific references to the Public Works Act of 1919, which stamp the obligation as being given under that act. If held to be a bond given under the Public Works Act, is it enforceable?

Two cases are specially relied upon by the appellant in support of its claim that as such a bond, it is invalid. The first is that of Evans v. Shackelford, 64 Cal. App. 750, 222 P. 846, wherein this court considered at some length the questions also involved in the instant action in reaching a conclusion that the bond there involved was one given under the provisions of the Public Works Act. But it was not held in that case that the bond was invalid. The plaintiff was denied relief because he had not filed his claim in accordance with the provisions of the Public Works Act. This case is not an authority in support of appellant's contention that as such a bond, it is unenforceable.

The second case strongly urged upon our attention is that of Hoffman v. Kennedy, 52 Cal. App. 612, 199 P. 341. In that case it was held that the bond was invalid by reason of the fact that it did not cover sufficiently the provisions required to be in such a bond by section 8a of the Drainage Act under which the work was being performed. That case, however, is readily distinguishable from the one at bar. A quotation from the syllabus illustrates this fact: "A bond not running to the county, but to any and all persons performing labor or furnishing materials and not conditioned for the faithful performance of the contract, and a bond in the penal sum of one-fourth of the contract price and conditioned in accordance with the public works act of 1897, as amended in 1915, failed to comply with the requirements of section 8a of the Drainage Act of 1903, and no recovery can be had thereon by subcontractors." Section 19 of the act of 1911 specifies that every contractor, etc., to whom is awarded any contract in street work, before executing the said contract, shall file with the superintendent of streets a good and sufficient bond in a sum not less than one-half of the total amount, etc., executed by the principal and two sureties, and shall be made to inure to the benefit of any and all persons, companies, or corporations who perform labor on, or furnish materials to be used in the work of improvement, etc. The Public Works Act (St. 1919, p. 487, § 1) specifies that every contractor, person, etc., to whom is awarded a contract for improvement etc., of any building, road, excavating, or other mechanical work shall, before entering upon such work, file with the managers, trustees, officers, board of supervisors, etc., a good and sufficient bond in not less than one-half the total amount payable by the terms of the contract, the bond to be executed by the contractor and at least two sureties, etc., conditioned that if the contractor or his subcontractor fails to pay for any materials, provisions, provender, or other supplies, etc., for or about the performance of the work, the surety will pay the same. Section 2 of the act then provides for the filing of a statement or claim, together with a statement that the claim has not been paid, within the time prescribed by section 1187 of the Code of Civil Procedure.

The fact that under the provisions of section 19 of the act of 1911, materialmen or laborers are given remedies which are not accorded them under the provisions of the act of 1919, as insisted upon by the appellant, is wholly immaterial so far as the obligation of the surety is concerned. Both the act of 1911 and 1919 provide for the giving of a bond or an undertaking to secure the payment to persons who have furnished materials. The fact that one of the sections is broader than the other, as to the extent of the materialmen or laborers who may have an action upon the bond, does not affect the validity of the bond if the person prosecuting the action has furnished that which is included within the terms of the section of the statute under which the obligation is executed by the surety.

The opinion in the case of Hoffman v. Kennedy, supra, shows that the court was constrained to render the decision which it did by reason of the fact that the bond, while not a common-law bond, did not conform sufficiently with any statute to constitute it a statutory bond, and therefore amounted to only a written instrument upon which no liability existed. The bond under consideration does conform to the Public Works Act of 1919, and may therefore be held to be a statutory bond upon which the sureties are liable, if the materials which were furnished were furnished and used in a public work or improvement. Such is the case here, even though the improvement is upon a street and not upon a building.

[5] The appellant cites the cases of Baum v. Whatcom County, 19 Wash. 626, 54 P. 29; Miles v. Baley, 170 Cal. 151, 149 P. 45; Milliron v. Dittman, 180 Cal. 443, 181 P. 779; Adams v. Williams, 97 Miss. 113, 52 So. 865, 30 L. R. A. (N. S.) 855, Ann. Cas. 1912C, 1129, and a number of others to the effect that erroneous references or recitals, considered as surplusage, found in a bond, would not invalidate the same if it conformed to the act of 1911, and that it would bind the surety to the extent contemplated by the statute, and no further. These cases are all applicable, in support of the undertaking in this case, if based upon the act of 1919. The really vital point in this case is as to whether the claim or statement constituting the basis of the plaintiff's action was filed on time and with the proper officers. If the act of 1919, upon which we think the bond in this case is based, applies, then by its very terms the sureties are bound. In the condition of the obligation given by the appellant we find the following: "* * * Provided, that any and all claims shall be filed, and proceedings had regarding the same, as provided for by the terms of said act." (Reference being to the Public Works Act approved May 10, 1919.)

Having specifically obligated itself in this particular, we think that the appellant is estopped to raise any question as to the filing of claims, if the procedure in relation thereto followed the language of the bond. While not directly in point, the reasoning of the following cases would lead to such conclusion: Tormey v. McIntosh, 43 Cal. App. 411, 184 P. 1012; Lake v. O'Brien, 54 Cal. App. 543, 202 P. 158; Togni v. Taminelli, 11 Cal. App. 14, 103 P. 899; Boyd v. Liefer, 144 Cal. 336, 77 P. 953; 4 Cal. Jur. 367; 4 R. C. L. 67. Other authorities to the same point might be cited, but these illustrate the rule which we are setting forth, to wit, having, in clear and unambiguous language specifically directed when and how the claims should be filed, upon which it would consider itself bound, the appellant is now estopped to disclaim liability when the stated conditions have been strictly complied with.

The judgment is affirmed.

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111 Cal. App. 538

WALKER et al. v. VAN VALKENBURGH, Superintendent of Streets.

Civ. 543.

District Court of Appeal, Fourth District, California.

Feb. 3, 1931.

1. Municipal corporations ⚷278(½).

City electing to proceed under state statute in constructing electrolier system could not proceed partly under act and partly under some other plan (St. 1911, p. 730; Fresno City Charter, § 46).

2. Municipal corporations ⚷340.

Failure of contractors installing improvement to follow ordinance, if defect, was informality cured by curative act under which city proceeded (St. 1911, p. 768, § 82, and p. 743, § 21, as amended by St. 1929, p. 1661, § 15).

> Contractors installed electrolier system for city, proceeding under St. 1911, p. 730, page 768, § 82, and page 743, § 21, as amended by St. 1929, p. 1661, § 15, which provided that no assessment, warrant, or proceedings should be held invalid for error, informality, or other defects, where intention of council to do work has been actually published, and that act should be liberally construed, and that no informality or omission of officer of city in any procedure taken under act not affecting jurisdiction of city council to order improvement should avoid proceeding or assessment for cost of work. Ordinance of city of Fresno with which contractors did not comply provided general plan for licensing of electrical inspectors, and provided that no work could be installed nor materials furnished by those not having licenses.

3. Municipal corporations ⚷362(1).

Eight days' delay in completing improvement was mere informality not defeating contractors' right to payment, where contractors asked for extension which city refused (St. 1911, p. 768, § 82, and p. 743, § 21, as amended by St. 1929, p. 1661, § 15).

Mandamus by R. H. Walker and another, copartners doing business under the firm name and style of Walker & Martin, against C. C. Van Valkenburgh, Jr., as Superintendent of Streets of Fresno, a municipal corporation.

Writ granted.

Simpson & Simpson, of Los Angeles, and Walter Sorensen, of Fresno, for petitioners.

Claude L. Rowe, of Fresno, for respondent.

MARKS, J.

This is an original petition filed in this court praying for a writ of mandate commanding respondent to make and issue an assessment to cover the sum due for work performed and materials furnished in the completion of a contract under the Improvement Act of 1911, and attach thereto a diagram of such assessment, together with a warrant for the amount due.

The city of Fresno is a municipal corporation organized as such under a freeholders' charter. The respondent, C. C. Van Valkenburgh, Jr., was, at all times material to this proceeding, acting superintendent of streets of the city of Fresno. Petitioners were contractors who performed the work of constructing and installing an electrolier system on certain streets of the city of Fresno.

The case comes before us on an agreed statement of facts, from which it appears that all the proceedings taken by the city were in due form and in accordance with the provisions of the Improvement Act of 1911, save, however, two controversial exceptions, and that the contract was fully performed in accordance with the plans and specifications. Respondent maintains that these exceptions justify his refusal to proceed with the assessment.

It is admitted that the peremptory writ of mandate must issue, unless it be found that the provisions of an ordinance of the city of Fresno apply to the proceedings in question here, and unless it be further found that the failure of the contractors to secure the necessary licenses and permits thereunder and to complete the work within the time fixed by the contract be found fatal to the rights of petitioners. This ordinance created the offices of electrical inspector and assistant electrical inspectors, and provided their duties and compensation, and provided also for the issuance of permits for electrical work and for the inspection thereof, for the examination of master and journeyman electricians and the issuance of certificates thereto, and required the filing of master electrician's bonds.

It is admitted that the petitioners did not complete the work within the time required in their contract, and that it was not completed until eight days thereafter; that they applied for an extension of time for the completion of such work, which application was denied by the city commission of Fresno.

It is further admitted that petitioners and their employees were not licensed as electrical, or assistant electrical inspectors, nor master or journeyman electricians, nor did they or any of them pass the examination required by the ordinance of the city of Fresno under which such licenses or permits could be issued. This ordinance provides a general plan for the licensing, by the city, of electrical inspectors, assistant electrical inspectors, master electricians, journeyman electricians, and apprentices. It is provided that no work can be installed nor materials furnished by those not having such licenses. Respondent urges that this ordinance was passed under the general police power given by the Constitution and laws to the city of Fresno for the protection of life and property therein, and that, as this is a legal exercise of the police power given to the city, its provisions should be construed as forming a part of the general procedure established by state law governing local improvement proceedings under the provisions of the Improvement Act of 1911 (St. 1911, p. 730). Petitioners urge that this ordinance applies to the installation of electric wires, equipment and appliances in and about buildings and cannot be construed to apply to the construction of an electrolier street lighting system. While the language of the ordinance and its general purposes would lend considerable weight to this argument, we do not find it necessary to decide this question here.

Section 46 of the charter of the city of Fresno provides as follows:

"The Commission is hereby authorized and empowered to construct, reconstruct, repair, maintain and improve streets and highways, and to open and close streets, and to make, acquire, construct, reconstruct, repair, operate and maintain all other public improvements of whatsoever kind or character in accordance with the laws of the state of California now existing or hereafter enacted when the Commission elects to follow such state laws, the city being specially and generally empowered to avail itself of such state laws, and nothing in this section contained shall be construed as an abridgement or limitation of the general power of the city to avail itself of State laws.

"The Commission shall also have power by ordinance to provide a plan or scheme for the payment of all or any part of the cost of the improvement, construction, reconstruction, repair, operation or maintenance of any public street, highway or place, and of any special lighting or electrolier system, and of the cost of any street opening or closing by the levy and collection of special assessments upon abutting, adjoining, contiguous and other property specially benefited in accordance with the benefits accruing to such property by reason thereof."

[1] Under the terms of this charter provision it is evident that the city of Fresno may follow any of the state improvement acts which may be applicable in installing its local improvements. The city has failed to exercise the power seemingly given to it by the charter, and has passed no ordinance providing a plan or scheme for the payment of the cost of the construction of an electrolier system within the city. It therefore must proceed under the provisions of a state statute. In the installation of the work in question here, it elected to proceed under the Improvement Act of 1911. Having thus elected so to do, the city was bound to follow the provisions of that act, and could not proceed partly under the act and partly under some other plan or scheme of its own. Cole v. City of Los Angeles, 180 Cal. 617, 182 P. 436; Gadd v. McGuire, 69 Cal. App. 347, 231 P. 754.

The Improvement Act of 1911 provides a detailed, comprehensive, and complete plan for the construction of and payment for local improvements. It is complete in itself. Among other things it provides for the appointment of inspectors to inspect the work during its progress and to see that it is done in accordance with the contract and the plans and specifications. When such inspectors are appointed under the provisions of this act and perform their duties in accordance with its requirements, the purposes of the act are fulfilled. We are of the opinion that the city of Fresno has no more authority to provide a separate plan for the appointment and licensing of such inspectors and for the examination and licensing of electricians engaged in the work of performing the terms of the contract and installing the electrolier system than it would have to attempt to dispense with some of the necessary requirements of the Improvement Act of 1911. It must either proceed under and in accordance with the provisions of the Improvement Act of 1911 or adopt a plan or scheme of its own, if authorized so to do. It having failed to adopt such a plan or scheme, it cannot, by ordinance or otherwise, change or add to the provisions of the state law under which it is proceeding. City of Long Beach v. Lisenby, 175 Cal. 575, 166 P. 333; People v. City of Long Beach, 155 Cal. 604, 102 P. 664.

[2] Assuming, but not holding, that the requirements of the ordinance were binding upon the contractors, we are of the opinion that, under the curative provisions of sections 21 and 82 of the Improvement Act of 1911 (St. 1911, p. 768, § 82, and page 743, § 21, as amended by St. 1929, p. 1661, § 15), their failure to conform to and follow the provisions of the ordinance was an informality which would not defeat their right to their pay under their contract. It will be necessary for us to consider these two sections of the Improvement Act of 1911 in considering the second contention of respondent. The authorities hereafter cited are authority for our conclusion that the failure of the contractors to follow the provisions of the ordinance, if a defect, is an informality cured by these sections.

Respondent contends that petitioners' delay of eight days in the completion of their work, after the time limit specified in their contract, will defeat their right of recovery herein. Under many of the earlier decisions of the Supreme Court construing the provisions of local improvement acts of California, this contention of respondent finds support. However, in many of these local improvement acts the Legislature has softened the rigor of these earlier decisions by the insertion of amendments containing curative provisions under which many of the defects which were formerly held fatal to the proceedings are now regarded as immaterial and unimportant informalities.

The curative provisions of the Improvement Act of 1911 are found in sections 21 (formerly 26) and 82 of the act. They are, in part, as follows:

"Sec. 21. No assessment, warrant, or diagram, and no proceedings prior to the assessment, shall be held invalid by any court for any error, informality, or other defect in the same, where the resolution of intention of the council to do the work, has been actually published as herein provided. * * *"

"Sec. 82. This act shall be liberally construed to the end that its purposes may be effective. No error, irregularity, informality, and no neglect or omission of any officer of the city, in any procedure taken hereunder, which does not directly affect the jurisdiction of the city council to order the improvement, shall avoid or invalidate such proceeding or any assessment for the cost of work done thereunder. The exclusive remedy of any person affected or aggrieved thereby shall be by appeal to the city council as herein provided."

In discussing the effect of section 82 in the case of Rutledge v. City of Eureka, 195 Cal. 404, 234 P. 82, 86, it was said (quoting the section):

"This is a most comprehensive curative provision. It is more than a curative act.

A curative act is retrospective. Here the same statute which prescribed certain requirements provides that failure to comply with such requirements shall not avoid the assessment. It is competent to provide in the law itself that a disregard of the provisions not essential to confer jurisdiction on the council to order the work may in turn be disregarded."

These curative sections were also discussed in the case of City Street Improvement Co. v. Watson, 50 Cal. App. 687, 195 P. 967, 968, in which it was said:

"'In any proceeding designed to subject the property of an individual to the burden of tax or assessment, certain elements are essential to constitute compliance with the mandates of the state or federal Constitutions. It is agreed on all hands that no curative act can deprive a property owner of the right to resist a pretended assessment which, if enforced, would deprive him of his property without due process of law or otherwise infringe his constitutional rights. But short of this, there is no more reason for denying to the statute before us than to that involved in Chase v. Trout, 146 Cal. 350, 80 P. 81, the effect of foreclosing any attack based upon the failure to pursue regularly or at all those steps which the Legislature was not bound to make a part of the statutory procedure. As is pointed out in Chase v. Trout, supra, the applicability of curative statutes is not to be determined solely by inquiring whether the steps omitted or defectively performed were "jurisdictional." The term "jurisdictional" has been used in various senses. The power to levy an assessment or impose a liability on private property is derived solely from the statute, and must be exercised in the manner laid down in the statute. In this sense, the jurisdiction of the board extends only to its right to act in the manner prescribed by the Legislature. But with respect to any steps which are not constituionally necessary, the Legislature may, in the very act which requires these "jurisdictional" steps to be taken, declare that unless objection is made at a certain time or in a certain way, a failure to take these steps shall not affect the validity of the proceeding. This is the plain meaning of the holding in Chase v. Trout, supra, and we do not doubt that it is equally applicable here.' Imperial Land Co. v. Imperial Irr. Dist., 173 Cal. 660, 161 P. 113.

"The foregoing was quoted with approval and applied to the 'curative' clauses of the Improvement Act of 1911, in Watkinson v. Vaughn, 182 Cal. 55, 186 P. 753, and the court further said in pointing out the distinction between the so-called jurisdictional requirements called for by the statute and those jurisdictional requirements which are necessary for a compliance with 'due process of law': 'This very question of what defects in street improvement proceedings could be cured under such provisions as those of section 16 and section 66 of the present act was considered at length in Chase v. Trout, 146 Cal. 350, 80 P. 81. The argument was there made that no so-called "jurisdictional defect could be thus cured." In response, however, to this argument the decision made a distinction between those so-called jurisdictional requirements which are called for by statute and those jurisdictional requirements which are necessary for a compliance with the constitutional provision that property shall not be taken without due process of law, or with other constitutional provisions, and it was held that, while failure to comply with jurisdictional requirements of the later class could not be cured, a failure to comply with those of the former class might be cured by action of the Legislature, since the Legislature had the right, in the first instance, to omit such requirements entirely. The discussion on this point is thus summed up in Chase v. Trout, supra (146 Cal. 359, 80 P. 84): "The correct proposition is that, as the Legislature has power to devise any scheme for the assessment and levy of taxes for local improvements, provided such scheme includes such notice and opportunity for hearing to the owner of property taxed as will be sufficient to constitute the due process of law required by the Constitution, and otherwise complies with constitutional limitations and restrictions, so the Legislature, by a curative clause in the law establishing the scheme, may provide that the issuance of a bond, or the execution of a deed, in the enforcement of such levy or assessment, shall be conclusive evidence of the regularity of the performance of all the required steps in the proceeding, excepting those that are necessary to constitute the due process of law, or to comply with any other constitutional prerequisite. As to all these other statutory steps or acts, the same power which prescribes them is competent to declare that their nonobservance shall not be fatal to the validity of the tax, and that no inquiry may be made concerning them. This is substantially the effect of the statute in question here."' See, also, Baird v. Monroe, 150 Cal. 568, 89 P. 352; Board of Education v. Hyatt, 152 Cal. 515, 93 P. 117; Wilcox v. Engebretsen, 160 Cal. 292, 116 P. 750; Schaffer v. Smith, 169 Cal. 764, 147 P. 976. * * *

"From the overwhelming weight of authority from Chase v. Trout down, we are compelled to conclude that the assessment cannot now be declared to be invalid on account of the delay of two days in obtaining an extension of time in which to complete the work. It will be admitted that, leaving out of view the curative provisions of the act, the authorities are ample and uniform to the effect that the superintendent of streets and the city council have no power to revive or validate a dead contract, and that orders of extension made after the expiration of the time within which such contracts are by their terms to be performed are void. [Citing cases.] However, in none of these cases was the effect of the curative provisions of a statute such as are contained in the Improvement Act of 1911 given any consideration. These curative provisions were considered in the Chase v. Trout Case, and that case has never since been questioned."

To the same effect are the cases of Bou v. Willits, 61 Cal. App. 32, 214 P. 519, and In re East Bay, etc., Water Bonds, 196 Cal. 725, 239 P. 38.

A delay in securing an extension of time in which to complete the work until after the expiration of the time limit for completion specified in the contract was held an informality which was cured by the curative provisions of the Improvement Act of 1911 in the cases of Oakland Paving Co. v. Whittell Realty Co., 185 Cal. 113, 195 P. 1058, and Tibbits Paving Co. v. Firth, 53 Cal. App. 771, 200 P. 976.

[3] If a delay in securing an extension of time within which to complete the contract is a mere informality which is cured by the curative provisions of the Improvement Act of 1911, we are of the opinion that the same rule should apply to the delay in the completion of the work where the contractor has in due time asked for an extension of time, which request had been denied by the governing body of the city.

The prayer of the petitioner is granted, and it is ordered that a peremptory writ of mandate be issued and directed to respondent, directing and requiring him to forthwith make and issue an assessment to cover the sum due for the work performed and specified in the contract herein referred to, including all incidental expenses, in conformity with the provisions of the Improvement Act of 1911, and to attach thereto a diagram exhibiting each street or street crossing, lane, alley, place, or court, property, or rights of way on which any work has been done, showing the relative location of each lot to the work done, numbered to correspond with the numbers of the assessments, together with a warrant to be attached thereto, all pursuant to the provisions of said Improvement Act of 1911, and to file said assessment, diagram, and warrant in the office of the city clerk of the city of Fresno, and to do and perform any and all acts necessary and proper under the provisions of the Improvement Act of 1911, to make a valid assessment and diagram and warrant for the payment for the work done and materials furnished and incidental expenses under the terms of the contract and proceedings hereinbefore referred to.

We concur: BARNARD, P. J.; JENNINGS, J.

PEOPLE'S FINANCE & THRIFT CO. OF VALLEJO v. SHAW-LEAHY CO. et al.*

Civ. 7495.

District Court of Appeal, First District, Division 1, California.

Feb. 5, 1931.

As Modified on Denial of Rehearing March 7, 1931. Hearing Granted by Supreme Court April 6, 1931.

1. Bills and notes 🔑155.

Accelerating clauses in trade acceptance, providing that note should mature at option of holder in event acceptor suffered fire loss or failed to meet at maturity any prior trade acceptance, *held* not to destroy negotiability of instrument.

2. Bills and notes 🔑385.

Transferee of negotiable trade acceptance, with acceleration clauses, had no duty to notify acceptor prior to fixed maturity date that it had instrument.

Appeal from Superior Court, City and County of San Francisco; J. T. B. Warne, Judge.

Action by the People's Finance & Thrift Company of Vallejo against the Shaw-Leahy Company and another. From a judgment for plaintiff, the Shaw-Leahy Company appeals.

Affirmed.

Stanislaus A. Riley, of San Francisco, for appellant.

O'Hara, Hatch & Pope, of Vallejo, for respondent.

PER CURIAM.

Respondent obtained judgment against the corporate defendants above named in an action to recover on a trade acceptance; and one of the defendants, Shaw-Leahy Company, has appealed; the single question presented for determination being the negotiability of the trade acceptance.

The instrument bears date November 8, 1924, and was made payable on February 12, 1925. It was given by appellant to the defendant Martin S. Barrett Company (hereinafter referred to as defendant) in payment of certain goods sold by the latter to appellant at an agreed price of $475. Under the terms of the sales contract, appellant was given the right to return the goods or any part thereof at any time prior to the maturity date of the trade acceptance; and on December 1, 1924, it exercised its right in this regard and returned the goods, which were accepted by the defendant. Thereupon by mutual consent the sales contract was rescinded and appellant demanded the surrender of the trade ac-

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*Hearing granted 3 P.2d 1012.

ceptance. In response to the demand defendant represented that for business reasons it desired that the instrument remain with the bank until the maturity thereof, promising that it would pay the same at that time; and appellant assented to the proposition. The truth of the matter was that two weeks previously and on November 15, 1924, defendant assigned and transferred said trade acceptance to respondent for a valuable consideration, but appellant did not learn of such assignment until more than a year and a half thereafter. When the trade acceptance fell due, defendant failed to keep its promise to pay the same, and more than two years thereafter respondent brought this action against appellant and defendant to collect the amount thereof. The instrument in question reads as follows: "Trade Acceptance. The obligation of the acceptor of this bill arises out of the purchase of goods from the drawer. Upon the acceptor hereof suspending payment, giving a chattel mortgage, suffering a fire loss, disposing of his business or failing to meet at maturity any prior trade acceptance, this trade acceptance, at the option of the holder, shall immediately become due and payable. No. 728. San Francisco, Calif., date—Nov. 8, 1924. $475.00. On February 12, 1925, pay to the order of Martin S. Barrett Co., 55 New Montgomery St. San Francisco, Calif.—Four Hundred seventy-five and No/100 Dollars. Value received and charge the same to the account of Martin S. Barrett Company, 55 New Montgomery Street, San Francisco. Shaw-Leahy Co. 416 Market Street, San Francisco, Calif. Martin S. Barrett, Drawer, President." And across the face of the instrument was written: "Payable at Anglo-California Trust Co., Market and Sansome streets, S. F. Shaw-Leahy Co., Inc. D. R. Shaw."

[1] The question as to the negotiability of the instrument arises from the provision thereof accelerating its maturity date; and appellant contends as a matter of law that in order to preserve negotiability the events and contingencies specified in the acceleration clauses must be such in their nature that the happening thereof will be brought about by some act or omission on the part of the acceptor, that is, which will depend upon his future volition; also that the same must relate to some business act incidental to the collection of the instrument. As will be noted, the provision of the instrument in question declares that the same is payable on February 12, 1925, but shall mature immediately upon the happening of any one of the five events or contingencies set forth therein; and while appellant concedes that there are cases sustaining negotiability of instruments embodying acceleration clauses similar in substance to clauses 1, 2, and 4 of the instrument under consideration, it is claimed that clauses 3 and 5 thereof, relating to the events of "suffering a fire loss" and "failure to meet at maturity any prior trade acceptance," do not fall within the scope of the foregoing rules, and therefore are destructive of negotiability.

Much of the confusion existing in the decisions of courts of the various states relating to the law of negotiable instruments which led to the adoption in nearly all of the states of the uniform negotiable instrument law seems to have continued particularly with reference to the effect upon negotiability of certain forms of accelerations clauses; and evidently any attempt to reconcile the conflicting cases would be both interminable and impossible. As said by the Supreme Court of this state in the case of Utah National Bank v. Smith, 180 Cal. 1, 179 P. 160, 161, in quoting the language of the supreme court of the state of Utah (Felt v. Bush, 41 Utah, 462, 126 P. 688): "* * * The negotiable instruments law was intended to give legislative sanction to the majority rule to which reference has been made and was conceived by its authors and adopted by the different state Legislatures for the express purpose of harmonizing the conflicting decisions which had been rendered on the subject of negotiable instruments and the rights of those interested therein whose rights were acquired before maturity. As we view it, therefore, it is our plain duty to follow the numerous decisions that have directly passed upon the negotiable instruments law, and have construed it in accordance with the majority rule. The question is one of business expediency, and not of logic or equity as applied to an individual case."

The acceleration clauses contained in the instrument in the present case are identical in form with those construed by the Supreme Court of Idaho, in the case of McCornick v. Gem State Oil & Products Co., 38 Idaho, 470, 222 P. 286, 34 A. L. R. 867, which state, like California, has adopted the uniform negotiable instrument law, and it was held that said clauses were not destructive of negotiability. Appellant has advanced no convincing reasons to show that the decision in that case is unsound or contrary to the weight of authority; and we are of the opinion, therefore, that it is determinative of the present controversy.

The arguments appellant makes in furtherance of its legal contentions are based mostly upon certain language used in an article appearing in a law review published by one of the eastern universities, portions of which article are quoted in appellant's brief. But it is evident from an inspection thereof that the author, after reviewing the conflicting decisions, assumes only to set forth his individual views as to what the law upon this particular subject ought to be, some of which are in harmony with the law as declared in adjudicated cases, and others are in conflict therewith. The author's view that negotiability is destroyed by acceleration clauses relating to extrinsic facts is admittedly based upon the English rule announced in the case of Alexander v. Thomas, 16 Q. B. 333; but the author frankly concedes that "numerous decisions in this country repudiate the English case and uphold negotiability" (citing among other cases "those collected in 1 Daniel Negotiable Instruments, § 43; 8 Corpus Juris, 138, note 75; and Van Arsdale-Osborne Brokerage Co. v. Martin, 81 Kan. 499, 106 P. 42"). For example, it has been held that negotiability is not destroyed where the instrument provides that the maturity date shall be accelerated if certain property is sold (Nickell v. Bradshaw, 94 Or. 580, 183 P. 12, 11 A. L. R. 623), or in case of the death of the maker before maturity (Miller, as Ex'r, v. Western College of Toledo, 177 Ill. 280, 52 N. E. 432, 42 L. R. A. 797, 69 Am. St. Rep. 242; Bristol v. Warner, 19 Conn. 7; Martin v. Stone, 67 N. H. 367, 29 A. 845); or upon the completion of a building (Stevens v. Blunt, 7 Mass. 240; Goodloe v. Taylor, 10 N. C. 458); or if certain machinery is sold (Ernst v. Steckman, 74 Pa. 13, 15 Am. Rep. 542; Cisne v. Chidester, 85 Ill. 523; Charlton v. Reed, 61 Iowa, 166, 16 N. W. 64, 47 Am. Rep. 808); or upon the delivery of certain property to the payee (Dobbins v. Oberman, 17 Neb. 163, 22 N. W. 356). And the cases of McCornick v. Gem State Oil & Products Co., supra, and Ernst v. Steckman, supra, are authority for the proposition that it is not essential that the events be such that the happening thereof depends upon the future volition of the acceptor, or be wholly under his control, but that they may relate to the happening of contingencies beyond the control of both the acceptor and the holder. True, there are cases holding that negotiability is destroyed where acceleration is placed entirely under the control of the holder, or made dependent upon his whim or caprice, regardless of any act of the acceptor, such as accelerating maturity whenever the holder "deems himself insecure" (Moyer v. Hyde, 35 Idaho, 161, 204 P. 1068, 28 A. L. R. 695; First Nat. Bank v. McCartan, 206 Iowa, 1036, 220 N. W. 364), or upon the institution of suit or attachment proceedings against the maker or indorser (Great Falls Nat. Bank v. Young, 67 Mont. 328, 215 P. 651). But as will be noted that is not the situation here. Therefore, it would appear that aside from the decision in McCornick v. Gem State Oil & Products Co., supra, there is ample authority to sustain the contention that accelerating clauses such as "suffering a fire loss" and "failure to meet at maturity any prior trade acceptances" are not destructive of negotiability.

Appellant places much reliance also upon the case of Great Falls National Bank v. Young (Mont.), supra, but as will appear from the decision itself the contrary views therein expressed are based upon the published article above mentioned, and are not only incompatible with the legal principles enunciated by the Supreme Court of Idaho in the case of McCornick v. Gem State Oil & Products Co., supra, but are also in direct conflict with the established rule followed in the states of Oregon and Iowa. Furthermore, the decision in the Montana case is somewhat questioned in the fourth edition of Brannan's Negotiable Instruments Law (p. 54); and the construction the Supreme Court of Montana places upon the term "determinable future time," as used in the Uniform Negotiable Instruments Law (Civ. Code, § 3082, subd. 3, and section 3085, subd. 2) is evidently at variance with the one adopted by the Supreme Court of this state in the case of Utah State National Bank v. Smith, supra, wherein it is said: "A matter is determinable 'that may be accurately found out, settled, or decided. Standard Dictionary. That is, 'capable of being determined, definitely ascertained, decided upon, or ended.' Webster's New International Dictionary. A future determinable time could be one determinable at some time in the future, as well as one determinable at present, or in advance." For the reasons stated we are of the opinion that the decision in the Montana case should not be followed in preference to the decision in the Idaho case.

The language used in deciding the case of Westlake Mercantile Corp. v. Merritt, 204 Cal. 673, 269 P. 620, 61 A. L. R. 811, cited by appellant, has no application to the questions at issue here. There the instrument provided: "The obligation of the acceptor hereof arises out of the purchase of goods from the drawer, *maturity being in conformity with original terms of purchase*" (italics ours); and it was held in substance that the clause was more than a mere statement of the transaction which gave rise to the instrument, as is permitted by the Negotiable Instrument Law (subdivision 2, § 3084, Civ. Code); and that pursuant to the italicized portion of the provision maturity of the instrument was made subject to the terms of an extrinsic contract of purchase, and that consequently negotiability was destroyed because the source of the acceptor's obligation to pay did not arise from the instrument itself, but grew out of a collateral transaction; in other words, that one of the principal elements of negotiability is certainty of payment, and that therefore since the italicized words rendered payment conditional or uncertain, they were destructive of negotiability.

[2] Appellant further contends that respondent is estopped to assert any rights against appellant under said trade acceptance because of the failure of respondent at any time prior to August, 1925, to notify appellant

of its claim to said trade acceptance. We find no merit in the point, for if, as held, the trade acceptance be negotiable, it was admittedly acquired for a valuable consideration prior to the maturity date thereof and also before the rescission of the sales contract pursuant to which the trade acceptance was given; and consequently under such circumstances there would seem to be no legal duty imposed upon respondent to notify appellant prior to the fixed maturity date of the instrument that it was the owner and holder thereof.

The judgment is affirmed.

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111 Cal. App. 622

PEOPLE v. WILEY.

Cr. 1138.

District Court of Appeal, Third District, California.

Feb. 7, 1931.

1. Criminal law 🔑624.

That verdict as to sanity of accused was not signed by same member of jury, as foreman, who signed previous verdict establishing defendant's guilt of murder, did not invalidate verdict (Pen. Code, § 1026).

2. Criminal law 🔑871(2).

Signing of verdict by jury foreman is mere means of authenticating finding of jury.

3. Criminal law 🔑871(2).

In absence of statute requiring verdict to be signed by jury foreman, verdict may be authenticated by any jury member.

4. Criminal law 🔑624.

In murder prosecution, where same jury tried guilt and insanity of accused, requiring accused to assume burden of proving his insanity was proper, without requiring further evidence of crime than was introduced on issue of guilt.

5. Criminal law 🔑633(1).

Where accused in murder prosecution failed to request appointment of alienists, he was not prejudiced by court's failure to appoint them (Pen. Code, § 1027).

> Pen. Code, § 1027, provides that, when defendant pleads not guilty by reason of insanity, the court must select and appoint two alienists to examine the defendant and investigate his sanity. Not only did accused fail to request appointment of alienists, but there was no objection to evidence of the alienists who did testify on the part of accused.

6. Criminal law 🔑633(1).

Refusing request of defendant, pleading insanity as defense, for appointment of two alienists, is error (Pen. Code, § 1027).

7. Criminal law 🔑633(1).

Examination of accused, pleading insanity, by alienists appointed by court, is not jurisdictional proceeding and may be waived (Pen. Code, § 1027).

8. Criminal law 🔑1171(1).

In murder prosecution, curtailment of accused's counsel's attempt to discuss result of verdict of "not guilty by reason of insanity" was not prejudicial error.

> Accused's counsel attempted to tell jury in his closing argument that, in event accused was found "not guilty by reason of insanity," he would not necessarily be discharged from custody, but the court would direct that he be confined in the state hospital for the criminal insane, unless it appeared that accused had recovered his sanity since committing the offense. The argument was interrupted and objected to by the prosecutor, who then erroneously stated, in the course of a colloquy with the court, that the verdict in question would necessarily make accused "a free man." The court also erroneously conceded this to be true.

9. Criminal law 🔑717.

In murder prosecution, attempt of accused's counsel to discuss result of verdict of "not guilty by reason of insanity" was improper, as it invaded province of court.

10. Homicide 🔑237.

Evidence *held* to support finding that alleged murderer was not insane at time of killing because of beating he received.

11. Criminal law 🔑720(9).

Prosecutor's argument in murder trial *held* not prejudicial.

> Accused defended on the ground of insanity. The prosecutor's argument was to the effect that accused must be held responsible for his conduct, that a witness stated that accused appeared to be perfectly normal, cool, and collected, not excited, after the homicide, and that accused knew what he was doing when he committed the homicide.

12. Witnesses ⚷277(2).

Where accused testified drinking and abuse night before homicide unbalanced him, cross-examination on conduct or recollection at shooting was proper.

> Accused contended that, as result of certain beatings received from the homicide victims, he was rendered unconscious, and that the following morning he committed the homicides before regaining full consciousness, and while suffering from traumatic psychosis, and in examination in chief offered supporting testimony.

13. Criminal law ⚷720(1).

Where defendant testifying as to his sanity failed to testify whether he comprehended nature of acts at time offense was committed, prosecution could comment on it.

Appeal from Superior Court, Stanislaus County; J. C. Needham, Judge.

Charles Wiley was convicted of murder in the first degree, and he appeals.

Affirmed.

Hugo McKinley and L. B. Schlingheyde, both of Modesto, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

The defendant was convicted of the crime of murder of the first degree and was sentenced to imprisonment for life. He became intoxicated and went on a rampage. He shot and killed three men. His excuse for the killing was that these men had beaten him the night before the fatal shooting until he became insensible and then robbed him of his money. His defense to the charge of murder was that the beating which he received caused temporary insanity, and that he therefore failed to appreciate the nature of the act which resulted in the killing.

At the trial the defendant denied his guilt and separately pleaded insanity. The jury found him guilty as charged and imposed the penalty of life imprisonment. The same jury subsequently found that he was sane at the time of the shooting. At the trial of the issue with respect to his sanity the verdict was signed by a member of the jury, as foreman, other than the one who signed the previous verdict which found him guilty of murder. The jury was polled at both trials and the members were unanimous in the rendition of their verdicts.

The appellant's attack is directed only to an asserted invalidity of the verdict as to his sanity. It is claimed this verdict is void because: (1) It was not signed by the same foreman who signed the verdict finding him guilty of the charge of murder; (2) the burden of proving his insanity was placed on the defendant without first requiring the prosecution to prove a prima facie case of guilt; (3) the court failed to appoint alienists as required by section 1027 of the Penal Code; (4) the argument of defendant's counsel was unduly restricted; and (5) the district attorney was guilty of prejudicial misconduct.

[1-3] The fact that the verdict as to the defendant's sanity was not signed by the same member of the jury, as foreman, who signed the first verdict establishing his guilt of the crime of murder, does not invalidate it. The signing of a verdict by a foreman is a mere means of authenticating the finding of the jury. There is no provision of the statutes requiring that the foreman of a jury, which is impaneled to try the issue of insanity, shall be the same foreman who is selected to try the chief issue as to the guilt of the accused. Section 1026 of the Penal Code provides that, in the event of a plea of insanity, that issue may be tried "either before the same jury [which tried the question of the guilt of the defendant as to the crime charged] or before a new jury, in the discretion of the court." Indeed, the law does not even require a verdict to be signed by a foreman. In the absence of such statute, we assume a verdict may be authenticated by any member of the jury. The form of a verdict is prescribed by statute and it does not require the signature of any member of the jury. The authenticity of the verdict is ascertained by requiring it to be orally declared in open court by the foreman. If demanded by either party, the verdict must be declared by each member of the jury as provided by section 1149 of the Penal Code. This is what is commonly termed polling the jury. In 16 C. J. 1100, § 2582, it is said: "In the absence of statute requiring it, a written verdict need not be signed by the foreman of the jury, or by any of the jurors, although it is the usual and better practice for one of the jury, particularly the foreman, to sign it."

[4] There is no error in requiring the defendant to assume the burden of proving his insanity at the time of the shooting without further evidence of the crime on the part of the prosecution. The case was tried by the same jury on both the issue as to the commission of the offense by the defendant and as to the plea of insanity. The evidence of the guilt of the defendant was already before the jury. It was said in Ex parte Merwin (Cal. App.) 290 P. 1076, 1077: "The cause presented by the information and the defendant's pleas thereto was 'a single cause and the trial thereof a single trial.'"

[5-6] The defendant was not prejudiced by the failure of the court to appoint two medical experts pursuant to section 1027 of the

Penal Code to examine the defendant with respect to his sanity. This right to such an examination on the part of the defendant was waived. The last-mentioned section provides in part: "When a defendant pleads not guilty by reason of insanity the court must select and appoint two alienists, at least one of whom must be from the medical staffs of the state hospitals * * * to examine the defendant and investigate his sanity. * * *"

This selection and appointment of alienists by the court was not made. That requirement on the part of the court, when it is requested, is mandatory. It is a humane provision and was enacted in the interest of fairness for the benefit of an impecunious defendant whose sanity, at the time of the commission of an alleged offense, is an issue at the trial. An examination of the accused by such impartial medical experts who are selected by neither of the partisans to the action, but by the court, is most likely to be free from bias. Upon request the defendant is entitled to the fulfillment of this requirement of the statute. It would constitute error to refuse such request.

[7] The examination of an accused by alienists which are appointed by the court is, however, not a jurisdictional proceeding and may be waived. In the present case it was waived. There was no request of the court, on the part of the defendant, to appoint such alienists and no objections to the proceedings in this regard. Six alienists were examined as witnesses at the trial regarding the sanity of the defendant. Four were summoned by the defendant and two were called by the prosecution. Both of the expert witnesses who testified for the prosecution were members of the medical staff of the Stockton State Hospital. One of these alienists was Dr. M. H. Smyth who had served on that staff for thirty years, and at the time of the trial was acting as superintendent of that institution. Under such circumstances, in the absence of a request for the appointment of alienists, and in the absence of objection to the evidence of those who did testify on the part of the defendant, he was not prejudiced by the failure of the court to appoint the alienists as provided by the statute.

[8] During the closing argument of defendant's attorney he attempted to inform the jury that, in the event "the defendant is found not guilty by reason of insanity," the accused would not necessarily be discharged from custody, but upon the contrary, under the provisions of section 1026 of the Penal Code, the court would then "direct that the defendant be confined in the state hospital for the criminal insane," unless "it shall appear to the court [from the evidence at the trial] that the defendant has fully recovered his sanity [since the commission of the offense]." This is a correct statement of the law. This explanation of the law was evidently intended to alleviate the fears of jurors that their verdict of "not guilty by reason of insanity" might result in endangering society by discharging a maniac from the custody of the officers. This argument was interrupted and objected to by the district attorney who then erroneously stated, in the course of a colloquy with the court, that in the event of a verdict of "not guilty by reason of insanity" the defendant would thereupon necessarily become "a free man." The court also erroneously conceded this to be true. It is now asserted by the defendant that this curtailment of his argument was prejudicial error and resulted in a miscarriage of justice. We think not.

[9] The attempt on the part of defendant's counsel to discuss the procedure which might follow as a result of their verdict amounted to an invasion of the province of court and was clearly improper. The jury was not concerned with the question of the defendant's state of mind at the time of the trial, except so far as his mental condition at that time might furnish evidence of his sanity or insanity at the time of the commission of the crime with which he was charged. The jury was subsequently correctly instructed by the court that "you are to determine * * * whether the defendant was sane or insane on April 28th, 1930, at the time he killed Joe Bartley, Deloice Fultz and Jack Murphy." The jury was further instructed: "Evidence of the defendant's sanity or insanity before and after the date of the killing is admissible in evidence for the purpose of proving the sanity or insanity of the defendant on April 28th, 1930, and for no other purpose."

It was not contended the defendant was insane at the time of the trial. The evidence of his insanity during any period of time was very slight and unsatisfactory. As a boy, in common with others, he was taught with difficulty and held an antipathy for schools. When he grew to manhood he became a mere laborer, but avoided working whenever it was possible. He became dissipated and associated with tramps. He was evidently a common itinerant. In 1915 he was committed to a state hospital for inebriacy. The night before the shooting he was intoxicated and engaged in a drunken quarrel with his itinerant companions at their camp near Crows Landing. A fight ensued between them that night. As a victim of their beating the defendant claims to have been left unconscious at a culvert near by. The circumstances of the shooting indicate a deliberate and atrocious plan to kill his companions for no better reason than that they had beaten him severely and perchance robbed him of a small sum of money. After the killing he started up the river along a trail carrying the rifle with which he had accomplished the homicide. Meeting Mr. Hutchinson, with whom he was acquainted, he said: "I have three of them laid out down there * * * (you) telephone to the sheriff." Hutchinson testified the defendant's face was bruised from the beating he had received. In response to the question, "Did he appear to be perfectly cool and collected and rational and at himself?" he replied, "Yes sir." Mr. Nunes, who owned a dairy ranch in that vicinity, was walking along the pathway on the levee to feed some stock which were kept in a corral, when he heard the three shots which were fired by the defendant. Soon afterwards the defendant came along the pathway, and, in response to an inquiry from Nunes as to the occasion for the shooting, he said: "They beat me up." Nunes testified: "They left him unconscious, he said, 'And when I waked up I get a gun and shot them and killed them, and I want you to go and telephone for the sheriff.'" There is evidence that the defendant said he regained consciousness and got up from the place where he lay near the culvert; that he went to the cabin and procured the rifle, and approaching the door of the other cabin where two of his associates were sleeping he confronted one of them and raising his rifle said: "You took my money and I'm going to kill you." Thereupon he shot and killed him. He immediately fired upon the other occupant of the cabin with fatal result. Going to the cabin where the third victim slept he shot and killed him.

[10] Dr. De Lappe, who examined the defendant at the jail, soon after his arrest on the day of the shooting, testified that the accused had both eyes blackened and had "rather a large contusion on the back of his head." Substantially all that the defendant's first expert medical witness testified to, which might tend to support the plea of insanity, was that such a contused wound as the defendant had might result from a blow severe enough to cause unconsciousness for a period of eight or ten hours; that such a blow might cause concussion of the brain without actually fracturing the skull. Other alienists then testified that such concussion of the brain might result in temporary insanity, or acute mania, during which period the patient might not comprehend the nature of an act which he performed. The inference from their testimony is that a person so afflicted might even shoot and kill another without realizing what he was doing, or that it was wrong to do so. This evidence is entirely hypothetical. The record amply supports the verdict of the jury to the effect that the defendant sustained no such concussion of the brain as a result of the beating which he received and that he was perfectly sane at the time of the shooting.

[11] Finally and most insistently the defendant asserts that the district attorney was guilty of prejudicial misconduct in arguing to the jury as follows: "He [the defendant] must be held responsible for his conduct. Why did he go over there to Hutchinson's, first? Why did he go to Nunes and say, 'I have killed three men?' Nunes said he appeared then to be perfectly normal, cool and collected, not excited. He knew what he had done. You will observe that * * * when I attempted to cross-examine this defendant in respect to what occurred after he became unconscious, I was blocked. * * * He knows better than any man * * * whether he knew right from wrong, he knows what he was doing. * * * Nowhere do you hear a voice in this courtroom (asserting) that this defendant on the day that he killed those three men, didn't know what he was doing." This argument was assigned as prejudicial error, and the court was asked to instruct the jury to disregard it. The court refused to so instruct the jury. We are of the opinion this was neither improper argument nor prejudicial. When the defendant became a witness in his own behalf on the trial involving his sanity at the time of the commission of the offense with which he was charged, he related the circumstances of his association and conflict with the three men whom he afterwards killed. His story ended with the statement: "Jack and Murphy grabbed me and throwed me down and Slim commenced beating me in the face. He says, 'Take his money off of him * * * and throw him into the river.' * * * Jack, he was getting my money out, * * * and I got it (the purse) in my hand. * * * He (Slim) told Murphy to help him, and finally wrenched it out of my hand, and that was the last I remember." On cross-examination the district attorney asked the defendant: "Q. Where were you when you said you became unconscious? * * * When you awakened the next morning, you were near the culvert, were you not?" To this question the court sustained an objection on the ground that it was not proper cross-examination. The examination as to the conduct of the defendant was not pursued further.

[12, 13] In assigning the foregoing argument of the district attorney as prejudicial, the defendant in his brief says: "Defendant testified in chief as to certain drinking indulged in, and as to beatings administered to him on April twenty-seventh. It was the contention of the defense that as a result of these beatings, the defendant was rendered unconscious, and remained that way for a period of from eight to ten hours. The following morning he committed the homicides before regaining full consciousness, and while suffering from traumatic psychosis."

It was therefore competent to cross-examine the defendant upon his conduct or recollection as to his acts on the morning of the shooting. His testimony left the inference that, because of the beating which he had received, he did not know what he was doing and was irresponsible for his conduct. Clear-

ly, the question, "When you awakened the next morning, you were near the culvert, were you not?" was competent. The court erroneously sustained the defendant's objection to this question. Because of the defendant's improper objection, the prosecution was precluded from proceeding to ascertain from the witness the extent to which he claimed to be ignorant of his acts and conduct on the morning of the shooting and the duration of time this pretended lapse of memory lasted. It would have been proper cross-examination for the district attorney to have asked the defendant to relate just what he did recall after he claimed to have become unconscious; to have asked him why he returned to the cabin; whether he recalled a purpose to punish his assailants for stealing his money; how he knew where to find the rifle with which he killed his victims and all the circumstances which might tend to show whether he was conscious or unconscious, sane or insane, at the time of the shooting. In the absence of this testimony on the part of the defendant, the prosecution had a perfect right to argue from his theory of the record, as it stood, that the defendant was conscious of his acts; that he fully comprehended the nature of the transaction and knew it was wrong to shoot his companions. Indeed the defendant told Hutchinson immediately after the shooting, "It's too bad, too bad I done it, I am a good American citizen, too bad I done it." This indicates knowledge of the evil of the homicide.

There was no prejudicial error in the district attorney declaring, in the course of his argument, that he was "blocked" in his effort to show by the defendant on cross-examination that he comprehended and knew exactly what he was doing on the morning of the killing. There was no error in his saying, as his conclusion from the record as it stood, that the defendant did know "better than any man * * * whether he knew right from wrong," or the nature of the acts which he performed at the time of the killing. Nor was it error for him to say he had heard no voice in the courtroom asserting that the defendant did not know what he was doing at the time of the shooting. To be sure the defendant's attorney was undoubtedly claiming his client did not know what he was doing when he fired the fatal shots. This was the entire theory of his defense. But clearly the district attorney was referring to the fact that no witness, expert, or nonexpert had specifically said the defendant did not then know what he was doing. There is no error in commenting upon the fact that a defendant who became a witness in his own behalf regarding his own sanity failed to testify as to whether he did or did not comprehend the nature of his acts at the time of the commission of the offense with which he is charged. The fact that an erroneous ruling of the court aided the defendant in avoiding these statements, made them none the less competent. It would be a preposterous rule that would permit an accused, who relied upon the defense of insanity, to testify to the conduct of others which he claims caused the mania and then close the door to an inquiry from him as to whether in fact it did or did not result in rendering him irresponsible for the acts which he performed. In the examination of one upon the issue of insanity, a wide latitude is allowed.

The challenged argument was not improper. There is no miscarriage of justice in this case.

The judgment and the order are affirmed.

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111 Cal. App. 509

HOUGHTON v. PACIFIC SOUTHWEST TRUST & SAVINGS BANK et al.

Civ. 7703.

District Court of Appeal, First District, Division 2, California.

Feb. 3, 1931.

Rehearing Denied March 5, 1931. Hearing Denied by Supreme Court April 2, 1931.

1. Execution 🔑41.

Interest of beneficiary of trust in real property, where beneficiary was entitled to proceeds thereof only, was personalty, and not interest in realty subject to attachment by levy upon realty (Civ. Code, § 863).

2. Trusts 🔑134.

Creation of trust in realty vests in trustee whole estate subject only to execution of trust (Civ. Code, § 863).

3. Execution 🔑41.

Interest of beneficiary of trust in real property which was personalty *held* subject to attachment and sale on execution (Civ. Code, §§ 663, 863; Code Civ. Proc. § 17, subd. 3, §§ 541, 542, subd. 6, and §§ 688, 691, 699).

Owner of real property conveyed same to bank by deed absolute in form, but intended to be in trust for sole use and benefit of owner. At same time, bank executed declaration of trust covering property, which declaration was accepted and approved by owner. Declaration of trust provided for subdivision and sale of realty and payment to owner of proceeds of sales.

Appeal from Superior Court, Los Angeles County; Leon R. Yankwich, Judge.

Action by W. H. Houghton against the Pacific Southwest Trust & Savings Bank, formerly the Los Angeles Trust & Savings Bank, and others. From the judgment rendered, plaintiff appeals.

Affirmed.

Hearing denied by Supreme Court; SHENK and RICHARDS, JJ., dissenting.

A. G. Alm, of Los Angeles, for appellant.

Neice & Packard, of Los Angeles, for respondents.

SPENCE, J.

Plaintiff brought this action against defendant bank to enforce an express trust and to obtain a judgment declaring the respective rights of plaintiff and the several defendants. The trial court sustained the demurrer of the defendant bank and defendant Gay Engineering Company to plaintiff's amended complaint without leave to amend, and, from a judgment thereupon entered in favor of said defendants, plaintiff appeals.

Plaintiff is the assignee of one Raymond, the original sole beneficiary of the trust in question, while the defendant bank is the trustee. Defendant Gay Engineering Company is the purchaser at a sheriff's sale on execution in an action brought against Raymond in which sale the sheriff sold to said defendant corporation all right, title, and beneficial interest of Raymond in said trust. The facts as alleged in the amended complaint so far as material on this appeal will be chronologically set forth. In March, 1922, Raymond, who was the owner of certain real property, conveyed said property to the defendant bank by deed absolute in form, but said conveyance was intended to be and was received in trust for the sole use and benefit of Raymond. On the same day the defendant bank executed a declaration of trust covering said property, which declaration was accepted and approved by Raymond. The declaration of trust provided for the subdivision and sale of said property by the defendant bank as trustee and the payment to Raymond of the net proceeds of such sales. In September, 1922, and before any of said property had been sold, an action was commenced by one Browne against Raymond and an attachment was levied upon all moneys, goods, credits, effects, debts due or owing, or any other personal property belonging to Raymond in the possession or under the control of the defendant bank. In March, 1923, Raymond assigned to plaintiff for a valuable consideration all of his right, title, and interest in and to said trust. In the case of Browne v. Raymond, above referred to, judgment was obtained against Raymond in March, 1924, for approximately $16,000, and a writ of execution was thereafter issued and levied upon all moneys, goods, credits, effects, debts due or owing, or any other personal property belonging to Raymond in the possession of or under the control of the defendant bank. Subsequently the sheriff, after notice given, conducted a sale in which he offered to sell to the highest bidder all of the right, title, and beneficial interest of Raymond in and to said trust. Defendant Gay Engineering Corporation bid $11,000, which was the highest bid received. This amount was paid, and the sheriff executed and delivered to said defendant a certificate of sale. In April, 1927, the defendant bank repudiated and disclaimed all responsibility, obligation, and liability to plaintiff under said trust.

From the above statement it appears that the attachment of Raymond's interest as beneficiary of the trust preceded Raymond's assignment of his interest to plaintiff. If his interest as such beneficiary was subject to attachment and subsequent sale on execution, it is conceded that the demurrer was properly sustained. Appellant contends, however, that Raymond's interest as beneficiary of the trust was neither subject to attachment nor sale upon execution. We are of the opinion that appellant's contention may not be sustained.

[1, 2] Under the law of this state the interest of Raymond as beneficiary of the trust in question was not an interest in the real property, but was personal property. The creation of the trust vested in the trustee the whole estate in the real property, subject only to the execution of the trust (Civ. Code, § 863), and Raymond as beneficiary retained no interest in the land which was subject to attachment by levy upon the real property. Ward v. Waterman, 85 Cal. 488, 508, 24 P. 930. It has been said that the interest of the beneficiary consists of "merely a chose in action, an interest in a fund of money to be realized in the future by the sale of real property. By the making of the trust agreement he had converted any * * * interest in the real property which he possessed into a right only to receive money in lieu thereof, and this right was undoubtedly personal property." Marble Company v. Merchants' National Bank, 15 Cal. App. 347, 351, 115 P. 59, 61. See, also, Craven v. Dominguez Estate Company, 72 Cal. App. 713, 237 P. 821; Ward v. Waterman, supra; Civ. Code, § 663; Code Civ. Proc. § 17, subd. 3.

[3] In our opinion the interest of Raymond as beneficiary of the trust must be treated as personal property not capable of manual delivery, and the Code sections are sufficiently broad and general in their terms to bring such interest within the category of property subject to attachment and sale on execution. Section 541 of the Code of Civil Procedure provides that "the rights or shares which the defendant may have in the stock of any corporation or company, together with the interest and profit thereon, and all debts due such defendant, and all other property in this state of such defendant not exempt from execution, may be attached, and if judgment be recovered, be sold to satisfy the judgment and execution." Section 688 of the Code of Civil Procedure reads in part: "All goods, chattels, moneys, and other property, both real and personal, or any interest therein, of

the judgment debtor, not exempt by law, and all property and rights of property seized and held under attachment in the action, are liable to execution. Shares and interests in any corporation or company, and debts and credits, and all other property, both real and personal, or any interest in either real or personal property, and all other property not capable of manual delivery, may be levied upon or released from levy in like manner as like property may be attached or released from attachment." Section 542, subd. 6, relating to the attachment of personal property not capable of manual delivery provides: "Debts and credits and other personal property, not capable of manual delivery, must be attached by leaving with the person owing such debts, or having in his possession, or under his control, such credits and other personal property, * * * a copy of the writ, and a notice that the debts owing by him to the defendant, or the credits and other personal property in his possession, or under his control, belonging to the defendant, are attached in pursuance of such writ." Section 691 of the Code of Civil Procedure, relating to sale on execution, provides: "The sheriff must execute the writ against the property of the judgment debtor, by levying on a sufficient amount of property, if there be sufficient; collecting or selling the things in action, and selling the other property. * * *". Section 699 of the Code of Civil Procedure reads: "When the purchaser of any personal property not capable of manual delivery pays the purchase-money, the officer making the sale must execute and deliver to the purchaser a certificate of sale. Such certificate conveys to the purchaser all the right which the debtor had in such property on the day the execution or attachment was levied."

It is true that, in the early stages of the law relating to attachment and execution, many forms of valuable property rights by reason of their intangible nature could not be reached in this manner. The early conception of attachment and execution seems to have contemplated the levy upon and seizure of tangible property, and it was very generally held that choses in action, stock in corporations, the interest of a pledgor, equitable interests and other forms of what might be termed intangible property were not subject to levy. But with the development of the law, both statutory and otherwise, and the combining of courts of law and equity jurisdiction, it is now possible to reach on attachment and execution practically every type of property, tangible and intangible, belonging to the judgment debtor. Code Civ. Proc., §§ 541, 542, 688, 699; 15 Cal. Jur. 1015 et seq.; Fish v. Fowlie, 58 Cal. 373; Le Roy v. Dunkerly, 54 Cal. 452; Kennedy v. Nunan, 52 Cal. 326; Brown v. Campbell, 100 Cal. 635, 35 P. 433, 38 Am. St. Rep. 314; Hoxie v. Bryant, 131 Cal. 85, 63 P. 153; Dubois v. Spinks, 114 Cal. 289, 46 P. 95; Treadwell v. Davis, 34 Cal. 601, 607, 94 Am. Dec. 770; Edwards v. Beugnot, 7 Cal. 162; Farmers' Nat. Gold Bank v. Wilson, 58 Cal. 600; Lackmann v. Kearney, 142 Cal. 112, 75 P. 668; Raymond v. Blancgrass, 36 Mont. 449, 93 P. 648, 15 L. R. A. (N. S.) 976; State v. District Court, 74 Mont. 355, 240 P. 667; Johnson v. Dahlquist, 130 Wash. 29, 225 P. 817; Beswick v. Dorris, (C. C.) 174 F. 502; Gordon v. Hillman, 107 Wash. 490, 182 P. 574.

That the interest of the beneficiary might be reached by the garnishment process was indicated in Ward v. Waterman, supra. Under a similar trust, it was there held that the beneficiary's interest could not be reached by levy upon the real property, but the court said on page 508 of 85 Cal., 24 P. 930, 935: "According to the allegations of his complaint the writ was levied, not by garnishment, but by direct levy, as upon real estate, upon all the interest of Waterman in the land. As we have already seen, Waterman had no interest in the land, legal, equitable, present, or prospective." It further appears that a pledgor's interest can be reached by garnishment of the pledgee, but not by levy upon the property pledged. Dubois v. Spinks, 114 Cal. 289, 46 P. 95; Treadwell v. Davis, 34 Cal. 601, 94 Am. Dec. 770; Edwards v. Beugnot, 7 Cal. 162; Jones on Pledges, § 376; Warner v. Fourth National Bank, 115 N. Y. 251, 22 N. E. 172. We see no reason why the interest of a beneficiary of a trust may not be reached in a similar manner by garnishment of the trustee.

Appellant relies upon Hassie v. God Is With Us Congregation, 35 Cal. 378, and Redondo Beach Company v. Brewer, 101 Cal. 322, 35 P. 896. These cases are not in point, and the language used in the opinions cannot be considered authoritative in the light of the numerous decisions above referred to. See, also, Brainard v. Rogers, 74 Cal. App. 247, 239 P. 1095; Philbrook v. Mercantile Trust Company, 84 Cal. App. 187, 257 P. 882; Youtz v. Farmers' & Merchants' National Bank, 31 Cal. App. 370, 160 P. 855; opinion of Supreme Court on denying hearing in Algeltinger v. Healy-Tibbitts Company, 23 Cal. App. 608, 611, 139 P. 436, 438.

As the interest of Raymond as beneficiary of the trust passed to defendant Gay Engineering Company by virtue of the attachment and sale on execution, it follows that the complaint of plaintiff as the subsequent assignee of Raymond failed to state a cause of action, and the demurrer thereto was properly sustained. It therefore becomes unnecessary to consider the further points urged by respondents in support of the judgment.

Judgment is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

111 Cal. App. 634

SHARP v. E. D. LEAVITT & CO. et al.

Civ. 6485.

District Court of Appeal, Second District,
Division 2, California
Feb. 9, 1931.

Rehearing Denied March 11, 1931. Hearing Denied by Supreme Court April 10, 1931.

1. Licenses 🔑39.

Conveyance of lot by subscriber in consideration of stockbroker's agent, acting beyond scope of employment in assuming payment of balance of stock, was not binding on broker or surety, where original subscription was not induced by misrepresentations.

2. Licenses 🔑39.

Subscriber to stock could not recover payment on subscription, where not rescinding subscription nor showing broker was unable to perform.

3. Licenses 🔑39.

Conveyance of realty for balance due on stock subscription, induced by stockbroker's agent acting outside employment, was not transaction within act obligating broker for acts of agent (St. 1925, p. 967, § 3, amending St. 1917, p. 677, § 5, as amended).

4. Appeal and error 🔑110.

Order denying new trial is nonappealable (Code Civ. Proc. § 963).

Appeal from Superior Court, Los Angeles County; Wilbur F. Downs, Judge.

Action by Belle Sharp against E. D. Leavitt & Co. and another. Judgment for defendants, plaintiff's motion for new trial was overruled, and plaintiff appeals from judgment and order denying new trial.

Appeal from order dismissed, and judgment affirmed.

J. S. LePage and Frank Linnell, Sr., both of Long Beach, for appellant.

Walter E. Burke and Harold E. Thomas, both of Los Angeles, for respondents.

ARCHBALD, Justice pro tem.

This is an appeal from a judgment in favor of defendants and from an order of the trial court denying a new trial. The defendant E. D. Leavitt & Co., a California corporation, secured from the commissioner of corporations a broker's certificate and filed a bond in the sum of $5,000, as required by section 5 of the Corporate Securities Act (Act 3814, p. 1376, Deering's Cons. Supp. 1925–27). The surety on the bond was the defendant Hartford Accident & Indemnity Company. Thereafter Leavitt & Co. employed one LeNaire to sell stock of the South Coast Gas Company. His instructions were to sell for cash or marketable securities only and with a deposit of not less than 30 per cent. at time of taking the order. From the record it appears that the agent's authority to make a contract of sale for his principal was limited only to securing the approval of the principal if any marketable securities were taken, but was full and complete if the sale was for cash. LeNaire secured an order for twelve shares of the stock from plaintiff at $100 per share, plaintiff giving him a deposit of $40 cash and a check for $60, payable to the agent. LeNaire turned the check into the company for credit to the plaintiff and wrote on the subscription, "Due 300.00 to be paid 10/4/27," the $300 plus the $60 check making the first payment required. The cash he kept for himself, saying nothing to his employer about it. The books did not show for what the $60 credit was given. Later on LeNaire explained that the credit was in error and instructed that it be transferred to one Benjamin. On October 7, 1927, a few days after the order was taken for the twelve shares of stock, he succeeded in prevailing upon plaintiff to subscribe for an additional thirty shares at $100 per share. The first payment of $900 in this transaction was made up of a credit of the $100 which plaintiff gave LeNaire on the first subscription and her check in his favor for $800. The balance of the purchase price plaintiff agreed to pay in six equal installments on or before the 10th day of each month following the date of the subscription, with interest at 7 per cent. About the 12th of October, 1927, LeNaire approached plaintiff with the proposition that, if she would deed a lot which she had in Garden Grove to a man named McDonald, to whom the former was in debt, he (LeNaire) would take it at a valuation of $2,100 and would himself pay the balance due on plaintiff's subscription for the stock from $6,000 in dividends on certain stock of his that he had coming from E. D. Leavitt & Co. and others. Plaintiff executed the deed as requested the afternoon of October 12th, and in the evening of that day LeNaire came to her home and offered his note dated October 12, 1927, for $2,100 payable one year after date. Plaintiff testified that she told him she did not want the note, but that he left it among some papers on her table, where she found it a day or two afterwards and kept it in her possession until the time of trial. Neither the first nor second subscription taken by LeNaire from plaintiff was turned into the defendant Leavitt & Co., nor was any of the money paid LeNaire by plaintiff, with the exception of the check for $60. A few days after the last transaction LeNaire disappeared and is now a fugitive from justice.

🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

The complaint alleged, in substance, that defendant Leavitt & Co., acting through its agent LeNaire, on or about the 7th day of October, 1927, falsely and fraudulently represented to plaintiff that, if she would pay LeNaire $900 and convey said Garden Grove lot to his nominee at an agreed consideration of $2,100, he (LeNaire), would have issued to her thirty shares (half preferred and half common) of the South Coast Gas Company's stock, fully paid, and that relying on such representations she entered into the transaction; that said representations were made for the purpose of defrauding plaintiff, were known to be false, and were made without any intention of performing the same. The complaint then alleges the making of the bond by the codefendant surety company, conditioned upon the principal, E. D. Leavitt & Co., and any and all of its agents and employees strictly complying with the provisions of the Corporate Securities Act and honestly and faithfully applying all funds received and honestly and faithfully performing all obligations and undertakings in the purchase and sale of securities by them, and, further, paying all damages suffered by any person damaged or defrauded by reason of the violation of any of the provisions of said act, "or by reason of any fraud connected with or growing out of any transaction contemplated by the provisions of the act"; following which is the allegation that the bond has been breached by the defendants and plaintiff damaged by the acts alleged in the sum of $3,000.

The complaint does not allege nor does the evidence show any misrepresentation as to the value of the stock. The trial court found, in substance, that it is not true that defendant E. D. Leavitt & Co. through its agent made the representations alleged; that it is true that plaintiff agreed to purchase the thirty shares of stock and paid to LeNaire, as agent of the defendant company, the sum of $900 on account of said subscription; that said LeNaire acted entirely outside the scope of his authority in receiving real property to provide money for the payment of the balance of said subscription, and that said defendant corporation is not bound by his actions; that defendant E. D. Leavitt & Co. has received from plaintiff the sum of $900 as a first installment on her stock subscription and no more, and that the latter has not been cheated out of said sum of $900, or said lot, by defendant E. D. Leavitt & Co.

[1, 2] Appellant contends that the court erred in finding as above set forth, and urges that judgment should have been rendered in her favor for the $900 and the value of the land, or at least for the sum of $900. As we have pointed out, the evidence shows the deal was made with the agent several days before the lot was mentioned. With regard to the lot and the payment by LeNaire of the balance of her subscription plaintiff testified as follows, on redirect examination:

"Q. Where did he represent he was going to get the money to pay for this stock for you? A. From the Leavitt & Company and other public utilities where he had stock in. * * *

"Q. And the deed was going then, as I understand it, to J. K. McDonald, to pay off the debt. Did he say he was going to get any money on the deed, also from J. K. McDonald? A. He did not say he was.

"Q. He was not going to raise, then, any money on the deed? A. He did not say anything about it, if he was."

It would seem from the uncontradicted evidence that plaintiff made the second subscription for stock and paid the first installment of $900 thereon without the inducement of any misrepresentations by the agent. The lot transaction as shown by the undisputed evidence was purely personal between plaintiff and LeNaire and had nothing to do with the defendant Leavitt & Co. It was entirely beyond the scope of his employment and could not bind his principal even if he tried so to do, so we fail to see how there could be any recovery, so far as the value of the lot is concerned, on the basis of agency (Ackerman v. Channel Commercial Co., 53 Cal. App. 259, 199 P. 1101), or upon the bond (Filarski v. Covey, 75 Cal. App. 353, 242 P. 874). With regard to the $900 paid to the agent in the line of his duty, it would seem to have been paid on a valid existing obligation; and it not appearing that plaintiff has rescinded the same, or that she had any grounds of rescission, or that E. D. Leavitt & Co. is not fully able to carry out its part of the agreement, we see no error in the findings and judgment of the trial court in regard thereto.

[3] Counsel for appellant contend that under section 5 of the Corporate Securities Act (Stats. 1925, p. 967, § 3) defendant corporation is liable for all the acts of its agent, even though without the scope of his employment. We have quoted heretofore substantially the provisions of the bond in question, which follows the requirements of the act, and it is sufficient to say that the conditions required to be in the bond are tied directly into transactions under the act, which the lot deal is not. "Strict compliance with the provisions of this act," "faithful and honest performance of all obligations and undertakings in the purchase or sale of securities," "payment of all damages suffered by any person damaged or defrauded by reason of the violation of any of the provisions of this act, or by reason of any fraud connected with or growing out of any transaction contemplated by the provisions of this act," is the language used, and the lot deal could not be

any stretch of the imagination be held to be within the provisions of the act or a violation of any of them, or to be a transaction "contemplated by the provisions" of the act.

[4] With regard to the attempted appeal from the order denying the motion for a new trial, it is sufficient to say that such an order is nonappealable. Section 963, Code Civ. Proc.

Appeal from order dismissed. Judgment affirmed.

We concur: WORKS, P. J.; CRAIG, J.

RICHARDSON et al. v. CALLAHAN et al.*

Civ. 6506.

District Court of Appeal, Second District, Division 2, California.
Feb. 6, 1931.

Rehearing Denied March 6, 1931. Hearing Granted by Supreme Court April 6, 1931.

Mines and minerals ⚷74.

Assignee of lease, binding himself to hold lessor harmless against liens arising from assignee's operations under lease, *held* not liable for liens arising from predecessors' operations.

Appeal from Superior Court, Los Angeles County; Marshall F. McComb, Judge.

Action by John M. Richardson and another against H. S. Callahan and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

William W. Fry, of Los Angeles, for appellants.

McAdoo, Neblett, O'Connor & Clagett, of Los Angeles, for respondent.

IRA F. THOMPSON, J.

This is an appeal from a judgment following an order sustaining the demurrer of the defendant W. J. Colter to plaintiffs' complaint without leave to amend. It was alleged that on November 14, 1925, the defendants H. S. Callahan and Augusta C. Callahan entered into a written agreement with the defendant W. A. Playter under and by the terms of which Playter was given the privilege of exploring for and developing oil on certain real property owned by the Callahans and to that end to furnish the materials and equipment for the drilling of wells thereon. The lease it was alleged contained the following pertinent clauses:

1. "The lessee shall not suffer, or permit any laborers or material men's lien or liens of like nature, to arise or exist upon or against the leased land, by reason of his operation under this indenture, and shall hold the owner harmless against any and all such liens. In like manner, the owner shall be solely responsible for, and liable for materials and labor for its enterprises permitted by this indenture, and shall likewise not suffer or permit any lien to arise or exist upon or against said leased land, or any part thereof, and shall hold the lessee harmless against any and all such liens. The party responsible for such liens shall have the right to contest the same; and in the event of such contest, shall not be deemed in default during the continuance of litigation; but shall promptly pay any judgment against it, him or them, or the land in said action; or in case of appeal, shall furnish appeal bond, or otherwise cause the stay of execution, pending appeal; and after decision of the appeal, clear the leased land of any such adverse judgment. If either party shall be in default regarding any such lien or judgment, the party not in default may, at such party's option, after five (5) days written notice to the party in default, elect to pay off the same, and clear the leased land therefrom; and in that event, the defaulting party shall immediately reimburse the other for all sums so expended."

2. "All provisions, covenants, agreements and stipulations contained in this indenture, by which either of the parties hereto are bound, shall in like manner be binding upon the heirs, successors and assigns of the parties so bound, and those which are for the benefit of either of the parties, shall in like manner inure to the benefit of the heirs, successors and assigns of the parties so benefited, and all such provisions, covenants, agreements, and stipulations shall run with the land."

On May 5, 1926, the defendants H. S. Callahan and Augusta C. Callahan agreed to sell the real property to the plaintiffs and assigned and transferred to them all of their interest in the lease formerly executed to the defendant W. A. Playter. The agreement of sale was completed on May 24, 1926. In the meantime, and on December 1, 1925, the original lessee, the defendant W. A. Playter, contracted with the Union Tank & Pipe Company for oil well casing to be used and which was used in the drilling of an oil well on the property at the agreed price of $3,529.50. On May 4, 1926, the Union Tank & Pipe Company filed and recorded its claim of lien for the sum mentioned, and its assignee commenced an action to foreclose that lien on July 30, 1926, which action resulted in a judgment of foreclosure in the sum of $3,942.73, rendered on February 7, 1928, pursuant to

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Hearing granted 3 P.2d 927.

which the property was sold by the sheriff on May 21, 1928.

On April 1, 1926, the original lessee W. A. Playter sold and assigned his interest in the lease to the defendant W. J. Colter, who went into possession of the leased premises and operated the same for several months thereafter, producing oil and gas therefrom.

The sole question with which we are concerned is whether the complaint states a cause of action against the respondent W. J. Colter. It is argued by respondent that the covenant to hold lessor harmless against liens is not a covenant running with the land and was not made so by the second quoted provision of the lease by which it was expressly stated that the covenant should bind the "heirs, successors and assigns" and "run with the land." But let us assume that the parties did by contract agree that the covenant should run with the land and be binding upon the naked assignee, in what position do we find the respondent Colter? Indulging the assumption, we find that he did by his acceptance of the lease bind himself to hold the lessor and his successors harmless against any liens arising "against the land, *by reason of his operation under*" the indenture. (Italics ours.) We are here confronted, however, with the necessity, if the judgment is to be reversed, of finding an implied undertaking, at least, on the part of the assignee, not merely to hold the lessor harmless against operations of his own, but operations of his predecessor. The language of the covenant cannot be stretched to that length. Nor are we called upon to decide whether the leasehold interest could be forfeited or otherwise subjected by a different kind of proceeding to the payment of the lien. The action is to recover from the respondent personally.

Judgment affirmed.

We concur: WORKS, P. J.; CRAIG, J.

111 Cal. App. 643

WOLVIN v. FIRST METHODIST EPISCOPAL CHURCH OF PASADENA.

Civ. 4235.

District Court of Appeal, Third District, California.

Feb. 9, 1931.

Rehearing Denied March 11, 1931. Hearing Denied by Supreme Court April 6, 1931.

1. Trial 🔑397(6).

In contractor's action to foreclose mechanic's lien, court *held* to have found by implication that specifications referred to in contract were not ones owner claimed were referred to.

The court found that no plans or specifications were attached to the contract, or otherwise identified at that time to the satisfaction of the court, except two outlines of the first floor plans, three exterior elevations, and an estimate sheet or budget which was basis for the contractor's guaranty, while the owner contended that the plans and specifications referred to consisted of some forty-two pages and included those found by the court to have been attached to the complaint.

2. Appeal and error 🔑931(3), 1071(6).

Judgment will not be reversed for failure to make express finding on issue, if finding thereon is necessarily implied from findings made.

3. Pleading 🔑381(2).

Where pleadings raised issue as to specifications referred to in contract, evidence of transactions between parties leading up to contract *held* admissible (Code Civ. Proc. § 1856, subd. 1).

4. Appeal and error 🔑1071(6).

Error, if any, in failing to make further findings, *held* not reversible where, if more complete findings had been made, they would have been adverse to appellant.

5. Appeal and error 🔑1011(1).

Judgment rendered on conflicting evidence *held* binding on appellate court.

Appeal from Superior Court, Los Angeles County; Hugh J. Crawford, Judge.

Action by J. A. Wolvin, doing business under the firm name and style of J. A. Wolvin Company, against the First Methodist Episcopal Church of Pasadena. Judgment for plaintiff, and defendant appeals.

Affirmed.

A. L. Rowland and Porter & Sutton, all of Pasadena, for appellant.

Morin, Newell & Brown and Edward R Milliken, all of Pasadena, for respondent.

JAMISON, Justice pro tem.

This is an action to foreclose a mechanic's lien brought by the contractor against the owner for contractor's fee or commission and for the amount remaining unpaid for labor and material. The plaintiff had judgment, from which the defendant has appealed.

In January, 1922, the appellant, in contemplation of the erection of a church building, employed T. B. Barber as its architect, and thereafter in March, 1922, Barber conferred with respondent, describing in a general way the kind of building desired, and asked for assistance in arriving at an estimate of its cost, no written specifications having been made at this time. Barber had with him blueprints showing three of the floor plans and three elevations and a booklet, which showed a picture of the contemplated building. Thereafter, during the month of March, 1922, Barber and respondent made up an itemized statement of the cost of the building, setting out therein the various things which would be required in such construction, including a commission of $25,000 to be paid the contractor for his services, the total cost of the building including the said commission being estimated to be $470,000.

Respondent testified that on May 28, 1922, he had a conference with the members of the church board and at this conference he laid before them the itemized estimate theretofore prepared by himself and Barber. Some time later respondent was requested to submit his proposition to appellant for the construction of the building, and on June 27, 1922, he wrote a letter to appellant's board of directors in which he offered, in accordance with the plans and specifications prepared by Barber, to construct the church building at a guaranteed cost of $470,000, including therein a commission of $25,000 for his services as contractor, donating $5,000 of this commission to the church, and also stating in said letter that this price included $7,050, covering the premium on a bond, that this bond was unnecessary, as payment would be made each month for materials and labor furnished and suggesting that, instead of a bond, appellant should hold the said commission until the building was completed and accepted, thereby saving to appellant that sum of $7,050.

On July 12, 1922, respondent received a letter from Don C. Porter, who was chairman of appellant's building committee, accepting respondent's offer, as contained in his letter of June 27, 1922, and stating that respondent was duly employed to construct the church building on the terms and conditions stated in his said letter, and that he was authorized to proceed with said work after July 14, and that, if a more formal contract was desired, the same would be entered into after Barber, who was then absent, returned.

Respondent testified that on July 15th he received from Barber, the architect, plans for the foundation and basement for one-half of the building, and some specifications consisting of twelve pages, the said twelve pages of specifications being the ones attached to the complaint; that shortly after July 15, 1922, respondent began work on the foundation of said building and thereafter continued work of constructing said building. On August 26, 1922, appellant and respondent executed a written contract for the construction of the church building, by the terms of which respondent agreed to provide labor and material and do all things necessary to the proper construction and completion of the building, as shown and described in the drawings and specifications prepared by Thomas B. Barber, architect. He also guaranteed that the cost of such construction would not exceed the sum of $437,950, exclusive of respondent's commission for services, which was placed at the sum of $25,000, less a donation of $5,000 to the church. The contract also provided that the owner, through its architect, could make changes in the drawings and specifications and require additional work, but in the event any additions or alterations were made in the plans, thereby increasing the cost of the building, such cost should be added to the cost of the building.

There is a conflict in the evidence as to the particular drawing and specifications to which the contract referred, respondent maintaining that they were the ones attached to his complaint and consisted merely of rough and incomplete sketches, showing the alterations and incomplete floor plans, consisting of some twelve pages, which had been given him by the architect on July 15, 1922; while on the other hand, appellant contends that the drawing and specifications to which the contract referred, consisted of some forty-two pages and included the twelve pages attached to the complaint. Appellant also contends that the court erred in failing to find which set of drawings and specifications were referred to in the contract. The finding of the court was as follows: "The court finds that no plans or specifications were attached to the contract of August 22, 1922, or otherwise identified at that time to the satisfaction of the court, except the two outlines of the first floor plans. three exterior elevations and an estimate sheet or budget referred to, which while not attached to the contract, or otherwise authenticated by the parties was the basis for plaintiff's guarantee, and that the contract, so far as it mentioned a guarantee of the cost of the structure, was ambiguous, uncertain and incomplete and from the evidence offered the court finds that it was the intention of the parties, in the agreement of August 26th, wherein a guarantee of the cost of construction was involved, to guarantee the cost of such building respecting the material to be used and the character of the building to be constructed as the parties represented by the architect for the church and the plaintiff agreed upon prior to June 27th, 1922."

The respondent produced evidence to the effect that the plans and specifications which appellant claims were the ones referred to in the contract of August 26, were not exhibited to him at the time said contract was executed, nor were they attached to the said contract, nor did he have any knowledge of them until about the 12th of October, 1922, when they were brought to his notice.

[1, 2] While the court did not expressly find that the plans and specifications referred to in the second contract were not the ones claimed by appellant to have been referred to therein, it did by implication so find.

It is well established that a judgment will not be reversed because of a failure to make an express finding upon an issue, if the finding therein is necessarily implied from the findings made. 24 Cal. Jur. 974; Shepard v. Yale, 94 Cal. App. 104, 270 P. 742.

[3] The next contention of the appellant is that the court erred in permitting respondent to introduce, over its objection, evidence of the negotiations and transaction between the parties leading up to the execution of the contract of August 26th. This objection was based upon the well-recognized rule that when the terms of the agreement are reduced to writing, no evidence other than the contents of the writing is admissible. Code Civ. Proc. § 1856. Subdivision 1 of this section provides an exception to this rule as follows: "Where a mistake or imperfection of the writing is put in issue by the pleadings." The drawings and specifications to which the contract of August 26, 1922, referred, were not signed by the parties, nor did they bear any distinguishing mark by which they could be identified. The answer of appellant denied that the rough and incomplete drawings and specifications attached to the complaint were the ones to which said contract referred, but on the contrary alleged that drawings and specifications attached to appellant's answer were the ones to which reference was made therein, thereby putting in issue the question as to what drawings and specifications were referred to in said contract. Under these circumstances, evidence of the transactions between the parties leading up to the contract which tended to throw light upon this question was admissible.

The court found that appellant, by its architect, did not observe the limitations of the plans for the building, as contemplated on June 27, 1922, but departed therefrom in many respects, and that solely by reason of the departure of appellant from the agreed plans and material upon which respondent's guarantee was based, the cost of the structure was caused to run greatly in excess of the guarantee. And that no definite plans sufficient in character to enable the definite cost of the building to be ascertained, were furnished by appellant, or its architect, to respondent at any time on or prior to August 26, 1922, nor thereafter, except from time to time, as the building progressed and these findings are supported by the evidence.

The evidence produced on the part of respondent was to the effect that within a few days after he began work on the building, changes in the plans as then outlined, and additions thereto, began to be made and thereafter continued to be made until the building was almost completed, and that these changes and additions were responsible for the increased cost of the building. We are of the opinion that the offer of respondent of June 27, 1922, and the acceptance of such offer by appellant of July 12, 1922, constituted the contract upon which the guarantee of respondent was based.

The said offer of respondent that he would construct the building in strict accord with the plans and specifications prepared by the architect had reference to the drawing and estimate sheets which the architect had previous to that time prepared, and which had been exhibited to the appellant's building committee prior to said offer by respondent, for at that time there were no other plans and specifications of said building in existence, and, in accepting the said offer by the letter of July 12, 1922, appellant did so with knowledge that the only plans and specifications that had up to that time been prepared by its architect were the drawings and estimates that had been exhibited to them at their said meeting on May 28, 1922.

[4] Appellant maintains that the finding relating to its counterclaim is insufficient. This finding is as follows: "The court finds that the evidence fails to establish the allegations of defendant's counterclaim."

Admitting that this finding may be subject to criticism, yet from the facts found and the judgment ordered, it is evident, in the light of the entire record, that if more complete findings had been made, they would have been adverse to the contention of appellant. Such being the case, the failure to find further on this issue is not ground for reversal. Hulen v. Stuart, 191 Cal. 562, 217 P. 750; Kling v. Gustafson, 101 Cal. App. 58, 281 P. 407; Reveal v. Stell, 56 Cal. App. 563, 205 P. 875.

[5] The evidence throughout the trial was conflicting, but it sufficiently supports the allegations of the complaint, its amendment and the findings, and such being the case, the judgment rendered thereon is binding on this court. 2 Cal. Jur. 921.

Appellant alleges that numerous other errors than those considered in this opinion were committed by the court in the trial of this case. We have examined these alleged errors and, in our opinion, none of them are sufficient to warrant a reversal.

Judgment affirmed.

All concur.

111 Cal. App. 518

O. A. GRAYBEAL CO. v. COOK et al.

Civ. 4225.

District Court of Appeal, Third District, California.
Feb. 3, 1931.

Rehearing Denied March 5, 1931. Hearing Denied by Supreme Court April 2, 1931.

1. Usury 🔑13.

"Forbearance," as applied to debt under Usury Law, means to wait, or abstain or desist from (Deering's Gen. Laws 1923, Act 3757, § 3, subd. 2).

> "Forbearance" would therefore mean a waiting to collect debt, or agreement to give further time, or not to insist on payment of debt at date of maturity.
>
> [Ed. Note.—For other definitions of "Forbearance," see Words and Phrases.]

2. Usury 🔑13.

"Loan," to which Usury Law applies, ordinarily means contract whereby one delivers money to another, who agrees to return equivalent sum (Deering's Gen. Laws 1923, Act 3757, § 3, subd. 2).

> "Loan" is also defined as the delivery by one person and receipt by the other of a given sum of money, upon an agreement, express or implied, to repay sum lent, with or without interest.
>
> [Ed. Note.—For other definitions of "Loan," see Words and Phrases.]

3. Usury 🔑13.

Where parties intend that one shall deliver money to another, who agrees to return equivalent sum, transaction will be considered loan within Usury Law, irrespective of form (Deering's Gen. Laws 1923, Act 3757, § 3, subd. 2).

4. Usury 🔑12.

When form of transaction does not disclose loan, and therefore does not explicitly violate Usury Law, question whether usurious intent exists becomes material (Deering's Gen. Laws 1923, Act 3757, § 3, subd. 2).

5. Usury 🔑142(4).

To recover usury penalty, where contract is fair on face, clear and satisfactory evidence is necessary (Deering's Gen. Laws 1923, Act 3757, § 3, subd. 2).

6. Pleading 🔑237(6).

If amended complaint to recover usury penalty was defective in not alleging dates of maturity of notes, refusing amendment conforming to evidence was abuse of discretion.

7. Principal and agent 🔑92(2).

Where agent is authorized to receive payment, payment to agent is payment to principal as matter of law.

8. Usury 🔑140.

That borrower is corporation does not preclude it from recovering statutory usury penalty (Deering's Gen. Laws 1923, Act 3757, § 3, subd. 2).

9. Usury 🔑26.

That mortgagor, after persuading third person to take assignment of notes and mortgage, guaranteed payment of notes, did not necessarily constitute usurious loan, but was circumstance to be considered (Deering's Gen. Laws 1923, Act 3757, § 3, subd. 2).

10. Usury 🔑26.

Respecting usurious intent, technical insufficiency of alleged borrower's guaranty of notes, which were assigned to lender by original holder, did not diminish evidential value of guaranty (Deering's Gen. Laws 1923, Act 3757, § 3, subd. 2).

11. Usury 🔑117.

Evidence supported finding that transaction wherein mortgagor paid bonus to third persons, inducing them to take assignment of notes and mortgage, and to perform other services, was not loan, precluding recovery of usury penalty (Deering's Gen. Laws 1923, Act 3757, § 3, subd. 2).

> Evidence disclosed that mortgagor desired to subdivide land into lots, and had already entered into contracts for deeds with various purchasers; that mortgagee refused to join in filing and recording of subdivision map, or to release lots from mortgage lien to enable mortgagor to give deeds; that brokers procured defendants, who agreed to advance necessary moneys and take assignment of notes and mortgage for bonus of $50,000, of which $37,500 was to be distributed among defendants, who testified that transaction was not loan, but merely purchase of notes and mortgage, with agreement to join in recording subdivision map and to release lots as sold.

12. Usury 🔑26.

That third person, if holder is willing, buys note at discount, is not usurious transaction, irrespective of third person's profit (Deering's Gen. Laws 1923, Act 3757, § 3, subd. 2).

13. Usury 🔑13.

Under finding that transaction was not loan, mere payment of bonus by mortgagor, to induce third persons to purchase notes and mortgage, was not violation of Usury Law (Deering's Gen. Laws 1923, Act 3757, § 3, subd. 2).

14. Appeal and error ⚷1071(3).

Where judgment rests on justifiable finding, which is only finding necessary to support judgment, fact that other findings are unsupported by evidence is immaterial.

15. Appeal and error ⚷1011(1).

Finding on conflicting testimony is conclusive (Code Civ. Proc. § 956a).

16. Appeal and error ⚷1011(1).

Appellate court, although believing preponderance of evidence favors unsuccessful plaintiff, is not justified in setting aside judge's findings and drawing others based on plaintiff's testimony (Code Civ. Proc. § 956a).

Appeal from Superior Court, Los Angeles County; Percy Hight, Judge.

Action by the O. A. Graybeal Company against William M. Cook and others. Judgment for defendants, and plaintiff appeals.

Affirmed.

Davis & Thorne, Keeler, Fickert & French, and W. A. Alderson, all of Los Angeles, for appellant.

Clock, McWhinney & Clock and Denio, Hart, Taubman & Simpson, all of Long Beach, O'Melveny, Millikin, Tuller & Macneil, of Los Angeles, and Swaffield & Swaffield, of Long Beach, for respondents.

PER CURIAM.

This cause is before us on appeal from a judgment entered in favor of the defendants in an action where the plaintiff sought to recover a penalty, as provided by the second subdivision of section 3 of the Initiative Act, adopted at the general election, held on November 5, 1918, covering the subject of usury. Deering's Gen. Laws 1923, part 1, p. 1384, Act 3757.

By reason of the fact that the findings of the trial court simply negative the allegations of plaintiff's amended complaint, it is necessary to summarize the different paragraphs set forth in said complaint.

The first and second paragraphs of the complaint are undenied and uncontroverted. The second paragraph of the complaint sets forth that certain premises owned by the plaintiff were incumbered by notes and mortgage in the aggregate sum of $267,380; that the notes and mortgage to secure the same were held and owned by the Associated Oil Company. The third paragraph alleges that the plaintiff desired to borrow the sum of $250,000 for the purpose of paying off and having said notes and mortgage satisfied, that the plaintiff was able to pay the sum of $20,000, or thereabouts, on said notes, leaving the sum of $250,000 to be raised by the loan. The fourth paragraph sets forth that on or about the month of June, 1924, the defendants promised and agreed to loan to the plaintiff the sum of $250,000 and to accept as security therefor a mortgage on said tract of land, the mortgage on said land to be paid off and satisfied; that the plaintiff was to pay the defendants' interest on said sum of $250,000 at the rate of 7 per cent. per annum; that the plaintiff accepted all of the terms and conditions of said promise and agreement on the part of the defendants, and to furnish the difference between the $250,000 and the amount necessary to pay the sum of $267,380 due to the Associated Oil Company.

The fifth paragraph sets forth that after said promise and agreement on the part of the plaintiff and the defendants, and while proceeding to consummate the deal, the defendants informed the plaintiff that, because of contracts for the sale of portions of said land, having been executed by the plaintiff and which were then in force, said contract should become a first lien on said tract of land, or portions thereof, with priority over the new mortgage to be given by the plaintiff to the defendants; that it was then agreed between the defendants and the plaintiff that, instead of the plaintiff executing a new mortgage on said tract of land to secure said sum of $250,000, the plaintiff should have assigned to the defendants, as security for said loan of $250,000, said notes and mortgage then on said tract of land. The sixth paragraph sets forth that in pursuance of said agreement the plaintiff proceeded to negotiate with and to secure from Associated Oil Company an assignment of said mortgage and notes to the defendants; said Associated Oil Company to be paid in full the entire amount then due on said notes and mortgage; that in addition to the sum of $250,000 then due on said mortgage, there was due a further sum of $22,593.79; that at the request of the defendants, the transaction between the plaintiff and the defendants was placed with and intrusted to the Marine Trust & Savings Bank of Long Beach in escrow; said Marine Trust & Savings Bank of Long Beach being named and selected by the defendants as their trustee and agent and authorized and instructed to receive and accept said matter in escrow and to act therein as agent and trustee of the defendants.

The seventh paragraph of the complaint sets forth that, pursuant to said promise and agreement, the defendants deposited and placed in escrow with said Marine Trust & Savings Bank of Long Beach the sum of $250,000, and the plaintiff deposited with said

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Marine Trust & Savings Bank of Long Beach the sum of $22,593.79, said bank being instructed to pay the same to the Associated Oil Company for the transfer and assignment of said notes and mortgage; that said notes and mortgage were assigned and transferred to the Marine Trust & Savings Bank of Long Beach. The eighth paragraph of the complaint sets forth that, as a condition upon which the defendants would loan to the plaintiff the sum of $250,000, the defendants would require that plaintiff guarantee the payment of said notes and the performance of all the conditions contained in the mortgage.

Paragraph 9 of the complaint sets forth that, in the instructions executed by the plaintiff and the defendants and given to the Marine Trust & Savings Bank of Long Beach, the defendants authorized and directed said Marine Trust & Savings Bank to act for them as their agent and trustee, to receive payment from the plaintiff of said loan of $250,000, and to pay the same to defendants, and likewise authorized and directed said bank to execute a declaration of trust, specifying that it held the title to such notes and mortgage for the benefit of defendants, stating the amount of the beneficial interest therein of each defendant.

The tenth paragraph of the complaint sets forth that, during the negotiations for said loan, the defendants demanded the further sum of $50,000 as a fee or bonus for loaning said money, together with an agreement to pay interest on said $250,000, at the rate of 7 per cent. per annum (being an increase of ½ of 1 per cent., the notes and mortgage called for only 6½ per cent.). The eleventh paragraph sets out that, at the time of the negotiations, the financial condition of the plaintiff was such that it was required to yield to the demands of the defendants to pay the additional sum of $50,000.

The twelfth paragraph of the complaint sets forth that, after the defendants had agreed to loan the plaintiff the sum of $250,000, it was agreed that the plaintiff should execute a second mortgage on the property to secure the $50,000, with interest thereon at the rate of 7 per cent. per annum, and that the plaintiff at that time did execute a note and mortgage for said sum of $50,000 to secure the payment of said sum to the defendants; that this mortgage was executed to the defendants Wm. M. Cook and W. E. Babb, for and on behalf of the defendants, and was assigned by them to the Marine Trust & Savings Bank of Long Beach. The thirteenth paragraph of plaintiff's complaint sets forth the payment of the $250,000, the $50,000, and the interest thereon.

The fourteenth paragraph sets forth that the defendants knowingly and intentionally exacted and demanded of the plaintiff as a bonus and consideration of said loan of $250,000, as aforesaid, that the plaintiff pay the sum of $50,000 and interest thereon, which amounted to the sum of $2,632.21, and that such payments were all made to secure the satisfaction of the notes and mortgage assigned by the Associated Oil Company to the Marine Trust & Savings Bank of Long Beach, as aforesaid. The fifteenth paragraph sets forth, among other things, that payment of said $50,000 and interest thereon was without any consideration, and for the express intent and purpose on the part of the defendants to compel the plaintiff to pay an unlawful and usurious rate of interest for the loan to it by the defendants of said sum of $250,000. After setting forth the detailed amount of interest paid and penalty alleged to be usurious, the plaintiff prays that the same be trebled, and sets forth the amount claimed in the sum of $198,021.75.

The findings filed by the trial court are as follows: Findings Nos. 1 and 2 are to the effect that paragraphs 1 and 2 of the amended complaint are true. Findings Nos. 3, 4, 5, and 6 are to the effect that paragraphs 3, 4, 5, and 6 of the plaintiff's complaint are untrue. Finding No. 7 is that all of the allegations of paragraph 7 of plaintiff's complaint are untrue, except that the sum of $272,593.79 was paid by said Marine Trust & Savings Bank of Long Beach to the Associated Oil Company, and that, in consideration thereof, the said Associated Oil Company assigned and transferred to said Marine Trust & Savings Bank of Long Beach the notes and mortgage referred to in the complaint. Finding No. 8 is simply that paragraph 8 of plaintiff's complaint, and all the allegations thereof, are untrue. Finding No. 9 is to the effect that all of paragraph 9 of the plaintiff's complaint is untrue, save and except that it is true that in the written escrow instructions to the Marine Trust & Savings Bank, which were severally executed by the several defendants, said Marine Trust & Savings Bank was authorized and directed to execute a declaration of trust specifying that it held title to the notes and mortgage for the benefit of the several defendants, and that it should thereafter issue certificates of beneficial interest to each of the defendants and collect the payments to be made, and as made disburse the same quarterly to the several defendants or their respective assignees. Finding No. 10 is to the effect that all of paragraph 10 of plaintiff's complaint is untrue. Finding No. 11 is simply to the effect that all of paragraph 11 of plaintiff's complaint is untrue. Finding No. 12 is to the effect that all of paragraph 12 of the plaintiff's complaint, save and except that plaintiff did execute a note for the sum of $50,000 and a mortgage on said property to secure the same with interest at the rate of 7 per cent. per annum to Wm. M. Cook and W. E. Babb as payees thereof, and that said Cook and Babb did assign said note and mortgage to the Marine Trust & Savings Bank as trustee for the several defendants, is untrue. Finding No. 13 is to the effect that all of paragraph 13 of plaintiff's complaint is untrue, save and except that prior to the commencement of this action the plaintiff paid to the Marine Trust & Savings Bank of Long Beach as trustee for the several defendants the sum of $250,000, together with interest thereon in the sum of $13,375.12, and, also, the further sum of $50,000, with interest thereon, in the sum of $2,632.21, and that, upon the payment of said sums, said notes and mortgage were satisfied and released. Finding No. 14 is to the effect that all of the allegations of paragraph 14 of plaintiff's complaint are untrue. Finding No. 15 is likewise to the effect that all of the allegations of paragraph 15 of plaintiff's complaint are untrue.

As a conclusion of law from the foregoing findings, the court held that the plaintiff was not entitled to recover anything from the defendants, and judgment was entered accordingly.

The record shows sufficient testimony to justify the finding of the following facts: That prior to the opening of the negotiations involved in this action in 1924, the O. A. Graybeal Company was a corporation, of which Graybeal, Miller, and Lindsay comprised the executive officers. The company was at that time the owner of a large tract of land, which it had purchased for the purpose of subdividing and reselling the same in city lots. This land was subject to an existing mortgage which had been executed by George H. Peck, a previous owner, to secure three promissory notes aggregating $267,380. These notes matured as follows: One in October, 1924, one in October, 1925, and one in October, 1926. The notes and mortgage were held by the Associated Oil Company. The notes drew interest at the rate of 6½ per cent. per annum. The mortgage contained no provision requiring the mortgagee to join in subdividing the premises, nor was there any release clause in the mortgage. The appellant had surveyed the land, subdivided it into lots and streets, and had prepared for filing and recordation a map of such subdivision. Up to this time the Associated Oil Company had refused to join in the filing and recording of the map.

Likewise no agreement had been entered into or arrangement made for the release of any of the lots from the mortgage. Appellant, however, had proceeded and sold upon contract lots according to such unrecorded map; the value at which the lots were so sold aggregated about $650,000. Many of the contracts upon such lots had been and were being paid up by the purchasers, who were demanding deeds which appellant was unable to give them because of its inability to record its map and to procure a release of the lots from the mortgage. The real estate commissioner of California was investigating the situation. The urgency was, therefore, very great that some one be found either to loan the money to the appellant with which to pay off the Peck notes and mortgage, or who would purchase the Peck notes and mortgage and take an assignment thereof from the Associated Oil Company, and, also, to find some one who would join in the immediate filing and recording of the subdivision map and to enter into a plan for the acceptance of partial payments and the release of lots from the lien of the mortgage. In this contingency Graybeal and Miller, and a man by the name of Senter, took up with Cook and Babb, real estate dealers and investment brokers, having an office in Long Beach, the proposition of refinancing.

According to the testimony of Babb and Cook, the proposition was to employ them as agents or brokers to procure a purchaser or purchasers for the Peck notes and mortgage, who would be willing to accept installment payments, agree to the filing and recording of the plat or map of the subdivision and the release of lots. After one or two interviews, Cook stated that they had just completed an arduous season and were about to take their vacations, that the job was a difficult one, but, if they would "make it easy enough for them, they would undertake it," explaining that, by "making it easy enough for them," he would want the sum of $50,000 to handle the deal, that of this sum $2,500 would be paid to Senter, that Babb and Cook would want $10,000 for their commission, and that the remainder of the $50,000, to wit, $37,500, would probably have to be prorated among the purchasers of the Peck notes as an inducement to persuade them to produce such a large sum of money, and to agree to receive back their money "in small dribs," and to join in the subdivision map and the execution of partial releases. To this there is testimony to the effect that Graybeal and Miller stated they would be glad to pay $50,000 for this service, as they expected to make between $750,000 to $800,000 out of the deal. Babb and Cook then asked for time to investigate, and proposed that an option be executed giving Babb and Cook time within which to find purchasers for the Peck notes, the option providing for the payment of said sum of $50,000. Some discussion also took place at these conferences as to the extension of time upon the Peck notes, and it appears that an arrangement was made by which Babb and Cook were to advance the necessary sums of money to make payment for extensions if so requested. No advances of this kind were made, however, by Babb and Cook. The several conferences resulted in the following conclusion: The different defendants mentioned in this action paid to the Marine Trust & Savings Bank of Long Beach the necessary money to make up the $250,000. The plaintiff paid to said bank the additional sum of

$22,592.79. These amounts, aggregating $272,592.79, were paid to the Associated Oil Company and the notes and mortgage assigned to the Marine Trust & Savings Bank of Long Beach. Trust agreements and declarations were executed as hereinbefore stated showing that the bank was acting as trustee and agent for the respective parties, to receive payment from the plaintiff and to disburse such payments to the defendants in this action in proportion to their respective interests. In due course of time, as herein stated, the Peck notes and the $50,000 note to Babb and Cook, together with interest at the rate of 7 per cent. per annum, were paid by the plaintiff to the bank and the bank released the Peck mortgage.

On the part of the appellant, as alleged in its amended complaint, it is claimed that application was made to Babb and Cook for a loan, and that the transaction took the form of a purchase of the Peck notes and assignment of the mortgage securing the same simply to evade the provisions of the Initiative Act defining usury.

On the part of the respondents it is insisted that the subject of loan was never mentioned, that it was never considered by any of the defendants, that it was a straight purchase of the Peck notes and assignment of the mortgage securing the same, and that the $50,000 covered by the note and second mortgage given to Babb and Cook assigned to the Marine Trust & Savings Bank was simply a bonus or gratuity to induce them to enter the syndicate formed for purchasing the Peck notes and mortgage and for the agreement to release lots from the lien of the Peck mortgage, as full payments were made thereon by the different purchasers.

The trial court, in its findings, did not directly characterize the transaction as being either a loan or a purchase, did not find whether the Peck notes were discounted, or whether a bonus or gratuity was paid by the plaintiff. All that the trial court did find was that the transaction did not amount to a loan. In other words, the findings of the trial court are to the effect that the allegations of the plaintiff's amended complaint, in so far as it sets forth a loan, are untrue. While a number of issues are presented to this court for consideration, there is only one vital question, to wit: Was the transaction, so far as the defendants are concerned, a purchase of the Peck notes and mortgage, or was it a loan in the form of a purchase?

[1-3] The Usury Act to which we have referred fixes a penalty only to a loan or forbearance of money, etc. There is no pretense in this case that there was any forbearance. The word "forbearance" means, according to 26 C. J. 794, "to abstain or desist from; to give up, a term which is equivalent to 'wait,'" when used in reference to a debt. In other words, it would mean a waiting to collect a debt or to agree not to insist upon payment at the date of maturity of the debt or to give further time. Nothing of that kind appears in the case, so it may not be further mentioned. The word "loan" as defined in 38 C. J., page 126, ordinarily means the following: "A contract by which one delivers a sum of money to another and the latter agrees to return at a future time a sum equivalent to that which he borrows; the delivery by one party and the receipt by the other party of a given sum of money, upon an agreement, express or implied, to repay the sum loaned, with or without interest." If such is the intent of the parties, the transaction will be considered a loan without regard to its form.

[4, 5] When the form of the transaction does not show a loan, and, therefore, does not explicitly exhibit a violation of the Usury Law, the question of intent becomes material. Thus the note found in Ann. Cas., 1913C, page 1327, is pertinent: "'There are two cardinal rules in the doctrine of usury,' said the court in Nichols v. Fearson, 7 Pet. 103, 8 L. Ed. 623, 'which we think must be regarded as the commonplace to which all reasoning and adjudication upon the subject should be referred. The first is, that to constitute usury there must be a loan in contemplation by the parties; and the second, that a contract which in its inception is unaffected by usury can never be invalidated by any subsequent usurious transaction.'" It is then said that, when a thing is valid in its inception, the fact "that a promissory note which is sold at a discount exceeding the lawful rate of interest is indorsed by the seller does not make the transaction usurious, if the sale is made bona fide, and not as a cover for a loan." In 39 Cyc. page 922, the rule relating to the subject of intention, supported by a long list of authorities, is thus set forth: "But when a contract is honest on its face, proof of the existence of a corrupt intention to evade the usury laws is important as showing that the transaction is really a cloak to disguise usurious dealing, just as good faith and absence of such a corrupt intent will justify the court in upholding a transaction suspicious on its face." And on page 1057 and 1058 of the same volume, we find the text likewise supported by a number of authorities, reading as follows: "When a transaction honest in form is alleged to be a mere cloak to cover usury, the existence of the corrupt usurious intent behind the device is a question for the jury. * * * It is for the jury to determine whether a usurious purpose lurks behind what purports to be a sale of property, or a note legal on its face but given for a larger sum than was actually advanced upon it, or commissions purporting to be paid to the lender or his agent for services rendered or expenses incurred in connection with the loan." And, as stated in the text, "it is only when there is no dispute

as to the facts, the question whether such facts constitute usury is a question of law to be determined by the courts." To the same effect is the text found in 27 Ruling Case Law, pages 211 and 212. The rule is likewise well established, and set forth in Houghton v. Burden, 228 U. S. 161, 33 S. Ct. 491, 57 L. Ed. 780, to wit: "The defense of usury to a suit upon a contract fair on its face must be established by clear and satisfactory evidence." This rule is likewise applied to the proofs necessary to be made by a plaintiff when prosecuting an action for the recovery of a penalty under the usury laws.

[6] A few minor objections raised by the respondents affecting the right of the plaintiff to maintain this action may be here considered. The first objection is that the complaint does not set forth facts sufficient to constitute a cause of action. The clerk's record fails to disclose that there was any demurrer filed to the plaintiff's amended complaint. In behalf of this objection, it is urged by the respondents that no date is set forth as to the maturity of the three notes held and owned by the Associated Oil Company and assigned to the Marine Trust & Savings Bank. The record, however, establishes these facts: No special demurrer was directed, as we have said, to this technical deficiency in the amended complaint. Assuming that the amended complaint was defective in this particular, it was an abuse of discretion on the part of the trial court to refuse to permit the plaintiff to file an amendment to its complaint conforming to the proofs. An examination of the proposed amendment to the plaintiff's complaint shows that the dates of maturity of the notes were specifically set forth.

[7] It is likewise objected that the testimony does not show payment of the notes and the interest thereon to the defendants in this case. The agreement which we have hereinbefore referred to executed by the respective parties named the bank as a trustee to hold the notes for and on behalf of the defendants. The trustee was authorized to receive payments and cancel the notes and mortgage, and, as payments were made from time to time to distribute such payments to the respective defendants, according to their interests. This agreement constituted, in law, the bank the agent to receive payment for and on behalf of the defendants. It can hardly be questioned that, when the principal appoints an agent and authorizes him to receive payment for and on behalf of the principal, that payment has been made to the principal as a matter of law, when made to the agent.

[8] It is likewise urged by the respondents that the Usury Law does not apply to corporate borrowers, and, in support of this contention, the case of In re Washer, 200 Cal. 598, 254 P. 951, is cited. A reading of this case clearly demonstrates that this contention is untenable. We are not dealing with any note issued and sold by any corporate power. The provisions in the Usury Law relative to the issuance and sale of corporate securities are not involved in this case, and the contention of the respondents in this particular appears to be entirely without merit.

Likewise presented for our consideration is the minor subject of the guaranty called for in the agreements and executed on behalf of the plaintiff guaranteeing the payment of the three notes assigned by the Associated Oil Company to the Marine Trust & Savings Bank. On the part of the appellant three cases are cited which support the rule that, when notes are transferred under circumstances similar to those presented here, and a guaranty of payment is demanded and executed, the transaction takes on the character of and is therefore held in law to be a loan. Supporting this rule are the cases of Campbell v. Reed, Mart. & Y. (Tenn.) 392, and others noted. However, this case appears to be overruled by the case of Cantrell v. Ford (Tenn. Ch. App.) 46 S. W. 581. In Cowles v. McVickar, 3 Wis. 725, the rule contended for by the appellant is upheld. Likewise in Sedbury v. Duffy, 158 N. C. 432, 74 S. E. 355, the giving of a guaranty is held to transmute the transaction into a loan. All the other cases cited by the appellant are really contrary to the rule contended for.

[9, 10] As opposed to the three cases supporting the appellant's contention, the authorities are so numerous as to preclude their citation. These authorities generally follow the rule as found in Lloyd v. Keach, 2 Conn. 175, 7 Am. Dec. 256, 257, and approved in Belden v. Lamb, 17 Conn. 441; Brittin v. Freeman, 2 Har. (17 N. J. Law) 191; Cram v. Hendricks, 7 Wend. (N. Y.) 569; Nichols v. Fearson, 7 Pet. 103, 8 L. Ed. 623, and Dickerman v. Day, 31 Iowa, 444, 7 Am. Rep. 156, that the giving of a guaranty is simply an item of testimony or evidence which the trial court may consider in determining whether the transaction is in fact a loan, or, what it purports to be, a purchase and sale of a negotiable instrument. In this connection, it is urged by the respondents that the instrument executed as and purporting to be a guaranty of payment of the Peck notes is defective, and is not an instrument capable of being enforced. As bearing upon the question of intent, we do not very well see how any technical insufficiency of the instrument executed as a guaranty can be considered and determined upon this appeal, or how it could be determined by the trial court in the trial of this action. As bearing upon the question of intent, and in determining what the court should hold the transaction to be, a guaranty would have exactly the same effect, even though its technical legal sufficiency might be open to question.

[11] As we view the circumstances presented upon this appeal, there is but one crucial question, to wit: Does the evidence support the finding of the court that the transaction was not a loan? As we have heretofore stated, there is no finding in specific language that the transaction was a purchase and sale of the Peck notes. The finding is simply to the effect that the allegations of the complaint that the transaction was a loan are untrue. If the testimony of the appellants' witnesses, taken in connection with the surrounding circumstances of the transaction, the apparent fact that the bonus or fee exacted by Babb and Cook to make the negotiations "easy," and the division of $37,500 among the several defendants, according to their interests in the syndicate formed to take over the Peck notes, as a gratuity or bonus for the putting up of the money to take over the Peck loan be weighed in the balance, and the finding made by the trial court that the transaction was really a loan, and was taken in the form of a purchase and sale as a covert contrivance to evade the provisions of the Usury Law, it cannot very well be denied that such a finding would have been well supported by the testimony set forth in the record in this case. On the other hand, if the testimony introduced on the part of the plaintiff be disregarded and set aside, and the testimony on the part of the defendants and given by the defendants, when examined by the plaintiff under the provisions of section 2055 Code of Civil Procedure, be accepted as a true version of the transaction then, and in that case, we think the record shows sufficient testimony to support the finding of the court that the transaction was not a loan.

A large number of authorities have been cited by respective counsel to the effect that the holder or owner of a negotiable instrument may sell and discount the same for any sum or price he may be willing to accept, and, though it gives to the purchaser a rate of interest largely in excess of 12 per cent. per annum, the transaction is not usurious; that is, when a negotiable instrument has been given legal inception, its sale and purchase is subject to the law relating to the sale of ordinary personal property, that is, the seller may sell for what he is willing to take and the purchaser may buy for the least sum the seller will accept. In this case, however, there is no question of discount. The Associated Oil Company received full payment for the three notes.

The testimony of Cook and Babb is to the effect that the only subject ever discussed was that of sale and purchase of the Peck notes and mortgage, that the subject of loan was not mentioned.

Mr. Craig, one of the defendants, testified substantially as follows:

"Q. What was said at that conversation? A. He told me that he wanted to raise $250,000 to buy a mortgage, and told me what the mortgage was.

"Q. What did he say about the mortgage? A. He said it was a mortgage that was backing up some notes of Mr. Peck's on land on Western avenue, and he said there was a $50,000—he said that the parties owning the land could not get releases; the mortgage was held by the oil company and they would not give partial releases, and he had to have releases because he had sold lots, and they were getting paid up, and he had to produce his deeds, and that if we bought the mortgage he was willing to pay a $50,000 bonus for getting the release of these lots in small portions—release of small amounts of land as he sold the lots.

"Q. Was the subject of loaning any money to the owner of that land discussed by you or Mr. Cook in that conversation? A. The only thing discussed with me was buying this mortgage."

The witness further testified that the only intent he had in the matter was to buy the Peck notes and mortgage. The witness further testified that he understood there was to be a payment for the release of the lots, that he was told the bonus amounted to $50,000, that he understood Babb and Cook were to retain the sum of $12,500.

The defendant Bixby testified that he had never seen Mr. Graybeal until he saw him in the courtroom, and then testified as follows: "Q. Referring to the time of the transaction, at that time was this transaction ever mentioned to you in the form of making a loan to the O. A. Graybeal Company, or any other corporation, upon the land? A. No, it was simply us going in with others and buying the mortgage." The witness Bixby further testified: "This mortgage, the Peck mortgage, was to be purchased; that the purchasers were to agree to give partial releases as requested by the O. A. Graybeal Company upon a schedule to be arranged; that $50,000 was to be paid for granting—extending this privilege of releasing—making partial releases, and that the $50,000 was to be secured by a second mortgage, and when a lot was to be released from the first mortgage it was also to be released from the second mortgage on certain payments."

The witness Babb testified that the subject of making a loan to the Graybeal Company was not discussed. His version is as follows: "They came into our office by appointment. They said they had—what I mean by that, I don't know which one said it on their side in particular—but they said they had bought a tract of land up there that had a mortgage on it and sold lots in which they could not get satisfactory releases from the parties holding the mortgage, and wanted to know if we could get someone or several persons who would participate in the purchase of the mortgage and would give them partial releases. We told them what we would handle the proposition for, to-wit: the sum of $50,000."

Cook and Babb both denied the testimony introduced by Graybeal to the effect that during the conversations relative to the negotiations it was stated that it should be put in such a form as to escape the usury laws, or, as worded by the witness, "to make that part legal which in law was illegal", or to "legitimize an illegitimate transaction."

The testimony of Cook was to the effect that Graybeal and Miller came to him and asked him to handle the transaction, to find purchasers for the Peck notes, and that he would handle the transaction for the sum of $50,000. The language of the witness, as set forth in the supplement, is as follows: "I said to them that I was leaving on my vacation on the 19th of July, and that it was a very short period in which to accomplish the transaction they were asking me to accomplish, but if they wanted to make it easy enough for me to do it, or for us to do it, that we would look into the thing and see whether we could recommend it or not. Up to that time we had not seen the property and knew nothing of its value except what they had told us. One or the other of them asked me what I meant by 'making it easy enough', and I told them that it would cost them $50,000. I told them $2,500 would be for Mr. Senter. I told Miller and Graybeal that we would want $10,000 as a fee for our efforts in the enterprise and that the balance of $37,500 would be used in payment to those who would invest in the mortgage in consideration of their taking their money back in small dribs from time to time and granting the partial releases on rather favorable terms. * * * One or the other of them said, 'that is all right. We are making $750,000 or $800,000 in this deal, and we are glad to pay the $50,000 to get it in the shape we want to.'"

Without going into the testimony in further detail or set it out in this opinion, it is sufficient to say that the testimony of all of the defendants is to the effect that the $50,000 exacted as a fee by Babb and Cook, after deducting the sum of $12,500, was distributed among the defendants in proportion to their contribution to the general fund necessary to buy the Peck notes and mortgage, as a bonus for making the purchase. The testimony, in relation to the release of the respective lots as they were paid off by purchasers, establishes the fact that partial payments were to be made upon the notes from time to time, as purchasers of lots made their payments. The testimony also shows that the costs of executing the releases were otherwise provided for, which costs were, in fact, only nominal.

Having been found by the court not to be a loan, is it permissible for one against whose land there exists an indebtedness, evidenced by promissory notes secured by mortgage, to offer to or pay a bonus or gratuity to a purchaser in order to induce him to purchase a certain note or notes and mortgage, and agree to perform services not provided for in the original mortgage, such as the release of a portion of the mortgaged premises from time to time? Upon this question the authorities are almost negligible.

The only cases called to our attention bearing upon this subject are the following, and a diligent search fails to disclose any others. In Siewert v. Hamel et al., 91 N. Y. 199, the holding of the court is as follows (We quote for convenience from the syllabus.): "The purchase of a debt by one at the instance of the debtor for less than its face, the debtor himself with the knowledge of the purchaser paying the creditor the discount, is not per se usury. It must be made to appear that the transaction originated in an agreement for a loan, as there can be no usury disconnected with a loan." In the case at bar, the Peck notes and mortgage are entirely free from any imputation of usury. See, also, Lesley v. Johnson, 41 Barb. (N. Y.) 359; also, Donnington v. Meeker, 3 Stockt. (11 N. J. Eq.) 362.

[12, 13] The law is well settled that the defendants in this case, had the Associated Oil Company been wiling, could have purchased the Peck notes at a discount, irrespective of the amount of money earned by them through such a transaction. This being true, we do not well perceive how it could be held upon this appeal, in face of the finding of the court that the transaction was not a loan, that the mere payment of a bonus or gratuity on the part of the appellant to the defendants, in order to induce them to purchase the notes and mortgage, can be held to be a violation of the Usury Law to which we have referred.

[14] Another contention is made by the appellant not heretofore considered, to wit: That a number of allegations of the plaintiff's amended complaint found to be untrue by the court are true in fact and established by uncontradicted evidence and, therefore, that the judgment should be reversed. This, however, is not a tenable position. If the judgment rests upon a finding supported by sufficient testimony, and the only finding necessary to support the judgment, the fact that there are other findings not supported by the testimony becomes immaterial. As stated in Thayer v. Tyler, 169 Cal. 671, 673, 147 P. 979, 980, "it is only when a judgment rests for its validity upon a finding which is not supported, or which negatives a fact admitted by the pleadings, that injury is worked and a reversal must follow"—citing a number of cases.

[15, 16] Only one finding in this case is absolutely necessary for the support of the judgment, to wit, that the transaction was not a loan. This the court has found. The finding of the trial court against the contention of the

appellant upon conflicting testimony is binding upon appeal. Had the court found the transaction to be a loan, a simple computation would show its usurious character, and, if we were to agree that the evidence preponderates in favor of its contention, we would not be justified in setting aside the findings of the trial court and drawing findings of our own, based upon the appellant's testimony, as contended by it. under the provisions of section 956a of the Code of Civil Procedure.

The judgment is affirmed.

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211 Cal. 548

BURTT v. BANK OF CALIFORNIA NAT. ASS'N et al.

S. F. 13379.

Supreme Court of California.

Feb. 18, 1931.

1. Landlord and tenant ⚷55(3).

Evidence in landlord's cross-action *held* to support finding that collapse of building was sole and proximate result of tenant's negligence in unreasonably and excessively overloading building with onions.

2. Negligence ⚷56(3).

Violation of statute or ordinance must proximately cause or contribute to injury to bar recovery.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Walter Perry Johnson, Judge.

Action by Sarah L. Burtt, as executrix of the last will and testament of George L. Burtt, deceased, against the Bank of California National Association, as executor of the last will and testament of Edith L. Bull, deceased, and others, in which defendants filed cross-complaint. From judgment on the cross-complaint for defendants, plaintiff appeals.

Affirmed.

Thomas A. Keogh, John T. Thornton, Dozier & Kimball, and Dreher & McClellan, all of San Francisco, for appellant.

T. C. Van Ness and Hartley F. Peart, both of San Francisco (John D. Gallaher, of San Francisco, of counsel), for respondents.

WASTE, C. J.

Plaintiff brought this action to recover damages in the sum of $5,427.14, alleged to have been occasioned to certain onions when the building in which they were stored collapsed. While the complaint contains averments of misrepresentation in the letting of the building, plaintiff's principal theory appears to be that the collapse of the structure is traceable to its noncompliance with the building laws. The defendants, owners and lessors of the building, denied the material allegations of the complaint, and cross-complained for damages, alleging that the collapse of the building was due solely and proximately to the plaintiff's negligence in overloading it. From a judgment on the cross-complaint for $8,028.95, with interest and costs, the plaintiff prosecutes this appeal, contending that the building was an illegal structure and a nuisance per se, and that the defendants are therefore liable as a matter of law for all damages resulting to plaintiff, regardless of any question of negligence or misrepresentation as to the soundness of the building.

The respondents' evidence tends to show that on or about September 30, 1920, the appellant contacted their agent relative to the leasing of the two-story structure here involved, stating that he had twenty-five carloads of onions he would like to store immediately, as he was required to remove them from the docks without delay. Respondents' agent, being uncertain as to the ability of the structure to carry the weight of such a quantity of onions, stated he would seek the advice and opinion of the board of public works as to the carrying capacity of the building. Upon inquiry there, he was informed that the building was sufficiently strong to carry twenty-five carloads of onions if they were properly stacked and distributed. This information was transmitted to the appellant, who had already commenced storing the onions. Thereafter, and without respondents' knowledge, appellant stored forty-three carloads of onions in the building. On two distinct occasions prior to the collapse of the structure the ground floor began to sag, but appellant failed to notify the respondents or their agent of this fact until, finally, the first and second floors of the building gave way under the excessive weight, causing the damage to the building for which respondents recovered the judgment appealed from. Among other witnesses, the respondents called a qualified structural engineer, who testified that in his opinion twenty-five carloads of onions could have been safely stored in the building without unduly stressing or straining its joists or girders.

Upon this and other competent evidence produced by the respondents, the trial court found that the building was at all times entirely adequate and fit for the storage of a reasonable number of carloads of onions, namely, twenty-five carloads, the amount appellant stated he intended storing; that respondents did not make any false or untrue statements concerning the building for the purpose of inducing appellant to enter into the lease, nor did they represent that the building was in good or sound condition or suitable for appellant's purposes; that before entering into the lease the appellant personally examined and inspected the building; that, acting upon his own initiative and judgment, appellant negligently and without respondents' consent stored an excessive and unreasonable quantity of onions in the building; and that the subsequent collapse of the building was without fault on the part of the respondents and was due solely and proximately to appellant's careless and negligent storing of an unreasonable and excessive quantity of onions.

[1, 2] These findings, founded as they are on substantial evidence, will permit of no judgment other than one for the respondents on their cross-complaint. And this is so even if we assume, without deciding, that the building, as urged by appellant, was not constructed as required by law, for there is no finding that any weakness or defect in the construction of the building caused or contributed in any way to its collapse. The principle that a violation of a statute or ordinance is negligence per se is subject to the limitation that the act or omission must proximately cause or contribute to the injury in order to bar a recovery. Skaggs v. Wiley (Cal. App.) 292 P. 132; Dewhirst v. Leopold, 194 Cal. 424, 431, 229 P. 30; Williams v. Southern Pac. Co., 173 Cal. 525, 539, 540, 160 P. 660; 19 Cal. Jur. 636, § 67. Even though the structure failed to comply with the building laws, the trial court might reasonably conclude, as it did, that the sole proximate cause of the damage to the onions and building was appellant's negligence in unreasonably and excessively overloading the building, and that such injury and damage would have resulted from such overloading even if the structure had satisfied all building law requirements. The question was one for the trial court under all the circumstances, and we cannot say that its finding that the accident was directly traceable to and was the sole and proximate result of appellant's negligence, in unreasonably and excessively overloading the building, is without support in the record.

The judgment is affirmed.

We concur: PRESTON, J.; SHENK, J.; SEAWELL, J.; RICHARDS, J.; LANGDON, J.; CURTIS, J.

211 Cal. 532

PEOPLE v. GINGELL.

Cr. 3366.

Supreme Court of California.
Feb. 18, 1931.

Rehearing Denied March 19, 1931.

1. Criminal law 🔑703.

Statement by prosecutor, after court sustained objection to prosecutor's questions, that witness could explain anything, was not reversible error.

2. Criminal law 🔑730(1).

Argument of prosecutor in murder prosecution that life term may be very few years, objection to which was sustained with instruction to disregard, *held* not reversible error.

3. Criminal law 🔑730(16).

Prosecutor's argument concerning excluded letter written by defendant, provoked by argument of defendant's counsel, was not reversible error, in view of instruction to disregard.

4. Criminal law 🔑722(2).

In prosecution for murder of unfaithful wife, reference by prosecutor to what wife would testify concerning defendant's unfaithfulness was not reversible error, under evidence.

5. Criminal law 🔑1037(1).

Argument of prosecutor referring to matters of common knowledge, prevalence of crime, and duty of jury in enforcing law, not objected to, was not reversible error.

6. Homicide 🔑340(2).

Portion of instruction differentiating between degrees of murder and manslaughter, referring to killing during unlawful act, was not reversible error as inapplicable.

7. Criminal law 🔑829(21).

Requested instruction reducing killing in heat of passion to manslaughter, covered by instructions given, was properly refused.

8. Homicide 🔑295(1).

Requested instruction to consider life, habits, and conduct of particular defendant in determining time for cooling of passion, rather than time within which reasonable man would cool, *held* properly refused.

9. Criminal law 🔑519(9).

Questioning of defendant after arrest until dawn of morning following tragedy was not alone sufficient to render statement inadmissible.

10. Homicide 🔑47.

Killing of wife and paramour caught in act of adultery could not be reduced to second degree murder under evidence showing prior knowledge, premeditation, and intent to kill.

11. Homicide 🔑282.

Whether defendant was guilty of first-degree murder *held* for jury.

In Bank.

Appeal from Superior Court, Los Angeles County; Marshall F. McComb, Judge.

August A. Gingell was convicted of murder in the first degree, and he appeals.

Affirmed.

C. J. Orbison and Orbison & Irwin, all of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and John L. Flynn, Dep. Atty. Gen., for the People.

SHENK, J.

By information filed by the district attorney of Los Angeles county the defendant was charged with the murder, on February 21, 1930, of his wife Vera Gingell, in the first count, and of Sigurd Bjorneby, in the second count. The jury returned a verdict of guilty of murder in the first degree on each count, and in each verdict fixed the extreme penalty. From the judgment on each verdict, and from the order denying his motion for a new trial, the defendant presents this appeal.

The defendant and Vera Ramsey were married at Portland, Or., on December 24, 1919. In 1924 they moved to Los Angeles, where they resided together as husband and wife until June 5, 1926, when the defendant departed for Washington, D. C., where he had formerly lived, his wife following him to that city in November of the same year, and they resided there for three years. In November, 1929, the wife left Washington, D. C., by train to New York, thence by boat to New Orleans, thence by train to Los Angeles. Because of lack of funds the defendant did not accompany his wife, but proceeded later by stage, arriving in Los Angeles on January 18, 1930. He registered at the Hayward Hotel and telephoned his wife, who was living at 253 South Lake street with Jean Chappelear, a friend under whom, as a department manager, the wife had worked as a saleslady in a department store during her former residence at Los Angeles. According to the defendant's testimony he was without funds to rent an apartment for himself and wife, so he rented a room for himself at 1039 South Hope street. He continued to live at that place until the night of the tragedy. He had known Jean Chappelear in the former years of his residence at Los Angeles and was dissatisfied with his wife's living with her. He had heard rumors that his wife was attending parties and going out with other men, whereupon he proceeded to spy upon the Chappelear apartment for the obvious purpose of satisfying himself of the actions of his wife and of the identity of her male company. His activities in this respect were carried on to such an extent that he was discovered several times watching his wife's apartment and was ordered by third parties to stay away from that vicinity. On one occasion he followed a man leaving the apartment to the latter's home and upon investigation found him to be Sigurd Bjorneby, the deceased, a man of foreign birth, 34 years of age, who had been employed on a whaling vessel, but having his residence in San Francisco, and who had been visiting his brother at Los Angeles from December 20, 1929, until the time of the homicides.

Although the defendant and his wife maintained separate habitations after their return to Los Angeles they saw each other frequently and cohabited as husband and wife. Their association was without strife, except as to accusations on the part of the husband as to the wife's association with other men and going out on parties. There is some evidence of counter accusations of the same sort on the part of the wife. After consultation the two decided that the wife would move from Jean Chappelear's apartment. Accordingly they spent much of the day of February 19th looking for an apartment acceptable to the wife. They finally decided on a single apartment, No. 32, on the fourth floor at 1225 West 6th street, where $10 was paid as rent for one week and a receipt for the money was issued to "Miss Gingell." Nothing was said at the time as to any one else occupying the apartment with her. The next day, the 20th, the defendant helped his wife pack her personal belongings at Jean Chappelear's apartment and conveyed some of them by suitcase and traveling bag to the new place. Later on in the day he borrowed an automobile from his employer, who conducted a market in Glendale, and by that means transported a wardrobe trunk to the new place, at which time he asked the apartment house manager for and was given the key to the apartment for the purpose of placing the trunk therein. When he was given this key he also stated to the landlady that he would probably bring some more things later in the evening, and, as it might be late, he requested and received a key to the outside door. The landlady testified that at no time did either of them state that they were husband and wife. The defendant testified that the landlady was so informed. The wife registered as "V. Gingell" and notified the landlady early that evening that she would probably be called on the telephone by the name of Ramsey from the motion picture studio where she had been employed.

The defendant was working at a Glendale market as a meat cutter. He returned with the borrowed automobile to his work at Glendale about 4 o'clock on the afternoon of the 20th and worked until his regular quitting time at 7 o'clock, when by prior arrangement his wife called him on the telephone, at which time she told him that she was going on a party or at least to a show and then to a friend's house for a late dinner after the party. After the homicides the defendant stated that he suspected that his wife was not telling him the truth and determined to find out. He returned to his room on Hope street, Los Angeles, had his supper, and armed himself with a 45-caliber United States Army revolver which he had obtained many years before from an ex-marine and had since kept in his possession. He then walked to Sixth and Witmer streets, where he called his wife's apartment on a drug store telephone about 9:15 o'clock. The wife answered and told him that there were four in her apartment; that they were just ready to leave for a little house party, and that they had decided not to go to a show. From then on he watched the apartment from a point on the opposite side of the street where he stationed himself behind a signboard and where he could see the light in the window of his wife's apartment. No one entered or left the apartment house after he commenced his watch whom he suspected of going to or leaving the apartment. At 11:45 the light in the apartment was turned out, whereupon the defendant entered the apartment house, proceeded to the fourth floor and rapped on the door of apartment 32. After the second rap and no answer he unlocked and opened the door, turned on the light and saw his wife and Bjorneby in bed together. The defendant exclaimed "'What's the idea' or something like that," whereupon the wife replied that it was none of his business. Bjorneby jumped out of bed and the defendant asked him to sit down, that defendant wanted to talk to his wife. The defendant testified that Bjorneby did not sit down but started toward him with a clenched fist and in a menacing manner and that he (the defendant) thereupon drew his gun and shot one shot into the air. Bjorneby then sat down on the bed. The defendant then asked his wife to dress and go with him to his room, whereupon the wife said: "Take that damn gun and get the hell out of here and leave us alone." He repeated his request to his wife to dress and join him and received a similar answer. Bjorneby rose again, so the defendant testified, and started toward him, and his wife jumped out of bed and started toward him, when "I then lost control of myself and started firing." Four shots were then fired, the first two into the body of Bjorneby, the second of which entered his head and killed him instantly. The other two shots entered the body of the wife, the second of which entered her head, rendered her unconscious, and she fell to the floor. The defendant immediately left the apartment, returned to the street and walked to the corner of Sixth and Lucas streets, looking for an officer. He then proceeded to Seventh and Lucas and entered the Commodore drug store where Officer Elmer Hoffman happened then to be. The defendant walked over to the officer, touched him on the arm and asked him to come outside. When the two arrived on the sidewalk the defendant handed the officer the gun, stated that he had committed a crime and wanted to surrender. The officer called the Georgia street police station and shortly two officers from the detective bureau appeared in an automobile. At the suggestion of one of them the four went to the scene of the homicides, where they found the two bodies lying on the floor, the one dressed in her night clothes and the other in his underwear. Vera Gingell was still unconscious but breathing. She was taken to a hospital, but soon expired.

After ten or fifteen minutes spent in viewing the premises the defendant was taken to the Georgia street station, where he was interrogated and his statements taken down in shorthand and later transcribed. He was again taken back to the apartment and further questioned. Photographs were taken at the scene of the homicide, after which the defendant was taken to Central police station, where he was further interrogated.

Taking up the points raised by the defendant in the order in which they are presented, it is first contended that the deputy district attorney in charge of the case was guilty of misconduct in his cross-examination of the defendant and in his argument to the jury.

[1] In his statement to the officers on the night of the homicides, which statement was for the most part admitted in evidence, the defendant said that he did not want his wife to live in the vicinity of the Jean Chappelear apartment "on account of the gang she was running with." On cross-examination the deputy district attorney propounded the following question: "Can you tell us what you meant by 'the gang she was running with'?" An objection without stating the grounds therefor was interposed by the defendant's counsel and the court said "sustained." Then followed the question by the prosecutor, "Do you want to explain that?" To which objection was again interposed and a request made to the court to admonish the prosecutor for asking improper questions after the court had ruled the same objectionable. The prosecutor then said: "The witness has the right to explain anything," after which the court stated, "Objection sustained." It is this last remark of the prosecutor that is claimed to be misconduct. We find nothing objectionable in the remark, except perhaps a breach of decorum in interjecting it after the court had rightly or wrongly sustained the insufficient objection of the defendant's counsel. The objection might well have been overruled, as the question on cross-examination had a legitimate bearing on the mental attitude of the defendant just prior to the homicides and the relationship of the defendant with his wife at that time. The defendant contended at the trial that his relationship with his wife was harmonious and free from contention. In his statement before the trial he said that his wife accused him and that he had accused her of "cheating"; that she took it seriously a couple of times and that at one time she had attempted to commit suicide by taking poison. The prosecutor endeavored to cross-examine the defendant on his prior statements concerning these matters, by questions which appear from the record to have been appropriate. However, the defendant's objections thereto were sustained. Under the circumstances we cannot say that the course pursued by the prosecutor was misconduct.

[2] Among the further specifications of misconduct is the following statement of the prosecutor in his opening argument: "Under the circumstances I don't see how it can be contended that this is anything but a first degree murder, not one first degree murder, but two first degree murders. We know the law that for one murder a man may be given the extreme penalty. At one time not long ago the law said that the jury had to find mitigating circumstances or it was their duty to impose the death penalty. The law knows that jurors frequently hesitate to do that and now it makes it optional with the jury. If the jury wishes, they may impose for one murder the death penalty or life. The defendant cannot serve two life terms in the penitentiary, and maybe a life term doesn't mean a life term either; maybe it means a very few years." On objection and request for admonition the court said: "Sustained. The jury is instructed to disregard that last statement of counsel." It may be assumed and declared that the statement referred to had no proper place in the argument, but the incident falls far short, considering the whole record, of requiring the reversal of the judgments. See People v. Reilly, 208 Cal. 385, 281 P. 606.

[3] In his closing argument the prosecutor stated: "I wish the cold lips of Vera Gingell could tell you her story. I wish she could tell you of the infidelity of the defendant in this case. He silenced her lips. He tells his story. Could any one doubt that he lied from the witness stand? When a witness is false in one part of his testimony, it is all to be distrusted. Counsel argued that there was a letter that I should have offered to the jury. He knows that the court read the letter and ruled it was immaterial. If it is immaterial, the State can't offer it and the defense can't offer it. * * * Perhaps I know what Vera Gingell would testify to if she were here to go on the witness stand; perhaps I know that if Vera Gingell were here to testify that it would be of no value to the defendant in this case. Counsel knows we can't put in such a thing;

counsel knows that we can't put in her statements before that time. He says, why didn't I put that immaterial letter in evidence. The court ruled that that letter had nothing to do with the case."

Counsel for the defendant interposed an objection to the foregoing statement on the ground that it was not a correct statement of the law and requested that the jury be so instructed. In ruling upon the objection the court said: "The jury will receive the law from the court and not take any statement of counsel as the law in this case, except in so far as that statement may coincide with the law as given to you by the court." And the court further and at length admonished the jury to disregard statements made by counsel for both parties with reference to the letter. There had been during the course of the trial a sharp controversy between counsel as to the existence and contents of a letter written by the defendant to his wife before the tragedy. This letter was in the hands of the district attorney, and its production was called for by the defendant. After considerable maneuvering the court called for the letter and it was produced for the inspection of the court. Its introduction in evidence was refused apparently on the ground that it contained self-serving declarations. The letter is not set forth in the record so we are in the dark as to its contents and may not therefore rule upon its admissibility. Evidently counsel for the defendant in his argument, which is not in the record, commented on this letter and criticized the prosecutor for not producing it. Undoubtedly the reference to this letter by defense counsel provoked the reply of the prosecutor. There is no other reasonable explanation for it, and none has been suggested. At any rate, the court sustained the objection and admonished the jury at length not to consider the statement of the prosecutor.

[4] In reply to the argument of defense counsel advancing the honesty and rectitude of the defendant's character the prosecutor said: "He (counsel for defendant) leaves out the elements that could come from the mouth of Vera Gingell and Sigurd Bjorneby. He talks about the lecherous hands of Sigurd Bjorneby. I wonder how many times the hands of this defendant had been engaged in a similar enterprise?" Objection to this argument was sustained and the jury was instructed that "such statement is not evidence in the case and it is not to be considered by you for any purpose in reaching your verdict. Such statement is to be as though you had never heard it." It is urged that the reference to what Vera Gingell would testify to and as to what could be shown as to the defendant's conduct toward his wife, if she were alive, was especially reprehensible, because, so the defense claims, there was no evidence as to mutual unfaithful conduct. In the statement taken by the officers the following questions were asked of the defendant and answers given as follows:

"Q. You were both cheating? A. We were accusing each other.

"Q. You had accused her and she accused you? A. Yes.

"Q. Did it ever get serious? A. A little trouble; every family has a little trouble.

"Q. Was she cheating on you and you cheating on her? A. Both a little bit."

It is true that when the original statement made to the officers was offered in evidence, objection to the foregoing questions and answers was sustained; but the prosecution was permitted to use them for purposes of cross-examination, and when the defendant was asked if those questions were asked and the answers so made, the defendant stated that he "did not remember." On this state of the record we find no misconduct in the comment made thereon sufficient to justify a reversal.

[5] Again the prosecutor in his closing argument stated: "It is a matter of common knowledge and principle that there are more murders committed annually in America than any civilized nation on the globe. It is also a matter of common knowledge that the murder wave is on the increase in America. There are various reasons ascribed therefor. One is the looseness of the law. Another is lack of efficiency in the prosecution on the part of the officers of the law. Third, and last, is the reluctance and hesitancy upon the part of the jurors to properly act in enforcing the law." It has been held in many cases that the range of discussion, illustration, and argumentation is very wide, and that matters of common knowledge may be referred to and allusion may be made to the prevalence of crime and the duty of the jury. People v. Burke, 18 Cal. App. 72, 102, 122 P. 435, and cases there cited. Furthermore, no objection to this statement was interposed.

It is expressly not contended by counsel for the defendant that any one of his specifications of misconduct standing by itself would be reversible error in the light of the court's admonitions, but it is asserted that, taken together, they should prompt the conclusion that the defendant did not have a fair trial. An inspection of the rather voluminous record discloses that counsel have singled out what might, dissociated from the context and associated arguments, be stressed as an overstepping of the bounds by the prosecution. But we are not convinced that singly or collectively they rise to the importance urged by earnest counsel in that behalf.

It is next contended that the court erred in giving certain instructions and in refusing to give certain other instructions proposed by the defendant. The court charged the jury generally and at length on the law of homicide, setting forth therein the definitions of murder of the first degree, murder of the second degree, manslaughter, and self-defense, and called attention to the distinctions to be drawn in fixing the degree of the crime, if a verdict of guilty should be found. In these general instructions was included the following: "If the accused was engaged in the performance of an unlawful act, and if the deceased attempted in a lawful manner to prevent the performance of such unlawful act, and if, while so endeavoring to prevent the same, the defendant in anger, and solely for the purpose of revenge, or to enable him to carry out his unlawful design, so interfered with by said deceased, attacked the latter with a deadly weapon, intending to kill said deceased, and did, under such circumstances, carry such intention into execution, the fact that defendant was in a passion would not mitigate or excuse such homicide, but the crime committed would in such case be murder in the first degree. It is not less murder because the act is done suddenly after the intent to commit the homicide is formed. It is sufficient that the malicious intention precedes and accompanies the act of homicide."

[6] The foregoing portion of the general instruction is objected to, not because it does not state the law correctly, but because, it is contended, there are no facts in the case to which it could be made applicable. It is perhaps debatable whether such facts do or do not exist in the record. The prosecution's case was tried on the theory that the deceased wife had refused to live with her husband, and that she lived separately for that reason. There was evidence from the mouth of the defendant himself to support an argument on that theory. He stated before the trial that when his wife left Washington, D. C., he feared she would not live with him again. At the trial he testified that a permanent separation was never contemplated, and that they lived apart only because he was not financially able to provide a place suitable to the wife for both to live. There was also evidence to support the conclusion that the defendant obtained the key to her apartment without the wife's knowledge and in order that he might enter her apartment unbeknown to her. The wife had worked temporarily at a moving picture studio, and the evidence is quite clear that she intended to continue in this work under her maiden name, and that this was one of the reasons why she desired to live apart from her husband. But, assuming that the defendant had a legal right to enter his wife's apartment at any time, we are unable to conclude that he was prejudiced by this portion of a lengthy instruction which in its entirety correctly sets forth the law of homicide and the evident purpose of which was to call attention to the distinctions which the jury should draw in considering the evidence and in fixing the degree of the crime. See People v. Matthew, 194 Cal. 273, 283, 228 P. 424; People v. Quimby, 6 Cal. App. 482, 92 P. 493.

The defendant further complains of the refusal of the court to give three certain instructions relating to the circumstances under which the homicides might be found to be manslaughter. It is unnecessary to set them forth in full. It was sought thereby to have the jury instructed that the sight of adultery committed by defendant's wife may be provocation which will justify that heat of passion sufficient to reduce the crime to manslaughter, "provided the knowledge of the adultery of the wife is so recent as to preclude the idea of cooling time or premeditation and provided further that the defendant at the time of the commission of the alleged homicides was acting under the influence of passion aroused by the sight of his wife's infidelity." These instructions were "refused except as given in other instructions." The other instructions on the subject were the following: "The court instructs the jury that, although the law provides that the provocation causing the sudden passion must arise at the time of the killing, it is your duty in determining the adequacy of the provocation, if any, to consider in connection with all the facts and circumstances in evidence in the case, the state of mind of the defendant and the alleged provocation therefor, and if you find that by reason thereof the defendant's mind at the time of the killing was incapable of cool reflection and that said facts and circumstances were sufficient to produce such state of mind in a person of ordinary temper, then the proof as to the sufficiency of the provocation satisfies the requirements of the law and so, in this case, you will consider all the facts and circumstances in evidence in determining the condition of defendant's mind at the time of the alleged killing and the adequacy of the cause, if, any, producing such condition. * * * The court instructs the jury that if in this case you do not believe from the evidence to a moral certainty and beyond a reasonable doubt, that the defendant is guilty of murder as defined in these instructions, but you do believe from the evidence to a moral certainty and beyond a reasonable doubt, that on or about the 20th day of February, 1930, without authority of law and without a premeditated design to effect the death of Vera Gingell and Sigurd Bjorneby, or either of them, while in the heat of passion caused by a provocation apparently sufficient to excite uncontrollable passion in the mind of the defendant, such as would render him incapable of cool reflection [the defendant did] shoot and discharge leaden bullets into the bodies of Vera Gingell and Sigurd Bjorneby, or either of them, from a loaded pistol, and then and thereby inflicted wounds upon the bodies of said Vera Gingell and said Sigurd Bjorneby, or either of them, from the effects of which either of them died, then it will be your duty to acquit the defendant on the charge of murder, either in the first or second degree, and to find him guilty of the lesser degree of crime, to-wit: manslaughter."

[7] It is contended that nowhere in the instructions given is there any instruction or suggestion that the adultery of the wife suddenly discovered might be considered by the jury as a provocation for the deed or an extenuating circumstance to be considered by the jury in fixing the degree of the crime. To this we cannot agree. On the contrary, the instructions given would seem to have been more favorable to the defendant than the refused instructions in this respect. The refused instructions stressed the recent knowledge and sudden discovery of the adultery of the wife, resulting in the immediate resentment, anger, and passion sufficient to relieve the defendant of the crime of murder; whereas, the instructions given did not stress the recent knowledge and sudden discovery, but more generally directed a verdict of manslaughter instead of murder in the event that the homicide was found to be without premeditated design and while the defendant was acting "in the heat of passion caused by a provocation apparently sufficient to excite uncontrollable passion in the mind of defendant such as would render him incapable of cool reflection."

[8] Another instruction was refused and of which the defendant complains. This instruction, in the first portion thereof, treated of the reasonable time which the law allows for the subsidence of the anger aroused by the sudden provocation before the offense will be removed from the realm of manslaughter, and thus far it was unobjectionable and properly stated the law; but the instruction went on to say: "In applying this test all circumstances attending the homicides are to be taken into consideration, including the nature and extent of the provocation, the physical and mental condition of the defendant, his condition in life and peculiar situation at the time of the homicides, his education and his habits and his conduct and manner and conversation throughout the altercation." We think the foregoing quoted portion of the instruction was unsound and the entire instruction was therefore properly refused. The test was not the condition in life, education, habits, and conduct of this particular defendant, but rather the "cooling time" to be considered was the time within which an ordinary reasonable man would cool under like circumstances. A similar instruction was properly condemned in People v. Golsh, 63 Cal. App. 609, 616, 219 P. 456.

[9] The defendant insists that undue advantage was taken of him in his interrogation by the officers after his arrest, and therefore that his statement was inadmissible in evidence. We find nothing in the conduct of the officers that is subject to just criticism. True, he was questioned at intervals until nearly dawn of the morning after the tragedy, but that alone is not sufficient to render his statement inadmissible. A confession was not wrung from him. In fact, immediately after the shooting, he hunted out an officer, surrendered his firearm, and himself with the voluntary statement that he had committed a crime.

[10] Finally it is contended that, on the record, this court should reduce the degree of the crime from murder of the first degree to murder of the second degree or manslaughter. This contention would be entitled to favorable consideration if the record disclosed that the defendant, without previous warning, had discovered his wife in the adulterous embrace of her paramour, and in the heat of the anger and passion thereby engendered had slain them on the spot, without premeditation or design. But the record does not bear that interpretation. In the first place it shows beyond dispute the defendant's suspicions of the infidelity of his wife. He had shadowed her apartment in an endeavor to observe her conduct and learn the identity of her men company. He had discovered by his own means the identity of Bjorneby as at least one of his wife's associates.

There is also documentary evidence of premeditation and design. A week or so before the killing the defendant wrote a letter to his father-in-law as follows: "My dear Dad Ramsey:—After you have read this you will understand—I loved Vera too much to let her go on as she was—it was just another case of Birdie guess you understand even though it may be hard for you to believe tis true and I do too know you would rather see her where she is than doing such a wrong in the world —if I hadn't thought so much of Vera this would never happened but My God and Maker knows she drove me crazy night after night out with other men and all night too— thats why she would not live with me—I do hope you will pull yourself together now and don't take this too hard as it was the only thing to do and I have told her it would lead to this—Your son in Law Gus."

[11] The foregoing letter was not mailed, but was found in the defendant's possession after the homicides. At the time of his arrest he handed to officer Hoffman a letter addressed to Ray Ramsey, his brother-in-law,

reading as follows: "Dear Ray Ramsey. Well Ray here is the worse. It had to be. I have cornered Vera and a Mr. Bjorneby in her apartment as the law found them only knocked out. Vera has been doing this thing for the past five years and God my judge knows I did all in my power to make her stop it but just like Birdie, there was no stopping, and I know you all would rather see her where she is than continue to do this thing. I told her I would give her up to a good man if she would do the right thing in this world, but she would rather do as she was, so forgive me and thank me through your prayers as I did only the right thing. Gus." The defendant stated to the officers after his arrest that he wrote the letter to his brother-in-law before the night in question. At the trial he testified that he wrote it on the brick wall of the Good Samaritan Hospital which was nearby and after the homicides had taken place. The jury had the right to believe, as they must have felt compelled to believe, that this letter was written before the homicides. It would seem to be entirely beyond belief that after the tragic moments of the shooting affair, and his immediate departure to hunt an officer and surrender himself, the defendant would or could stop and pen this letter on the brick side wall of a building. On the other hand, this letter is in the same tenor as the one addressed to the father-in-law, admittedly written before the tragedy. Both of these letters evidence a deliberate purpose to relate the past event of the shooting of the deceased wife, but which was to take place after they were written. The second letter was unquestionably intended to impart information as to the killing of both the wife and her paramour. The defendant sought to explain them by stating that they referred solely to his own contemplated self-destruction, but they cannot be so interpreted. On no possible theory can it be said that they refer to the fact of his suicide. On the contrary, both refer to the past act of homicide which had not yet taken place. This we feel impelled to conclude is conclusive evidence of the prior intent and premeditation which classifies the homicides as murder of the first degree. It was the province of the jury, under the evidence, to fix the degree of the crime, and the application to reduce the degree must be denied.

Other minor points made by the defendant have been considered and are found to be without merit.

The judgments and orders are, and each of them is, affirmed.

We concur: WASTE, C. J.; RICHARDS, J.; SEAWELL, J.; CURTIS, J.; LANGDON, J.; PRESTON, J.

211 Cal. 556

MAUTINO v. SUTTER HOSPITAL ASS'N.

Civ. 4016.

Sac. 4244.

Supreme Court of California.

Feb. 19, 1931.

1. Hospitals 🔑7.

Private nurse working in hospital in employ of patient therein was invitee of hospital when injured.

2. Hospitals 🔑7.

If hospital was negligent in permitting floors to remain in slippery condition, private nurse, employed by patient, who continued to use floors with full knowledge of such condition, was guilty of contributory negligence.

3. Negligence 🔑32(1).

Invitee cannot recover from owner of premises for injuries resulting from dangers which are obvious or as well known to invitee as to owner.

4. Trial 🔑191(7).

Instruction that private nurse in hospital was not negligent in working there was erroneous as assuming slippery condition of floor.

5. Negligence 🔑32(1).

Owner of premises merely owes invitee duty to exercise reasonable care to keep premises in safe condition.

6. Negligence 🔑119(6).

Defense of contributory negligence was available without being pleaded, where contributory negligence was disclosed by plaintiff's own testimony.

In Bank.

Appeal from Superior Court, Sacramento County; J. R. Hughes, Judge.

Action by Ruth Mautino against the Sutter Hospital Association. Judgment for plaintiff, and defendant appeals.

Reversed.

For opinion of District Court of Appeal herewith adopted, see 285 P. 369.

Evan J. Hughes and J. W. S. Butler, both of Sacramento, for appellant.

Charles L. Gilmore, of Sacramento, for respondent.

WASTE, C. J.

Plaintiff recovered damages for personal injuries in an action brought by her against the defendant Sutter Hospital Association. On appeal, the judgment was reversed by the

District Court of Appeal for the Third Appellate District. A hearing was granted in this court to permit of further consideration of plaintiff's status, i. e., whether she should be adjudged an invitee or an employee of the defendant. After such consideration and review of the matter, we find ourselves in accord with the view of the District Court of Appeal, and therefore adopt the opinion of that court written by Mr. Presiding Justice Finch, and concurred in by Associate Justices Thompson and Plummer, viz.:

This is an action to recover damages for personal injuries suffered by the plaintiff when she fell on the floor of one of the rooms in defendant's hospital in which she was employed as a private nurse by the patient occupying the room. The verdict of the jury was in favor of the plaintiff for damages in the sum of $10,000. This amount was reduced by the trial court, with plaintiff's consent, to $6,235, and judgment was entered in favor of the plaintiff for that sum. The defendant has appealed from the judgment.

The floors of all the rooms in the hospital are covered with battleship linoleum. Whenever a room is vacated and before another patient is placed therein "a thin coat of paste wax is applied over the surface of the dusted floor, and a large revolving motor with a brush attached to it is used for polishing or rubbing that wax into the surface." The evidence shows without conflict that battleship linoleum is the standard floor covering in general use in hospitals, and that the above-described treatment of the same is in accordance with usual and approved methods. The linoleum in the room in question had been so treated shortly before the patient was placed therein. The plaintiff is a graduate nurse with several years' experience. She had been employed frequently as a private nurse by patients in the defendant's hospital and was familiar with the floor coverings therein and the condition in which they were maintained. She was not in the employ of the defendant at the time of the accident, but in that of the patient who occupied the room. No witness but the plaintiff testified directly as to the manner in which the accident occurred. Other witnesses gave testimony tending to discredit that of the plaintiff, but it may be presumed in support of the judgment that her testimony is all true. She testified on direct examination as follows:

"I went to duty at noon September 28th and was relieved at 7 o'clock that night by the night nurse." The next morning "I came on duty at 7 o'clock and relieved the night nurse." About 9 o'clock "I slipped and fell. * * * I had taken care of the patient, * * * and I thought the man would sleep, so I sat in the chair by him in the corner, * * * I got up to go * * * outside of the room, and when I got just past the foot of his bed going toward the door, before I knew what had happened or anything, I was on the floor. I had slipped in some way, * * * and I couldn't get up. * * * September 28th, when I went to duty, I told the nurse that the floor was so slippery, * * * the head nurse on that floor. * * * It was slick, and I couldn't keep my feet, the day of September the 28th. It was equally as bad on September the 29th, if not worse. * * * It was highly polished and I couldn't really keep my feet, it was so slick. * * * I told them I would slip and fall—the head nurse."

On cross-examination she testified that she noticed that the floors "were slick * * * from the time" she "first went into the room" and continued to notice it "throughout the day"; that on account thereof "I walked flat footed"; that the floor was as slick on the morning of the 29th as on the previous day, "maybe a little more so."

Other witnesses testified that immediately after the accident the plaintiff said that something had been "spilled on the floor in the room, that she had slipped on it and fallen and hurt herself," but the plaintiff denied that she had made such statement. One of the witnesses for the defendant testified that, about an hour after the accident she "saw white spots on the floor where something had spilled on the wax" at about the place where the plaintiff fell. The plaintiff testified that the "white spot * * * on the floor was part of the dressing that came off my shoes" at the time of the fall.

[1-3] The court properly instructed the jury, at the plaintiff's request, that at the time of the accident she was "an invitee of the defendant." It is clear from the plaintiff's testimony that she had full knowledge of the condition of the floor during all the afternoon of September 28th and for two hours in the forenoon of the next day. It does not appear that the defendant's knowledge thereof was superior to that of the plaintiff. If it was negligence for the defendant to maintain the floor in the condition described by the plaintiff, there appears to be no escape from the conclusion that it was negligence for the plaintiff, with full knowledge of such condition, to continue in the use thereof.

"The authorities are entirely agreed upon the proposition that an owner or occupant of lands or buildings who directly or by implication invites or induces others to go thereon or therein owes to such persons a duty to have his premises in a reasonably safe condition and to give warning of latent or concealed perils. In the language of a recent opinion: 'The law is well settled that an owner or occupant of land who by invitation, express or implied, induces or leads others to go upon premises for any lawful purpose is liable for injuries occasioned by the unsafe condition of the land or its approaches, if such condition was known to him and not to them.' * * * The owner is not an insurer of such persons, even when he has invited them to enter. Nor is there any presumption of negligence on the part of an owner or occupier merely upon a showing that an injury has been sustained by one while rightfully upon the premises. The true ground of liability is the proprietor's superior knowledge of the perilous instrumentality and the danger therefrom to persons going upon the property. It is when the perilous instrumentality is known to the owner or occupant and not to the person injured that a recovery is permitted. * * * There is no liability for injuries from dangers that are obvious, or as well known to the person injured as to the owner or occupant." 20 R. C. L. pp. 55–57; Goldstein v. Healy, 187 Cal. 206, 211, 201 P. 462; Shanley v. American Olive Co., 185 Cal. 552, 555, 197 P. 793.

Some of the instructions were in conflict with the foregoing statement of the law among them the following:

"The court instructs you that the plaintiff's continuing to work in the room at defendant's hospital after having had knowledge of the slippery condition of the floor was not an act of negligence on her part, nor was she guilty of negligence by reason of continuing her work as a nurse in the room where the patient was confined, even after she had knowledge of the slippery condition of the floor. * * *

"If you find that the floor was so slippery that a prudent and reasonable person, complying with the regulations of the defendant, would, under the same circumstances, slip and fall to the floor, then the defendant would be negligent and your verdict must be for the plaintiff."

[4] The first of these instructions incorrectly states the law and assumes as a fact that the floor was slippery. The second would require a verdict in favor of the plaintiff, regardless of contributory negligence on her part, if the floor was in such condition that a prudent and reasonable person would slip and fall on it. Even if the plaintiff were free from contributory negligence, "not every accident that occurs gives rise to a cause of action upon which the party injured may recover damages from some one. Thousands of accidents occur every day for which no one is liable in damages, and often no one is to blame, not even the ones who are injured." S. S. Kresge Co. v. Fader, 116 Ohio St. 718, 158 N. E. 174, 175, 58 A. L. R. 132.

[5] The court instructed the jury that "it was the duty of the defendant to provide a reasonably safe place for her (plaintiff) to work and discharge her duties." While this instruction may not have misled the jury, it is not an accurate statement of the law. It is not the duty of an owner in such a case to keep his premises absolutely in a reasonably safe condition, but only to exercise reasonable care to keep them in a safe condition. "The responsibility of such owner for the safety of such person in such a case is not absolute; he is only required to use ordinary care for the safety of the persons he invites to come upon the premises." Shanley v. American Olive Co., 185 Cal. 552, 555, 197 P. 793, 794. "The owner of premises is not an insurer of the safety of an invitee, but he owes him the duty to exercise ordinary care in seeing that the premises are in a safe condition." Dobbie v. Pacific Gas & Electric Co. (Cal. App.) 273 P. 630, 633.

In respondent's brief it is said that the plaintiff occupied "a status enabling her to claim the same degree of protection as an employee in her place of employment," and that "the employer is bound to provide a reasonably safe place for his employee to work in." It clearly appears that the plaintiff's status was that of invitee, as the court instructed the jury at her request, and that she was in no sense an employee of the defendant.

[6] Respondent urges that the defendant did not plead contributory negligence. The answer alleges that plaintiff's injuries "were entirely and solely caused by negligence of the plaintiff herself and not by any negligence on the part of the defendant." It is not necessary to decide whether that allegation sufficiently avers contributory negligence, because, "where the evidence introduced by the plaintiff shows that he has been guilty of contributory negligence, 'the defense may be availed of, even though not set up by defendant.'" Hoy v. Tornich, 199 Cal. 545, 551, 250 P. 565, 568.

The judgment is reversed.

We concur: PRESTON, J.; RICHARDS, J.; SHENK, J.; SEAWELL, J.; LANGDON, J.

211 Cal. 524

SINCLAIR v. CRABTREE et al.

S. F. 13386.

Supreme Court of California.

Feb. 17, 1931.

1. Trusts 🔑147(1).

Where beneficiary was to receive trust estate at 24 years of age, beneficiary's interest, whether vested or contingent, *held* alienable (Civ. Code, §§ 693, 699).

The trust estate was created by will which provided that the income should be used for maintenance and education of the beneficiary until she attained the age of 18; that thereafter until she attained the age of 24 the income was to be paid to the beneficiary, and at the age of 24 the trust was to cease and the trust estate pass to beneficiary.

2. Trusts 🔑147(1).

Beneficiary's complaint seeking to have conveyance of trust estate construed as equitable lien on trust fund *held* demurrable.

The beneficiary in her complaint set forth facts showing that trust estate was to become vested in beneficiary when she attained age of 24; that after she had attained age of 18 she conveyed her interest in trust estate; and complainant asked that the court construe the conveyance as equitable lien and to decree her to be owner thereof.

In Bank.

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Action by Frances Sinclair against George L. Crabtree and another. From the judgment, plaintiff and the named defendant appeal.

Reversed, with directions.

George D. Collins, of San Francisco, for appellant Crabtree.

Glensor, Clewe & Van Dine, of San Francisco, for respondent Sinclair.

H. F. Chadbourne, of San Francisco, for respondent Wells Fargo Bank.

CURTIS, J.

In the estate of Cornelia Bowman, deceased, certain property consisting of money and corporate stock was decreed and distributed to the Union Trust Company upon the following trust conditions: "To invest and keep the said trust estate invested so that income might be derived therefrom and to use the income of the said trust estate according to its best judgment for the maintenance and education of Fannie Sinclair, the great-granddaughter of decedent, until she attained the age of eighteen years; the net income of said trust estate to be paid to said Fannie Sinclair, after she shall have attained the age of eighteen years, at convenient intervals until she attains the age of twenty-four years, and when said Fannie Sinclair attains the age of twenty-four years, the trust to cease and the trust estate to pass to, vest in, and be by said trustee paid over and delivered to said Fannie Sinclair."

Frances Sinclair, named in said trust provision of said decree as Fannie Sinclair, attained the age of twenty-four years on December 8, 1927. Prior thereto, however, and on the 30th day of October, 1923, and when she was over eighteen years old, and therefore of legal age, the said Frances Sinclair executed and delivered to George L. Crabtree what purported to be a conveyance of said trust property. The consideration paid by the said Crabtree for said conveyance was the sum of $8,300. The conveyance was absolute in form and purported to convey the legal title to said property and not as security for the money advanced. The value of the trust property at the date of said purported conveyance was the sum of $25,849.28, subject to a lien of $7,500 held by John A. Bergerot. After reaching the age of twenty-four years the said Frances Sinclair instituted this action for the purpose of having the rights of said parties in and to said trust property determined by a decree of court. In her complaint she set forth the facts as related above and offered to do equity and to allow judgment and decree to be entered against her providing for the payment of said sum of $8,300 to said George L. Crabtree, with whatever rate of interest the court might adjudge reasonable, but asked that she be declared the owner of said property, subject to the liens of J. A. Bergerot and defendant Crabtree. The defendant Crabtree answered, setting up said conveyance and claiming to be the legal owner of the whole of said trust property, subject only to the said lien of J. A. Bergerot. Upon the issues thus made by the pleadings, a trial was had and resulted in a judgment and decree that the defendant Crabtree had an equitable lien upon said trust property as security for the payment to him of the said sum of $8,300, with interest thereon at the rate of 12 per cent. per annum from the 30th day of October, 1923, to the date of said judgment, the interest amounting at the date of said judgment to the sum of $5,118.31, and that plaintiff was entitled to all the rest and remainder of said trust property, after the payment of the lien of said George L. Crabtree. The Bergerot lien had been paid prior to the entry of said judgment. From this judgment each party has appealed. The plaintiff has appealed from that part of said judgment wherein it is adjudged and decreed that interest shall be allowed on said sum of $8,300 at the rate of 12 per cent. per annum, from October 30, 1923, to the date of said judgment. The defendant Crabtree has appealed from said judgment as a whole, his contention being that said judgment is erroneous in failing to adjudge him to be the legal owner of all of said property.

John A. Bergerot was made a party to the action by reason of his ownership of said lien of $7,500. As said lien has been paid, he is no longer an interested party herein. The Wells Fargo Bank & Union Trust Company is the successor in interest of the Union Trust Company. It has no interest in the result of this action except to have the question of ownership of said trust property determined by a decree of court.

The principal controversy involved herein grows out of the appeal of the defendant Crabtree, who will hereafter be referred to as the defendant, and for that reason we will devote our first consideration to the questions arising therein. Furthermore, should these questions be determined in favor of the defendant, it will not be necessary for us to pass upon the merits of plaintiff's appeal.

The rights of the parties hereto in and to said trust property depend entirely upon the meaning and effect to be given to the trust clause of the decree of distribution in the estate of Cornelia Bowman, deceased, which clause we have already set out in full herein. The contention of the defendant is that Frances Sinclair received by said decree a vested interest in said trust property, which passed to him by said conveyance of October 30, 1923, and that he thereby became the legal owner of said trust property, subject only to the prior lien held by J. A. Bergerot. Defendant further contends that even if Frances Sinclair by said decree became the owner of only a contingent interest in said trust funds at the date of the death of Cornelia Bowman, such interest could be conveyed by her after she became of legal age, and upon her arriving at the age of twenty-four years this interest became a vested interest and passed to the defendant by virtue of the prior conveyance to him by the said Frances Sinclair.

Plaintiff contends that her interest in said trust property prior to attaining the age of twenty-four years was only a contingent interest therein or a mere possibility; that it was not subject to alienation prior to her reaching that age; and that at most any attempted conveyance by her of her said interest, prior to the time she became twenty-four years of age, created only an equitable lien against said trust property, enforceable in a court of equity wherein the amount of defendant's recovery would be limited to the sum advanced by him with reasonable interest.

[1] As we view the case, the question as to whether the interest of Frances Sinclair in the trust property was contingent or vested is not a matter of controlling importance. It is conceded by the plaintiff that if her interest at the date of said conveyance was a vested interest in said trust property, said conveyance was a valid and legal transfer of said property to the defendant, and the latter thereby acquired a legal title to said property. She contends, however, that if her interest in said property under said decree of distribution was only a contingent interest she was incapable of transferring a legal title to said trust property until she attained the age of twenty-four years. In this contention we cannot agree. A future interest in property is declared by section 693 of the Civil Code to be either vested or contingent. By section 699 of the Civil Code it is provided that, "Future interests pass by succession, will, and transfer, in the same manner as present interests." In Gray v. Union Trust Co., 171 Cal. 637, 642, 154 P. 306, 309, the court held, speaking of certain trusts created under a deed executed by the plaintiff Gray: "Everything * * * which the law contemplates shall exist for the creation of equitable remainders or remainders in trust is found in this trust. Whether they be regarded as vested or contingent is immaterial, for in either case the estate and interest are alienable." In support of the foregoing ruling, the following authorities were cited: Davis v. Willson, 115 Ky. 639, 74 S. W. 696, 697; McDonald v. Bayard Sav. Bank, 123 Iowa, 413, 98 N. W. 1025, 1026, and Sikemeier v. Galvin, 124 Mo. 367, 27 S. W. 551.

In the first of these cases, the supreme court of Kentucky after referring to the rule of common law that, "as no title passed to the contingent remaindermen until the happening of the contingency, there could be no sale in the interim," called attention to the statute of that state and held as follows: "But section 6, art. 1, c. 63, Gen. St. (section 2341, Ky. St.), provides: 'Any interest in, or claim to, real estate may be disposed of by deed, or will, in writing.' This provision clearly embraces a contingent remainder interest in the land."

In the second of the cases just cited, the Supreme Court of the state of Iowa had this to say in regarding the right of the holder of a contingent remainder to alienate the same: "It may be conceded for the purposes of this case that the plaintiffs, at the time of making the quitclaim deed, were contingent remaindermen, having only a possibility of ever coming into possession; but, however remote and uncertain this remainder may have been, there was still a possibility, coupled with an interest, which might at some future time ripen into an estate. 1 Tiffany's R. P. 306. At the time the deed was executed, James McDonald was unmarried and without issue. If he died without issue, and the plaintiffs survived him, they would immediately come into possession of the estate under the provisions of the testator's will. True, this contingency might never happen, but there was a possibility that it might; and this possibility created, in our judgment, a contingency interest or concern in the land, which existed at the time of the conveyance. Godman v. Simmons, 113 Mo. 122, 20 S. W. 972. This interest was not a mere expectancy. In 2 Fearn on Remainders, p. 23, an expectancy or chance is defined as 'a mere hope, unfounded in any limitation, possession, trust, or legal act whatever—such as the hope which an heir apparent has of succeeding to the ancestor's estate. This is sometimes said to be a bare or mere possibility. It is a possibility in the popular sense of the term. But it is less than a possibility in the specific sense of the term "possibility." For it is no right at all, in contemplation of law, even by possibility, because, in the case of a mere expectancy, nothing has been done to create an obligation in any event; and, where there is no obligation, there can be no right, for "right" and "obligation" are correlative terms.' The interests of the appellants, then, were not mere expectancies. They have their foundation in the 'provision,' the 'legal act' of the will. Jeffers v. Lampson, 10 Ohio St. 101. If this be true, it follows that under this statute every conceivable interest in the estate, 'whether present or future, vested or contingent, and however acquired,' passed by the deed."

The statutes in these states, while differing in some respects from section 699 of the Civil Code of this state, are like it in the one respect in which we are concerned in this action. They all in effect empower the holder of the estate in remainder to alienate his interest in said state. The statutes of the states of Kentucky and Iowa provide generally that any interest in real estate may be disposed of by deed, which the courts of these states have held are broad enough to include the transfer of contingent interests in real property. The section of the Code of our state is more direct and specific and applies to future estates, and expressly provides that future interests pass by transfer in the same manner as present interests. That "future interests" in property include both vested and contingent interests, we think there can be no question. We are therefore satisfied that when Frances Sinclair executed and delivered to the defendant, after she became of legal age, but prior to the complete vesting in her of the absolute title to said trust property, the conveyance above referred to, she divested herself of all her interest in said trust property and that by said conveyance the defendant became the owner of said property, contingent only upon Frances Sinclair's attaining the age of twenty-four years. Upon her becoming twenty-four years of age, the defendant became the absolute owner of the present legal title thereto.

The contention of plaintiff that this case is governed by the rule enunciated in Bridge v. Kedon, 163 Cal. 493, 126 P. 149, 43 L. R. A. (N. S.) 404, we think cannot be sustained. That case involved a conveyance or assignment of the expectant interest by an heir in the estate of his mother, who was living at the date of said conveyance. It was held that such a conveyance, while it did not create any legal interest in the estate, would be enforced by the courts as an equitable assignment of the interest of the heir after the death of his mother. Such an assignment, it was held, would only be enforceable in a court of equity, and the recovery thereunder would be controlled by equitable principles. Accordingly, this court in that case affirmed the judgment of the trial court which upheld the assignment which was given to secure four promissory notes, one of which bore interest at the rate of 3 per cent. per month and the other at the rate of 2½ per cent. per month, but limited recovery to the principal of said notes and interest thereon at the rate of 12 per cent. per annum. Plaintiff contends that she is in the same position as the heir in that case was and that, therefore, her assignment was not a legal transfer of her interest in the trust property, but created only an equitable lien in favor of the defendant for the money advanced by defendant, and that defendant's right in said trust property should be limited to a lien thereon for the amount of money so advanced with reasonable interest. But as we have seen, plaintiff's interest in said trust property at the date of said conveyance was greater than that of an heir of his expectant interest in the estate of his ancestor. It was a future interest in said property, and even if but a contingent interest it was such an interest as might be the subject of a legal transfer by her. By this transfer the defendant became the legal owner of whatever right the plaintiff had in said trust property, which was the right to the corpus thereof upon the plaintiff attaining the age of twenty-four years.

Plaintiff has cited an excerpt from 23 Ruling Case Law, p. 574, to the effect that under the common law a contingent remainder could not be the subject of a transfer. Conceding that this was the rule at common law, this rule has been changed by the statutes of this state. Section 699, Civ. Code; Gray v. Union Trust Company, supra. Section 953 of Pomeroy's Equity (4th Ed.) is not applicable for the same reason.

[2] In this action the defendant interposed a general demurrer to plaintiff's complaint,

which was overruled by the trial court. This ruling we think was erroneous. Plaintiff in her complaint set forth portions of the decree of distribution in the estate of Cornelia Bowman, deceased, which provided for the creation in her of said interest in said trust property. She then alleged the conveyance thereof to the defendant and asked the court to construe this conveyance as an equitable lien in favor of defendant upon said trust property and to decree her to be the owner thereof, subject to said lien. From what we have already said, it is clear that said complaint stated no cause of action against the defendants, or either of them. The demurrer should have been sustained.

The judgment herein is reversed, with directions to the trial court to sustain the defendant's demurrer to the complaint and to dismiss said action.

We concur: WASTE, C. J.; LANGDON, J.; PRESTON, J.; SHENK, J.; SEAWELL, J.; RICHARDS, J.

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211 Cal. 552

SAN FRANCISCO IRON & METAL CO. v. ABRAHAM et al.

S. F. 13567.

Supreme Court of California.

Feb. 18, 1931.

1. Attachment ⚷7.

Plaintiff in action for tort *held* not entitled to attachment (Code Civ. Proc. § 537).

2. Attachment ⚷47(4).

Plaintiff's count for money had and received was evidence on issue of right to attachment, but was not conclusive.

3. Attachment ⚷245.

Plaintiff's verified complaint at hearing of motion to dissolve attachment stood as affidavit.

4. Attachment ⚷5.

Plea in assumpsit for money had and received waived deceit and affirmed original contract under which no liability existed, and hence precluded right to attachment.

> Count in petition alleging assumpsit for money had and received affirmed agreement whereby defendant transferred to plaintiff all of his interest in partnership and plaintiff assumed all obligations of the partnership but by terms of which no sum of money was stipulated as payable from either party to the other.

5. Attachment ⚷7.

Complaint to recover money paid to copartnership *held* to state cause of action in deceit, precluding right to attachment (Code Civ. Proc. § 537).

> Complaint alleged formation of partnership and payment of money into funds of copartnership; that partnership became heavily indebted; that defendant partner offered to surrender interest in partnership if remaining partners would assume obligations of partnership; that defendant, in accordance with offer and without further money consideration, transferred interest in partnership to remaining partners, who agreed to assume obligations of partnership and to regard copartnership as dissolved. Action was commenced more than two years after last payment into funds of partnership was made by plaintiff.

6. Attachment ⚷92.

Attaching party should show he is fairly and strictly within his rights to be entitled to attachment, where there are other creditors who may be affected thereby.

In Bank.

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Action by the San Francisco Iron & Metal Company against Nathan Abraham and others. From an order discharging an attachment, plaintiff appeals.

Affirmed.

Superseding opinion in 287 P. 569.

Louis E. Goodman, of San Francisco, for appellant.

Bianchi & Hyman, of San Francisco, for respondents.

PER CURIAM.

A hearing in this matter was granted by this court for the purpose of giving further consideration to certain contentions urged by appellant petitioner as to the soundness of the conclusion arrived at by the District Court of Appeal. Such investigation leads us to the conclusion that the trial court did not abuse or misuse its power by discharging the attachment, and that the appellate court's decision as to the law of the case may well be affirmed. The opinion of Mr. Justice Sturtevant, Division Two, First Appellate District, with the noted correction as to the order of the counts of the complaint, which in no way affects the substance of the opinion, is adopted and approved as a part of our opinion. It follows:

"This is an appeal by the plaintiff from an order made discharging an attachment. On the hearing of the motion the parties introduced in evidence the plaintiff's verified complaint, its affidavit for an attachment, its undertaking, plaintiff's verified amended complaint, defendants' notice of motion to discharge, defendants' affidavit, and the affidavit of L. H. Silberman, the vice president of the plaintiff.

"From the foregoing papers the following facts appear: Prior to November 1, 1926, N. Abraham was the owner of a store and doing business under the name of N. Abraham and Co. On that date Lou H. Silberman and Harry Silberman, as the agents of plaintiff, and N. Abraham formed a partnership and thereafter conducted the business of the store under the name of N. Abraham Mercantile Company. As for the contribution of the new partner or partners, the plaintiff paid into the funds of the copartnership $60,093.31. The new firm continued to transact business until the 1st day of December, 1927. At that time it was in financial embarrassment and the defendant proposed to give or take. By agreement of the parties, the defendant transferred to the plaintiff all of his interest and the plaintiff assumed all of the obligations of the partnership, but by the terms of the dissolution agreement no sum of money was stipulated as payable from either party to the other. The plaintiff's complaint is in two counts. The first count specifically pleads a cause of action as for deceit. The second count pleads a cause of action as for moneys had and received. It was stipulated at the trial that both counts are but different methods of pleading one transaction. It nowhere appears that the plaintiff rescinded the partnership contract, offered to rescind it, nor, even at this time, offers to place the defendant in statu quo.

[1] "The foregoing facts show that the plaintiff's grievance is a tort and under our statute it was not entitled to an attachment. Code Civ. Proc. § 537; Hallidie v. Enginger, 175 Cal. 505, 509, 166 P. 1. Moreover, searching the entire record, nothing appears showing any contract under which the defendant became indebted to the plaintiff '* * * upon a contract express or implied, for the direct payment of money. * * *' Code Civ. Proc. § 537; Willett & Burr v. Alpert, 181 Cal. 652, 662, 185 P. 976; Sturtevant v. K. Hovden Co., 60 Cal. App. 696, 698, 214 P. 244; Cal. Packing Corp. v. Kato, 45 Cal. App. 491, 493, 188 P. 57.

[2-4] "The plaintiff points to the count as for money had and received, asserts that count sounds in contract, and therefore claims that in any event it was entitled to take out a writ of attachment. In making this claim it is assuming that the court is passing on a demurrer, whereas the proceeding before the court is a motion to dissolve an attachment. The question is not what the plaintiff has pleaded, but what in truth and in fact is its grievance. The count for moneys had and received was evidence on the issue before the court, but no more conclusive than any other item of evidence before the court. [3] The plaintiff's complaint on the hearing of the motion before the court stood as an affidavit. Jacobs, Malcolm & Burtt v. Railway Co., 71 Cal. App. 42, 44, 234 P. 328. That is, the hearing on the motion before the court was similar to a hearing on a motion to dissolve an injunction. That the plaintiff's verified pleading stands as an affidavit on a motion to dissolve an injunction is made clear by the authorities. Falkinburg v. Lucy, 35 Cal. 52, 60, 61, 95 Am. Dec. 76; Heffion v. Bowers, 72 Cal. 270–272, 13 P. 690; Hiller v. Collins, 63 Cal. 235, 237; Christopher v. Condogeorge, 128 Cal. 581, 585, 61 P. 174. [4] Moreover, by pleading the count in assumpsit the plaintiff waived the tort and affirmed the original contract. But by the terms of that contract the defendant never bound himself to repay to the plaintiff the amount of its expenditures. Bechtel v. Chase, 156 Cal. 707, 711, 712, 106 P. 81. Therefore it was not entitled to a writ of attachment. We think that the trial court was clearly right in making the order dissolving the attachment."

The inadvertence above referred to consists in the reversal of the counts pleaded, naming the third count—the only one which states facts—as the first count, and referring to the first count for money had and received as the second count, disregarding the second count of the complaint based upon an alleged open book account as immaterial to the reasoning of the opinion.

[5] The parties to the contract of copartnership operated under the same as copartners for more than a year after entering into it, and it is respondent's contention that the $60,093.31, which appellant furnished, was his contribution or purchase price for one-half of the partnership business. The payments made by appellant for said one-half interest in said business began November 1, 1926, and were concluded in the month of June, 1927, but no action was commenced prior to February 26, 1929, more than two years after the last payment was made, and then only after appellant, heavily indebted to a named banking corporation, to which it assigned all of its right, title, property, and interest in and to the firm of N. Abraham Mercantile Company, and said bank had placed a bookkeeper or overseer, in conjunction with said Abraham, in charge of said copartnership business. It further appears by affidavit, which is not satisfac-

torily met by counter affidavit, that Abraham became dissatisfied with the injection of said overseer into the management of the business, and that therefore a meeting of the agents of said bank and said Abraham was had, at which meeting the latter offered to assume all of the assets of said business, or to surrender his right in and to said copartnership and its properties, provided that said remaining partners would assume the obligations of said copartnership; that, in accordance with the latter offer, said Abraham did set over and assign, without further money consideration, all of his right, title, and interest in and to said copartnership to said remaining copartners; that they accepted the same and agreed to assume all the obligations of said copartnership and to regard the copartnership as dissolved; and that said transfer was in full settlement of said copartnership affairs. The complaint upon its face furnishes sufficient justification for the court's action. There is no reasonable theory by which the complaint can be construed, other than that the deceit, set forth with much particularity and detail in the third cause of action, is the gravamen and forms the basis of the causes of action, scantily pleaded in the other two counts.

The rule is thus stated in 2 Ruling Case Law, § 18, p. 815: "* * * Nor * * * will the courts permit a cause of action sounding in tort to be converted into an action of contract by means of the form of the pleading. The same act or transaction may constitute a cause of action, both in contract and in tort, and a party may have an election to pursue either remedy. In that sense he may be said to waive the tort and sue in contract. But for the purpose of bringing the case within the attachment law a right of action in contract cannot be created upon the theory of waiving the tort that gave rise to the cause."

[6] The affidavit of said Abraham, which is full and specific in its averments, and which is not satisfactorily rebutted in important respects, further strengthens the contention that the action is in fact, as alleged in the third cause of action, one sounding in tort and not in contract. Where there are other creditors who may be affected by the attachment of property, as there appear to be in the instant case, the right to gain a preference over them by the exercise of the extraordinary writ of attachment, it should satisfactorily appear to the trial court that the attaching party is fairly and strictly within his rights. From the case as presented by the record, we cannot say that the trial judge exceeded or abused his power in dissolving the attachment.

The order is affirmed.

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111 Cal. App. 372

PEOPLE v. ROGERS.

Cr. 2020.

District Court of Appeal, Second District, Division 2, California.

Feb. 11, 1931.

Rehearing Denied March 30, 1931.

Criminal law 🔑**1169(3).**

Admitting gun and officer's conversation with defendant, resulting in finding of gun after arrest on other charge, *held* harmless, where defendant's counsel first directly informed jury of other charge.

> In robbery prosecution, while officer was permitted to testify regarding conversation had with defendant and finding of gun which was admitted in evidence, there was nothing in direct testimony from which it could be argued that gun related to any former charge, unless it was showing thereby made that witness procured weapon from its hiding place four months before robbery charge was preferred against defendant. On cross-examination, defendant's counsel brought out that conversation was had after preliminary on other charge, and, on district attorney's objection to question whether conversation was in reference to other case, stated that defendant "was charged with another crime and he was tried and acquitted."

Appeal from Superior Court, Los Angeles County; Warren V. Tryon, Judge.

On petition for rehearing.

Rehearing denied.

For former opinion, see 295 P. 521.

Ralph D. Paonessa and Alexander L. Oster, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

PER CURIAM.

On petition for rehearing appellant challenges our statement, concerning the disclosure to the jury of the fact that "appellant had been under prosecution upon another criminal charge," to this effect: "This disclosure, however, was not first made by the evidence in question, but by a statement of appellant's counsel made in the presence of the jury." In view of this challenge we deem it proper to state more fully why the error of the trial court in receiving in evidence the conversation of the police officer and the gun, if there was any such error, was harmless. When the police officer first took the stand, it was shown by him, without objection or motion to strike, that he arrested appellant on April 1, 1930, and took him into custody, whereas the charge of robbery was not made against him until in August of that year. Thus the jury was shown that appellant had been placed under arrest, at least, long before the pending charge was made against him. When the police officer was asked for a conversation with appellant, held after this arrest, counsel for appellant inquired of the district attorney whether the conversation "was in reference to this charge," a form of inquiry from which the jury might reasonably have inferred that some former charge had been made against appellant. The district attorney answered the query in the affirmative, doubtless believing that the conversation and the gun found pursuant to it were admissible under the rule stated in People v. Stoerkel, 87 Cal. App. 336, 262 P. 825. This is certainly an arguable question, and is the one we found it unnecessary to decide in the opinion in the present case. When it developed that the conversation asked for related to a gun, counsel for appellant sought leave to "take this witness on voir dire," whereupon the following occurred:

"The Court: As I understand it, anything he is testifying to hasn't anything to do with any other charge.

"The District Attorney: My question is specifically directed to the facts of this case and the gun *as it applies* (italics ours) to this particular charge and no other. * * *

"Counsel for defendant: With that understanding I will withdraw my objection."

No objection, however, had theretofore been interposed. The witness then repeated the conversation. In it appellant told the witness where he had concealed a gun. It was then shown that the witness had procured the gun from its place of concealment, a gun was identified by him as the one in question, and it was offered in evidence. There was not the slightest item in the testimony from which it could be argued that the gun related to any former charge, unless it was the showing thereby made that the witness procured the weapon from its hiding place four months before the robbery charge was preferred against appellant. After the gun was offered, the witness was cross-examined as to his identification of it, and it was received in evidence. The record shows the following at the beginning of the general cross-examination of the police officer:

"Q. Officer Sterritt, when did you first know of the present robbery charges? A. The day after the preliminary *on the other charge.* (Italics ours.)

"Q. So that up to the time of the preliminary *on the other trial*, any conversation that you had with the defendant was in reference to *the other case* (italics ours), was it not?

"The District Attorney: That is objected to as calling for the conclusion and opinion of the witness. * * *

"Counsel for Defendant: Why, this man was charged with another crime and he was tried and acquitted.

"The District Attorney: Just a moment; that is entirely uncalled for."

In these few lines the jury was first directly informed that appellant had been previously charged with crime.

Rehearing denied.

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112 Cal. App. 37

ADAMS v. CHRISTOPHER et al.
INDEMNITY INS. CO. OF NORTH AMERICA v. BURGESS.
Civ. 4176.

District Court of Appeal, Third District, California.
Feb. 17, 1931.

1. Appeal and error 🔑102.

Appeal from order overruling or sustaining demurrer is unauthorized.

2. Appeal and error 🔑870(5).

Rulings on demurrer are reviewable on appeal from judgment itself.

3. Appeal and error 🔑70(3).

Appeal does not lie from interlocutory order directing that cross-complaint shall be considered and treated as independent pleading (Code Civ. Proc. § 963).

4. Appeal and error 🔑782.

Appellate court has no jurisdiction to hear appeal from order which is not appealable.

Appeal from Superior Court, Sacramento County; J. F. Pullen, Judge.

Action by H. O. Adams against John Christopher, the Indemnity Insurance Company of North America, D. E. Burgess, and others, wherein defendant last named filed a cross-complaint. From an order overruling a demurrer to the cross-complaint, the second named defendant appeals.

Appeal dismissed.

R. C. Pardoe, of Stockton, for appellant.

Hubert H. Briggs, of Stockton, for respondent.

Justice Pro Tem. McDANIEL delivered the opinion of the court.

All the parties above named, excepting D. E. Burgess, denominated defendant and cross-complainant, respondent herein, and Indemnity Insurance Company of North America, defendant and appellant herein, have no further part in this litigation for the reason that they, by appropriate judgments, settlements, and stipulations, have disposed of their several controversies.

The appellant gave notice of appeal as follows:

"(Title of Court and Cause.)

"To the Honorable J. F. Pullen, Judge of said Superior Court, and to D. E. Burgess, Defendant and Interpleader in the above entitled action, and Hubert H. Briggs, his attorney:

"You, and each of you will please take notice that Indemnity Insurance Company of North America, a corporation, one of the defendants in the above entitled action, hereby appeals to the District Court of Appeal, Third Appellate District of the State of California, from that certain order made and entered in the above entitled cause in said Superior Court on the 5th day of May, 1930, overruling demurrer of defendant Indemnity Insurance Company of North America, a corporation, to the pleading of defendant and interpleader D. E. Burgess in said action, and that the pleading of D. E. Burgess denominated cross-complaint, be treated as an independent, original complaint, and from the whole thereof.

"Dated: May 16th, 1930.

"R. C. Pardoe,

"Attorney for defendant Indemnity Insurance Company of North America, a corporation.

"Service of the within Notice of Appeal by copy is hereby admitted this 16th day of May, 1930.

"Hubert H. Briggs, per C. Dubois

"Attorney for D. E. Burgess, Defendant and Interpleader.

"Endorsed Filed May 16-1930 Harry W. Hall, Clerk by W. H. Young, Deputy."

There seem to have been two orders exactly alike made by the trial court on May 5th; the only difference being that in the first order the names of all of the parties defendants and interpleaders were not set out in full but in abbreviated form.

There is a written stipulation signed by the attorneys for the two remaining respective parties, whereby they agree that the name McIntosh may be stricken, as he was not a party to the pleading of said Burgess, and the name of John Christopher be substituted. This stipulation was not followed by any order of the court correcting the order or orders of May 5th, but it is immaterial, as neither McIntosh nor Christopher is attempting to appeal. The said order of May 5th, from which the appeal is sought to be taken, was not followed by any judgment, as the clerk's transcript shows. No judgment is referred to in the order.

[1-3] Our law does not authorize an appeal from an order overruling or sustaining a demurrer. The rulings on demurrer are reviewable, however, on appeal from the judgment itself. Harmon v. De Turk, 176 Cal. 761, 169 P. 680; 2 Cal. Jur. 156, and cases cited in note 10; section 963, Code Civ. Proc.; Garroway v. Jennings, 189 Cal. 97, 207 P. 554. Neither will an appeal lie from an interlocutory order, like an order directing that the cross-complaint of respondent shall be considered and treated as an independent pleading. 2 Cal. Jur. 157, and notes. Interlocutory orders not enumerated by the code are not appealable. Lantz v. Vai, 199 Cal. 190, 248 P. 665; section 963, Code Civ. Proc.

[4] The appellate court has no jurisdiction to hear the appeal where the order is not appealable. Ouzoonian v. Vaughan, 64 Cal. App. 369, 221 P. 958; Hughes v. De Mund, 70 Cal. App. 265, 233 P. 93.

It is ordered upon our own motion that this appeal be, and it is hereby, dismissed.

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111 Cal. App. 359

MOSS v. STUBBS et al.

PRATT v. SAME.

Civ. 7381.

District Court of Appeal, First District, Division 1, California.

Feb. 26, 1931.

Rehearing Denied Feb. 26, 1931. Hearing Denied by Supreme Court March 26, 1931.

Evidence ⚷383(9).

Rough crayon sketches by unskilled witnesses while testifying *held* without value, not being drawn to scale or correctly representing conditions or distances.

Appeals from Superior Court, Alameda County; E. C. Robinson, Judge.

On petition for rehearing.

Petition denied.

For former opinion, see 295 P. 572.

Thomas J. Straub, J. C. Wood, and Alden Ames, all of San Francisco, for appellants.

Everette C. McKeage, of San Francisco, for respondents.

PER CURIAM.

In passing upon respondents' petition for rehearing herein, it may be stated that we have given due consideration to the two "diagrams" upon which they place so much emphasis; but a casual inspection of them will show that neither by themselves nor in connection with the testimony can they be of any value whatever in establishing any of the points urged by respondents in their petition, for the reason that said diagrams are merely rough crayon sketches made by the witnesses in court while testifying; and it is not pretended that that said witnesses are skilled in engineering or draftmanship, nor that the maps were drawn to scale nor correctly describe the conditions existing at the scene of the accident, either as to courses, distances, or directions.

Rehearing denied.

111 Cal. App. 746

PEOPLE v. BREITENSTEIN.

Cr. 1971.

District Court of Appeal, Second District, Division 1, California.

Feb. 16, 1931.

As Modified on Denial of Rehearing March 2, 1931. Hearing Denied by Supreme Court March 16, 1931.

1. Criminal law 🔑**427(3).**

Conversation outside presence of defendant charged with grand theft, based on conspiracy to defraud city, was properly admitted, where, before termination of trial, existence of conspiracy was shown.

2. Criminal law 🔑**427(5).**

Evidence authorized conclusion that defendant charged with grand theft conspired to defraud city into paying money for fraudulent estimates of work done by contractors.

3. False pretenses 🔑**51.**

In prosecution for grand theft, based on conspiracy to defraud city, jury was required to determine whether payment for extras was result of innocent mistake or fraud.

4. Criminal law 🔑**423(1).**

Where conspiracy between contractor and city officials to defraud city was shown, testimony of conversations between city officials was admissible against contractor.

5. Criminal law 🔑**511(2).**

Corroboration of accomplice's testimony, though slight, connecting defendant with offense, is sufficient to sustain conviction (Pen. Code, § 1111).

6. False pretenses 🔑**23.**

Where conspiracy existed to defraud city, it was immaterial which of conspirators made false representations; each being liable for acts of others.

7. Criminal law 🔑**938(1).**

New trial for new evidence was properly refused, where not likely to have affected result, and failure to produce was not sufficiently excused.

8. Criminal law 🔑**938(1).**

Grant of new trial for new evidence is within trial court's discretion.

Appeal from Superior Court, Los Angeles County; William T. Aggeler, Judge.

Thomas C. Breitenstein was convicted of grand theft, and he appeals.

Affirmed.

W. Joseph Ford and Peter J. Youngdahl, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., Lionel Browne, Deputy Atty. Gen., and Buron Fitts, Dist. Atty., and Arthur Veitch, Dep. Dist. Atty., both of Los Angeles, for the People.

HOUSER, J.

In each of four counts of an indictment, defendant Breitenstein and three other persons respectively named Earle, Ward, and Ducey were charged with the commission of the crime of grand theft. Earle was the city engineer of the city of Pasadena; Ward was his assistant, and the two defendants Ducey and Breitenstein were partners engaged in said city in the business of contracting in matters affecting various kinds of street improvements. It appears that two several contracts for street improvement work were entered into between the city of Pasadena and the contracting firm of Ducey & Breitenstein.

The evidence adduced on the trial of the action shows that, under each of two separate contracts, double payments were made by said city to Ducey & Breitenstein, apparently for "extra" work supposedly not in the contracts between the parties, when, as a matter of fact, such work actually was stipulated therein. Each of such double payments formed the basis of one of the counts in the indictment herein. Each of the other two charges against the defendants arose out of the same two contracts between the interested parties, and each was based upon a payment of money to the firm of Ducey & Breitenstein for alleged intentional overmeasurements of square feet of cement work, pavement, etc., constructed for said city by said firm of contractors.

The theory of the prosecution was that, as to the payments of money made for alleged "extra" work, they were received by Ducey & Breitenstein as a result of a criminal concert of action between them and defendant Earle; and that each of the other two payments was accomplished by means of connivance or conspiracy among all the defendants.

For the reason that the action was dismissed as to defendant Ward, who thereupon became a witness for the people, and for the further reason that on account of the personal illness of the defendant Ducey, which resulted in his inability to be present at the time when the trial was had, the action was tried as against defendants Earle and Breitenstein only. From a judgment of conviction against each of such defendants on each of the charges preferred against them, as well as from an order by which their motion for a new trial was denied, defendant Breitenstein has appealed to this court.

[1, 2] The first point presented by appellant as a sufficient reason for a reversal of the judgment is that "the court erred in admitting against defendant Breitenstein the testimony of defendant Ward as to conversations between Ward and Earle outside the presence and hearing of said defendant Breitenstein, without any proof of conspiracy, except that contained in such conversations themselves."

As a necessary prerequisite to a determination by the jury that the defendants were guilty of the offense of which they were charged, among other rules of law the court instructed the jury that it must find that by means of false and fraudulent representations and pretenses the defendants actually defrauded the city of Pasadena at the times and in the manner alleged in the indictment against them. From the nature of the case and the facts adduced in evidence, it is manifest that the criminal offense of which the defendants were charged could have been committed only as a result of some corrupt agreement or understanding entered into between or among some or all of the defendants. Assuming that a sufficient total of evidence was introduced on the trial of the action to warrant the determination by the jury that a conspiracy to defraud the city of Pasadena as alleged in the indictment existed, the possible fact that, at the time the witness gave the testimony to which appellant here objects, the evidence was lacking in quantity and quality to justify such a conclusion would present no sufficient reason for a determination by this court that defendant had been prejudicially injured by the reception of such testimony at the time it was given. In other words, the "order of proof" is of no consequence, provided that no abuse of discretion be exercised by the trial court in directing the admission of such evidence at the time it is submitted to the jury for its consideration. 5 Cal. Jur. 514. So here, if, at the time defendant Ward gave his testimony regarding certain alleged conversations which took place between him and defendant Earle outside the presence of defendant Breitenstein prima facie proof of the existence of the conspiracy had not been presented to the trial court, that fact in itself would create no substantial prejudice against defendant Breitenstein, provided that before the termination of the trial sufficient evidence was introduced from which a conclusion might legally have been reached that by means of a conspiracy so to do the defendants had committed the offense for which they were then on trial.

Unquestionably, evidence was introduced from a consideration of which the jury was authorized to conclude that the city of Pasadena had been defrauded in each of the particulars alleged in the several counts of the indictment. Also, that, as to the "extras" in each of the two counts which were the subject of inquiry, the several acts of defendant Earle were directly and largely responsible; and that as to the other two counts the overpayments therein alleged, based on fraudulent estimates of the work done by defendants Ducey & Breitenstein, were directly traceable to both Earle and Ward. In the latter connection, unobjectionable evidence showed that Ward raised the figures on each of such jobs and gave to Earle the correct figures as well as those which were false, at which times either Earle or Ward subtracted the correct estimate from that which was false. In addition thereto, one of the witnesses testified to a conversation which he asserted had occurred between him and Breitenstein with reference to the work done by Ducey & Breitenstein under the provisions of one of the contracts in question, in which Breitenstein said to the witness, "Plans don't amount to anything on this job." The witness also testified that he compiled a progress report on the work done on said job, and frequently talked with Breitenstein regarding the work done and the measurements of such work; that Breitenstein would approach the witness and ask him how the job was running, and that he would then be told exactly how it ran; that Breitenstein would be given the number of square feet of concrete put in and the amount of material used in the work; that he would thereupon figure the amounts, put notes in his book, and that Breitenstein was furnished with notes all the time. The witness further testified that Breitenstein had told him that he and defendant Ducey had brought Earle from the city of San Diego to the city of Pasadena and had Earle appointed city engineer of the latter city; furthermore, that any inspector who "sat on the firm of Ducey & Breitenstein too strong" would, through their influence, be removed by Earle, and that several had already been removed. The witness continued that Breitenstein had told him not to consult with a certain engineer in the office of defendant Earle on any technical points, but to consult defendant Ward; that the employee to whom Breitenstein referred was "too nosey; that he was a nosey kind of a fellow, having no standing in the city hall, and not to furnish him with any information."

Another witness, who was an inspector of the "extra" work for the city of Pasadena, testified that he furnished Breitenstein with the figures on the concrete work done on one of the jobs in question, and that Breitenstein kept the figures in a little memorandum book; that Breitenstein at no time told such witness that his figures were wrong; that the witness gave Breitenstein the square or lineal feet of cement work done the day before, and that Breitenstein usually called on the job and received these figures "in the morning." It also appeared in evidence that defendant Earle caused the checks which represented the several payments of moneys which were the basis of the instant prosecution to be drawn on behalf of the city of Pasadena in favor of defendants Ducey and Breitenstein. Shortly thereafter, a part of a conversation had between Ward and defendant Breitenstein included the following: Defendant Ward testified to a conversation with defendant Breitenstein as follows: "I says, 'Well, you finally got around—' I can't call that inspector's name now—the chief inspector of the Light Department—and he said, 'Yes,' and I said, 'Well, I think he was a little bit off of his pins, or something like that—and a little bit too far fetched, and wanted to be hard on the Linda Vista job,' and we talked about that, and in a few minutes I said, 'How did you manage to get those large bills without suspicion?' and he told me that they were cashed and brought down from San Francisco by a bond salesman."

[3, 4] Without attempting to detail the evidence adduced with reference to the two counts which were founded on the alleged fraudulent collection by Ducey & Breitenstein from the city of Pasadena for "extra" work claimed to have been performed by Ducey & Breitenstein, it is sufficient to state that from the evidence the jury was authorized to draw the conclusion that in fact the work which was covered by such "extras" was specified and included in the contract, and consequently that the contractor could not properly be compensated for such performance other than as was provided in the contract itself. Furthermore, although the evidence given by defendants relating to the matter conflicted with that introduced by the prosecution, the jury, as the sole judge of the credibility of the witnesses, had the power to determine, and upon it was thrust the duty of determining, whether the payments for such "extras" were the result of an innocent mistake on the part of defendants, or whether they were deliberately and knowingly accomplished by them with the fraudulent intent of securing to themselves certain sums of money to which they were not justly and honestly entitled. The latter conclusion manifestly having been reached by the jury, the further conclusion that a conspiracy must have existed as between defendant Earle and Ducey & Breitenstein necessarily would follow. In such circumstances, the authorities are unanimous in the declaration of the legal principle which would include a ruling that the testimony given by Ward as to certain alleged conversations which occurred between him and defendant Earle, and which are the subject of the objections interposed by defendant Breitenstein on the trial of the action and by him reiterated in this court, was admissible, not only as against defendant Earle, but as well against defendant Breitenstein.

[5] What hereinbefore has been said necessarily presents by inference a ruling against defendant's contention to the effect that the testimony given by Ward was not corroborated. Furthermore, although by the provisions of section 1111 of the Penal Code a conviction of a defendant cannot be had solely upon the testimony of an accomplice, the authorities of this state are numerous to the effect that, even though but slight, and standing alone entitled to but little weight, if the corroboratory evidence but tend to connect the defendant with the commission of the offense, it measures up to the statutory requirement. People v. Kelly, 69 Cal. App. 558, 570, 231 P. 767, and authorities there cited.

[6] Appellant also predicates error upon the assumed fact that no evidence was introduced by which it was established that any false pretenses were made by defendant Breitenstein to the city of Pasadena. But assuming the existence of a conspiracy among the several defendants to fraudulently procure the payment of money by the city of Pasadena to the firm of Ducey & Breitenstein, it was immaterial which of the several defendants actually made the false representations. After the formation of the conspiracy, and preceding its consummation, each of the conspirators was liable for each and all of the acts of each of his coconspirators performed in furtherance of the conspiracy; and the evidence is ample to sustain the conclusion that principally by the acts of defendant Earle the city of Pasadena was induced to and actually did part with the money which by the indictment herein it is alleged was paid to Ducey & Breitenstein.

The specification by appellant that the city of Pasadena did not rely upon any representation which may have been made by defendant Breitenstein and was not thereby induced to part with the money in question is fully answered by the situation that defendant Breitenstein was liable for Earle's acts in the premises, and that it was directly through and because of the representations made by the latter to the city manager of the city of Pasadena that the several checks which authorized the payment of the several sums of money to defendants Ducey & Breitenstein were issued.

[7, 8] Finally, appellant complains that the trial court erred in denying his motion for a new trial which was based on the ground of "newly discovered evidence." From an examination of the affidavit presented in the trial court on the hearing of the motion, it becomes apparent that no sufficient excuse was shown for the failure of defendant to produce the proposed "new evidence" at the trial of the action. Furthermore, such "newly discovered evidence" affected but one detail in the mass of evidence adduced by the prosecution which tended to establish the guilt of the defendants, and it is inconceivable that for that reason, had the evidence been introduced on the trial of the action, the defendants, or either of them, would have been acquitted as to any or either of the several charges against them, or that the verdict of the jury would have been in any wise affected by such "newly discovered evidence." In addition thereto, it is a universal rule that the granting of a new trial on the ground of "newly discovered evidence" rests in the sound discretion of the trial court. The record herein presents no evidence that in denying the motion the trial court abused its discretion.

The judgment and the order by which the motion for a new trial was denied are affirmed.

We concur: CONREY, P. J.; YORK, J.

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111 Cal. App. 740

SPILATRO v. OSTENDORF et al.

Civ. 6423.

District Court of Appeal, Second District, Division 1, California.

Feb. 14, 1931.

Rehearing Denied March 3, 1931.

Husband and wife 🔑332.

Fixing marriage of plaintiff to wife in alienation of affections complaint at date after acts complained of was not reversible error under facts.

The complaint alleged that the acts complained of occurred in November, 1925, and fixed the date of plaintiff's marriage to his wife at January, 1927, but the complaint further alleged that the issue of said marriage consisted of three children, of the respective ages of eight, six, and five years, at the time of the commencement of the action in March, 1927, and that the alleged wrongful acts of defendant occurred while the plaintiff was living with and cohabiting with, and supporting, his wife and children. It thus appeared that the stated date of the marriage was a clerical error.

YORK, J., dissenting.

Appeal from Superior Court, Los Angeles County; Marshall F. McComb, Judge.

Action by Dominick Spilatro against Frances E. Ostendorf and another. Judgment for plaintiff, and defendants appeal.

Affirmed.

S. C. Schaefer, of Los Angeles, for appellants.

A. S. De Santis, of Los Angeles, for respondent.

CONREY, P. J.

This is an appeal on the judgment roll from a default judgment.

In the complaint it is alleged that the 7th day of January, *1927*, is the date of the marriage of the plaintiff and his wife. The complaint then proceeded to allege certain facts constituting enticement or alienation of affection of the plaintiff's wife, all of which facts occurred prior to January 7, 1927, to wit, in November, 1925.

The sole ground of appeal is that on the face of the complaint it appears that, at the time when the alleged wrongful acts were committed, the plaintiff and Laura Spilatro were not husband and wife. But the complaint further alleged that "the issue of said marriage" consisted of three children, of the respective ages of eight, six, and five years at the time of the commencement of the action in March, 1927, and that the alleged wrongful acts of defendant occurred "while the plaintiff was living and cohabiting with, and supporting, his wife and children." It thus appears that the stated date of the marriage was a clerical error. It might well be considered as a self-correcting clerical error, not, indeed, that it supplied the true date, but to the extent that it was made to appear that the date of the marriage must have been and was prior to the date when the wife was enticed away from her husband.

The judgment is affirmed.

I concur: HOUSER, J.

I dissent: YORK, J.

🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Ex parte DUEL et al.
Cr. 1620.

District Court of Appeal, First District,
Division 1, California.

Feb. 17, 1931.

1. Robbery 🔑17(7).

Where information averred robbery was accomplished by force and fear, allegation property was taken against will and without consent of person robbed was unnecessary.

2. Robbery 🔑17(5).

Where property is taken out of possession of agent of owner, it may be described in information charging robbery as property of either owner or agent.

3. Robbery 🔑4.

One having right of possession, as against robber, is, so far as latter is concerned, the "owner."

[Ed. Note.—For other definitions of "Owner," see Words and Phrases.]

Application of Rex Duel and Edward Gibeau for a writ of habeas corpus directed to the Sheriff of the city and county of San Francisco.

Writ denied.

M. James McGranahan, of San Francisco, for petitioners.

PER CURIAM.

An application for a writ of habeas corpus. Duel and Gibeau, in whose behalf the application is filed, were charged jointly by information with the crime of robbery, it being alleged that they did "willfully, unlawfully, and feloniously steal, take and carry away from the person, possession and immediate presence of one Arthur Scovil, who was then and there acting as clerk, agent and servant for Carley Hamilton Company, a corporation, a truck load of tobacco" of the value of $16,845, and of the personal property of said company, without the consent and against the will of the said Arthur Scovil and by means of force and fear, etc. A demurrer to the information was sustained with leave to amend; and subsequently an amended information was filed, charging that the property was taken, stolen, and carried away "against the will and without the consent of the said Arthur Scovil *and of said Carley Hamilton Company*," by means of force and fear, etc. (Italics ours.)

It is contended that the inclusion of the italicized clause added a new element to the charge which finds no support in the testimony adduced at the preliminary examination, and that consequently the defendants stand charged with an offense for which they were not committed by a magistrate.

[1-3] The point is without merit for the reason that the amendment was wholly unnecessary. As will be noted, Scovil was the person alleged to have been robbed, and it was averred that the robbery was accomplished by means of force and fear. Therefore, even as to him, it was unnecessary to allege that the property of which he was robbed was taken and stolen "against his will and without his consent." People v. Riley, 75 Cal. 98, 16 P. 544; People v. Johnson, 57 Cal. App. 271, 207 P. 257. And with respect to the ownership of the property it has been repeatedly held that when the property is taken out of the possession of a bailee or agent of the owner it may be described in the pleading as the property of either bailor or bailee, or owner or agent. 22 Cal. Jur. 848–849; People v. Dean, 66 Cal. App. 602, 226 P. 943. "The actual status of the legal title to the stolen property is of no concern to the thief," and consequently one who has the right of possession as against the thief is, so far as the latter is concerned, the owner. People v. Edwards, 72 Cal. App. 102, 116, 236 P. 944, 950.

The application for the writ is denied.

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111 Cal. App. 458

COWAN v. TREMBLE et al.
Civ. 7659.

District Court of Appeal, First District,
Division 1, California.

Jan. 31, 1931.

Rehearing Denied March 2, 1931. Hearing Denied by Supreme Court March 30, 1931.

1. Principal and agent 🔑143(2), 145(2).

Generally, undisclosed principal can sue or be sued on contract made by agent.

2. Principal and agent 🔑171(9).

That undisclosed principal sued on contract was sufficient ratification of agent's acts.

3. Frauds, statute of 🔑115(3).

Contract within statute, subscribed by party to be charged or agent, is enforceable, though not signed by plaintiff or his agent (Civ. Code, § 1624).

4. Frauds, statute of 🔑115(3).

Rule that contract within statute need be signed only by party to be charged does not deprive contract of mutuality (Civ. Code, § 1624).

Rule under statute of frauds does not render contract liable to objection of lack of mutuality, for, by bringing suit, other party binds himself to abide by judgment of court.

5. Partnership 🔑161.

Partner making unauthorized contract for partnership would be personally liable.

6. Partnership 🔑132.

As condition to consent to transfer of interest in business to third party, partner may impose on copartner's authority to sell business any binding restrictions he sees fit.

7. Partnership 🔑160.

Where one dealing with partner has notice of restricted authority, partner's unauthorized acts are not binding on partnership or copartners, unless copartners, by conduct, waive restrictions on authority.

8. Partnership 🔑157(2).

Partners' claim that buyer of business forfeited deposit was recognition of contract, as regards acquiescence in sale by one of partners.

9. Partnership 🔑157(1).

Copartners may be bound by partner's unauthorized act, where they knowingly acquiesced, as by accepting and retaining benefits.

10. Partnership 🔑217(3).

Evidence supported conclusion unwilling copartner subsequently acquiesced in sale of business and accepted benefits.

11. Sales 🔑185.

Where sellers of business, before expiration of escrow period, notified buyer of refusal to carry out agreement, no tender of performance by buyer was necessary (Civ. Code, § 1440).

12. Contracts 🔑279(1).

Tender of performance is unnecessary, where facts show tender would have been unavailing.

13. Frauds, statute of 🔑115(3).

Permitting plaintiff on contract within statute of frauds signed by defendants to testify regarding verbal authorization to agent to act for him *held* proper (Civ. Code, § 1624).

Such testimony was properly received, since Civ. Code, § 1624, requires only that contract within statute must be signed by party to be charged or his agent.

14. Evidence 🔑71.

There is no presumption that letter was mailed on day of its date.

15. Evidence 🔑378(1).

In action on contract for sale of business, evidence justified inference letter stating buyer's willingness to consummate sale was received before expiration of escrow period; hence was properly admitted in evidence.

Although addressee, who was escrow agent and also attorney for sellers, testified he was unable to remember date of receipt, yet, considering nature of communication, it was fair inference from testimony of such witness that, had it been received after period mentioned, he would have remembered facts, and circumstances furnished sufficient foundation for its admission in evidence.

16. Sales 🔑416(2).

Permitting jury, in determining damage buyer of business suffered from breach, to consider part payment retained by sellers, *held* proper.

Appeal from Superior Court, Los Angeles County; Arthur Keetch, Judge.

Action by S. B. Cowan against Elmer Tremble and another, partners doing business under the name and style of the Service Motor Express. From a judgment in favor of plaintiff, defendants appeal.

Affirmed.

H. J. Bischoff, of San Diego, for appellants.

Davis & Thorne and W. A. Alderson, all of Los Angeles, for respondent.

PER CURIAM.

This action was brought to recover damages for the alleged breach of a contract. The jury returned a verdict for the plaintiff in the sum of $3,000. Defendants' motion for a new trial was denied, and they have appealed from the judgment entered on the verdict.

The defendants, who are copartners, were conducting a transfer business between Los Angeles and neighboring cities under the name of Service Motor Express Company. In January, 1923, Carl I. Jacobson—who, as the evidence shows, was the agent of plaintiff—commenced negotiations with defendant Tremble, who was in charge of the partners' Los Angeles office, for the purchase of the business. An offer of $23,000 was made which, after Tremble had communicated with his partner at Riverside, was accepted. The latter, however, suggested to Tremble that, as a condition to the sale, the buyer should agree to purchase any additional motor equipment needed in the business which the partners might purchase before the transfer, and also that the sale should not include an adding machine and typewriter owned by the partnership. Subsequently, on January 27, 1923, two documents, called escrow instructions, were executed by Jacobson and Tremble, and deposited with an attorney as escrow holder. These documents stated in substance that Jacobson delivered therewith to the attorney $1,000 as part payment on the purchase price of $23,000, the latter sum being stated therein to be "the full consideration for the transfer and sale of the entire equipment, properties, goodwill of business and operating franchises and all assets now possessed by the Service Motor Express Company"; that the balance of the purchase price should be paid into escrow within ninety days from date, with the understanding that the purchasers might at their election assume any debts of the sellers up to $8,000, in which event this amount should be deducted from the purchase price; that the sellers should immediately cause a corporation to be formed, to which the title to all equipment, operating franchises and assets of the Service Motor Express Company, should be transferred, the expense of incorporation, however, not to exceed $300, which was to be borne by the purchasers, and the amount deducted from the first payment of $1,000; also that the seller should deposit with the attorney a financial statement showing the property to be free of debts and incumbrances, except the sum of $8,000 above mentioned; that an inventory and appraisement of all the equipment, trucks, and property should be made and placed in escrow; and that the sellers should immediately furnish a statement of all their liabilities. The latter also agreed to fully perform within ninety days; it being provided that, in case of failure so to do, the purchasers at their option might terminate the agreement and recover the amount paid, but that, in the event of the purchasers' failure to perform, the amount paid should be forfeited to the sellers. It was also stipulated as follows: "It is the purpose and intent of the purchasers and sellers in this escrow that the transfer of the properties hereinabove described for the consideration herein mentioned shall be effected and accomplished by the incorporation of said company, and by having all property hereinabove described transferred and considered as assets of said corporation when so formed, and then upon the forming of said corporation the properties hereinabove described shall be transferred by sellers to purchasers by a transfer of the entire stock of the corporation."

While it was testified by defendant Tremble that the conditions suggested by his partner were communicated to Jacobson, and that the latter stated that the purchase of needed equipment would be satisfactory, these conditions were not made a part of the escrow agreement. The complaint alleged, in substance, that defendants failed to perform the stipulations above set forth, and before the expiration of the ninety-day period notified plaintiff that they would not perform. These allegations were denied.

Among the grounds for the appeal, it is contended that for the following reasons the verdict is unsupported, namely: That Jacobson was not authorized in writing to represent the plaintiff in the transaction; that there was no consent by defendant Fletcher to the terms of the escrow agreement; and that plaintiff failed to deposit the unpaid balance of the purchase price with the escrow holder on or before the expiration of the ninety-day period.

[1-4] It is well settled as a general rule that an undisclosed principal can either sue or be sued on the contract made by his agent (1 Cal. Jur. Agency, § 131, p. 854; Parker v. Otis, 130 Cal. 322, 62 P. 571, 927, 92 Am. St. Rep. 56; Schader v. White, 173 Cal. 441, 160 P. 557); and the fact that plaintiff brought the action thereon was a sufficient ratification of the acts of Jacobson (2 Corp. Jur. Agency, § 132, p. 513; Argenti v. Brannan, 5 Cal. 351; Thompson v. Spray, 72 Cal. 528, 14 P. 182). Moreover, contracts within the statute of frauds need be subscribed only by the party to be charged or his agent (Civil Code, § 1624), and may be enforced notwithstanding they are not signed by the plaintiff or his authorized agent (Cavanaugh v. Casselman, 88 Cal. 543, 26 P. 515; Scott v. Glenn, 98 Cal. 168, 32 P. 983). Nor does this rule render the contract liable to the objection of a lack of mutuality, for, by bringing the suit, the plaintiff binds himself to abide by the judgment of the court. Harper v. Goldschmidt, 156 Cal. 245, 104 P. 451, 28 L. R. A. [N. S.] 689, 134 Am. St. Rep. 124; Allen v. Dailey, 92 Cal. App. 308, 268 P. 404; Williston Contracts, § 140, p. 314.

[5-7] Defendant Fletcher refused to sign the escrow agreement or to proceed with the sale. As a rule, every general partner is agent for the partnership in the transaction of its business; but the statute then provided (Civ. Code, § 2430) that a partner as such had no authority to dispose of the good will of the business, or the whole of the partnership property at once, unless it consisted entirely of merchandise, or to do any act which would make it impossible to carry on the ordinary business of the partnership, unless his partners had wholly abandoned the business to him or were incapable of acting.

Although defendant Tremble would be personally liable on the contract in any event (Lewis v. Clarkin, 18 Cal. 399; Brooke v. Glide, 39 Cal. App. 534, 179 P. 546), under the above section he was without authority to bind his partner as to any of the acts enumerated therein without the latter's consent; and as a condition to his consent to a transfer of his interest in the business, defendant Fletcher might impose any restrictions upon Tremble's authority that he saw fit, and Tremble, like any other agent, would be bound to observe the same; and, where a person dealing with a partner has notice of the restrictions upon his authority, the acts of the partner in contravention of such restrictions are not binding on the firm or the other partners, unless the latter by their conduct have waived the restrictions or limitation. 47 Corp. Jur. Partnership, § 296, p. 833.

[8-10] Though the evidence shows that Fletcher's consent was conditional, that plaintiff's agent was apprised of the fact, and that plaintiff was also notified by Fletcher before the ninety-day period had expired of the latter's objection to the contract and refusal to proceed on that account, it was also shown that, after the expiration of the escrow period, the escrow holder—who was also defendant's attorney—proceeded with the incorporation of defendants' business, the articles being filed in June, 1923. This, as testified by Fletcher, was because defendants believed that their business could be conducted more conveniently in that manner; and, if the deal with plaintiff finally went through, the incorporation would serve some purpose in that connection. It was also shown by the testimony of the attorney that part of the amount paid by plaintiff, namely, about $300, was used for that purpose, and that later defendants were given credit for the balance upon a claim for services rendered by the attorney in other matters. While defendant Fletcher testified that he refused to accept any part of the deposit, the attorney's testimony was sufficient to support the conclusion that both partners knew of its application and acquiesced therein.

Defendants claimed that plaintiff, by his failure to pay the balance of the purchase price, forfeited the above amount, and that, consequently the use thereof for defendants' benefit was proper. This was a manifest recognition of the contract by both defendants; and, while the rule as to the limitation of a partner's authority is as above stated, his copartners, notwithstanding his previous want of authority may be bound by his acts where with knowledge of the facts they acquiesce therein, as by accepting and retaining the benefits of the transaction. 20 R. C. L. Partnership, §§ 100, 101, pp. 890, 891; Jones v. Clark, 42 Cal. 180; Markell v. Matthews, 3 Colo. App. 49, 32 P. 176; American Exchange, etc., Bank v. Georgia Construction, etc., Co., 87 Ga. 651, 13 S. E. 505; Porter v. Wilson, 113 Ind. 350, 15 N. E. 676; Mathis v. Taylorsville Bank (Ky.) 106 S. W. 1174; Golding v. Brennan, 183 Mass. 286, 67 N. E. 239; Doll v. Hennessy Mercantile Co., 33 Mont. 80, 81 P. 625; Pearce v. Wilkins, 2 N. Y. 469; Griffing v. Dunn, 23 S. D. 141, 120 N. W. 890, 20 Ann. Cas. 579; Guthiel v. Gilmer, 27 Utah, 496, 76 P. 628; Lynch v. Flint, 56 Vt. 46; McDougall v. McDonald, 86 Wash. 334, 150 P. 628.

The evidence was sufficient to justify the conclusion that, notwithstanding Fletcher objected to the contract, he acquiesced therein and accepted the benefits thereof.

[11, 12] It is admitted that plaintiff failed to deposit in escrow the balance of the purchase price; and it is contended that this constituted a defense to the action. The evidence shows that defendants refused to carry out the agreement, and so notified the plaintiff before the expiration of the escrow period. Under such circumstances, no tender of performance by plaintiff was necessary (Civ. Code, § 1440); and the rule also applies where, as was the case here, the facts show that a tender would have been unavailing (Hoppin v. Munsey, 185 Cal. 678, 198 P. 398).

[13] Plaintiff was permitted over objection to testify that he verbally authorized Jacobson to act for him in the transaction. For the reasons previously stated in connection with the objection that plaintiff could not recover without showing that the authority of his agent was in writing, the objection was properly overruled.

[14, 15] A letter addressed by plaintiff's attorney to the escrow holder, who was also the attorney for defendants, both attorneys having their offices in Los Angeles, was admitted in evidence over defendants' objection that the mailing of the letter was not shown, or that the same was received before the expiration of the escrow period. The letter was dated April 26, 1923; and it was clear from the testimony of the addressee that he received the same through the mail, the exact date, however, not being shown. The letter referred to the transaction in question, and stated plaintiff's willingness to consummate the sale. The addressee testified that he was unable to remember the date of its receipt, and there is no presumption that it was mailed on the day it bears date. Considering the nature of the communication, however, it is a fair inference from the testimony of this witness that, had it been received after the period mentioned he would have remembered the fact, and the circumstances furnished sufficient foundation for its admission in evidence.

[16] The jury, in arriving at the amount of plaintiff's damage, was permitted to consider the part payment made by him and retained by defendants. This was proper, for, as the rule has been stated, "when the contract has been partly performed the plaintiff, upon a breach of it, loses more than the mere value of the contract; he has not only lost the benefit of the contract, but he has also lost the expense of partial performance on his own part." Sedgwick on Damages (9th Ed.) § 615, p. 1198; Cunningham v. Dorsey, 6 Cal. 19; Cederberg v. Robison, 100 Cal. 93, 34 P. 625.

Other instructions complained of were correct in the abstract, and none can fairly be said to have been prejudicial. As to certain instructions offered by defendants and refused, we find no merit in the claim that the rulings were erroneous.

After considering all the evidence, we are satisfied that the verdict was fully sustained, and that no error is disclosed which would warrant the conclusion that the result was a miscarriage of justice.

The judgment is affirmed.

111 Cal. App. 587

SCOTT v. WARDEN et al.

Civ. 4238.

District Court of Appeal, Third District, California.

Feb. 5, 1931.

Rehearing Denied March 6, 1931. Hearing Denied by Supreme Court April 6, 1931.

1. Adverse possession ⇨13.

Elements necessary to support title by "adverse possession" stated.

To support a claim of title by "adverse possession," there must be actual, open, and notorious occupancy of the land by the claimant, acts and conduct on his part hostile to real owner's title, open and notorious claim of title, continuous and uninterrupted occupancy accompanied by acts and a claim of title adverse to that of the real owner for the continuous period of five years, and payment of all taxes levied or assessed against the land during the statutory period of five years.

[Ed. Note.—For other definitions of "Adverse Possession," see Words and Phrases.]

2. Adverse possession ⇨27.

No presumption of adverse possession prevails where land is unimproved, uninclosed, and not cultivated (Code Civ. Proc. § 325).

3. Adverse possession ⇨27.

Mere clearing of débris and weeds from land on one occasion *held* not sufficient evidence of cultivation to raise presumption of adverse possession (Code Civ. Proc. § 325).

4. Adverse possession ⇨114(1).

Evidence *held* insufficient to establish title by adverse possession.

5. Municipal corporations ⇨579.

Tax deed showing that assessment was made for construction of electrical equipment to be used to furnish electricity for 20 years *held* void (St. 1913, p. 421, § 2).

Tax deed was void, since it showed on its face that the assessment, the nonpayment of which led to the sale and execution of the tax deed, was levied for construction of the electrical lighting apparatus and equipment to be used to furnish electricity for period of twenty years, while St. 1913, p. 421, § 2, authorizing municipalities to install electrical equipment, provided that the maintenance of appliances or the furnishing of electricity should be for period stated in resolution of intention, but not exceeding two years.

6. Taxation ⇨726.

Every essential step of statutory proceedings leading to execution of tax deed must be strictly followed or deed is void.

7. Municipal corporations ⇨579.

Decree quieting title in owner against possessor of tax deed void for irregularities in improvement proceedings should be rendered subject to owner reimbursing possessor full amount of taxes, penalties, and costs expended by him (Pol. Code, § 3898, subd. 5).

8. Taxation ⇨830.

Possessor of void tax deed bringing suit to quiet title *held* not entitled to reimbursement for taxes, penalties, and costs as against owner merely defending title (Pol. Code, § 3898, subd. 5).

9. Taxation ⇨830.

In absence of evidence of payment of taxes, holder of void tax deed cannot complain of failure to make decree quieting title in owner conditional on reimbursing holder for taxes paid.

10. Quieting title ⇨10(1).

Plaintiff in suit to quiet title must prevail on affirmative proof of his own title.

11. Quieting title ⇨44(1).

Plaintiff in suit to quiet title need not prove entire chain of title, where both parties rely on same source of title.

12. Quieting title ⇨44(1).

As regards necessity of proof of chain of title, both holder of tax deed and claimant relied on same source of title, where delinquent assessment accrued while claimant's grantors held record title.

13. Quieting title ⇨44(4).

Decree of specific performance providing for conveyance of title to plaintiff *held* equivalent to deed establishing prima facie case of title in plaintiff in suit to quiet title.

> This was true, since the mere omission to perform the ministerial duty required by the decree of actually executing and delivering the deed in no wise affected the plaintiff's title.

Appeal from Superior Court, Los Angeles County; Stephen G. Long, Judge.

Suit by Mary E. Scott against Julia P. Warden, Carrie W. Peterson, and others. From judgment for plaintiff, the last-named defendant appeals.

Affirmed.

J. Everett Brown, of Los Angeles, for appellant.

John B. Haas and John D. Home, both of Los Angeles, for respondent.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

This is an appeal from a decree quieting title to an unimproved lot at Hermosa Beach, valued at $600.

In February, 1922, Sarah W. Hughes and A. S. Hughes, husband and wife, owned lot 89, Walter Ransome Company's Venable Place of Los Angeles county according to the map of that tract recorded in book 9 of maps, page 150, Los Angeles records. February 6, 1922, the plaintiff purchased that lot from these owners, on contract, for $600. The deed of conveyance was not executed. Upon refusal to convey the property pursuant to contract, a suit for specific performance was commenced by the plaintiff in November, 1923. The allegations of the complaint were controverted. The action was tried. On January 22, 1925, a decree was rendered in favor of the plaintiff directing a conveyance of the property. This decree provided that, in the event the defendants failed or refused to execute and deliver a deed of conveyance to the lot within thirty days from the date thereof, the clerk of the court "is hereby constituted a commissioner of this court to make a good and sufficient deed in compliance with this judgment and deliver the same to the plaintiff herein." This deed was not executed or delivered. But the decree remains in full force and effect.

Based upon this decree the plaintiff instituted this suit to quiet title. The complaint contains two counts. The first is founded upon a claim of ownership based upon record title. The second alleges title by adverse possession. The defendant Carrie W. Peterson denies the allegations of the complaint and affirmatively asserts she is the owner of the lot and is entitled to the possession thereof, praying that the title be quieted in her.

At the trial the plaintiff made an ineffectual effort to prove adverse possession. The evidence as to this issue will not support the findings and judgment. The plaintiff never actually occupied the property. No improvements were made. The evidence as to the payment of taxes for the statutory period is unsatisfactory and we think insufficient.

The evidence of plaintiff's record title consists solely of the decree against the former owners, Sarah W. Hughes and A. S. Hughes, directing them to execute and deliver to the plaintiff a deed of conveyance to the lot in question. Upon this decree the plaintiff relies.

The only evidence of title in the defendant Peterson consists of a void tax deed executed April 22, 1924, by the tax collector of the city of Hermosa Beach. This deed was executed to Julia P. Warden, who purchased the lot at a tax sale for delinquent municipal improvement assessments for electric lighting equipment authorized and installed pursuant to the provisions of the Municipal Improvement Act of June 6, 1913. Stats. 1913, p. 421. Warden executed a quitclaim deed to defendant Peterson November 10, 1926.

The court found that this delinquent assessment deed was void, and that it conveyed no title to the appellant. The court further found that the plaintiff was the owner and entitled to the possession of the lot in question, both as the record owner of the title and also by virtue of adverse possession. A decree was accordingly entered in favor of the plaintiff quieting the title in her. From this judgment the defendant Peterson has appealed.

[1-4] It must be conceded there is no substantial evidence to support the findings and judgment on the theory of adverse possession. To support a claim of title by adverse possession five elements must concur: (1) Actual, open, and notorious occupancy of the land by the claimant, (2) acts and conduct on his part hostile to the real owner's title, (3) open and notorious claim of title, (4) continuous and uninterrupted occupancy accompanied by acts and a claim of title adverse to that of the real owner for the statutory period of five years, and (5) payment of all taxes levied or assessed against the land during the statutory period of five years. 1 Cal. Jur. 522, § 22; 1 R. C. L. 700, § 13. No presumption of adverse possession prevails in the present case for the reason that the lot was unimproved. It was not protected by a substantial enclosure. It was not cultivated. These elements are necessary to create a presumption of possession. Section 325, Code Civ. Proc. The mere clearing of old cans, débris, and weeds from the land on one occasion will not suffice to furnish evidence of cultivation or improvements such as the statute requires. The issue as to adverse possession was therefore not sustained.

[5] The evidence is adequate to support the findings to the effect that the appellant's tax deed is void, and that her claim of an interest in the real property by virtue thereof is without merit. This tax deed, which was admitted in evidence over the objection of the plaintiff, appears on its face to be void. It is in conflict with the statute authorizing the improvements, for which the assessment was levied, the nonpayment of which led to the sale and execution of the tax deed. December 5, 1922, the city council of Hermosa Beach adopted a resolution authorizing that city to levy assessments upon the property included therein for the construction of electric lighting apparatus and equipment for municipal purposes pursuant to the Statutes of 1913, page 421. This statute authorizes municipalities to install and equip appliances with which to serve the inhabitants with water, electricity, or gas for public utility purposes, "provided, however, that the maintenance of appliances or the furnishing of electric current, gas, or other illuminating agent, shall be for a period stated in the resolution of intention, but not exceeding two years." Section 2. In violation of the foregoing limitation of authority of the city council to provide for the "furnishing of electric current * * * for a period * * * not exceeding two years," the appellant's deed on its face shows that "the Board of Trustees of said City of Hermosa Beach * * * did on the 5th day of December, 1922, duly pass and adopt a resolution * * * to order the necessary posts, wires and appliances to be installed, and electric current to be furnished for the period of twenty years, for lighting of Lighting District No. Two in said City of Hermosa Beach. * * *" This authorization is in violation of the express limitation of the statute. The terms of the deed which clearly show this violation of the statute render it void.

[6] All provisions relating to the sale of property for delinquent taxes or assessments are in invitum. Every essential step of the statutory proceedings leading to the execution of the tax deed must be strictly followed or the instrument will be rendered void. Numitor Gold Min. Co. v. Katzer, 83 Cal. App. 161, 256 P. 464; 24 Cal. Jur. 324, § 296. In the present case no evidence was adduced as to the regularity of the proceedings required by statute leading to the sale of the property for delinquent assessments. Regardless of this ommission, the deed appears upon its face to be void. The appellant is therefore left with no evidence of title whatever.

The appellant complains because the decree quieting title in the plaintiff was not rendered subject to the repayment of the small sum of money which she claims to have paid for the tax deed which she received.

[7-9] In an equitable action, maintained by the owner of property, to quiet title against the possessor of a void tax title deed for fatal irregularities in the proceedings which resulted in a sale for delinquent taxes, the decree quieting title in the owner should be rendered subject to reimbursing the purchaser of the tax title "the full amount of taxes, penalties and costs paid out and expended by him." Section 3898, subd. 5, Pol. Code; McPhail v. Nunes, 48 Cal. App. 383, 387, 192 P. 95; Holland v. Hotchkiss, 162 Cal. 366, 123 P. 258, L. R. A. 1915C, 492; Smith v. Golden State Syndicate, 43 Cal. App. 346, 185 P. 209. A different rule prevails where suit is brought by the holder of a tax deed and the owner of the record title merely defends his own title. Coleman v. County of Los Angeles, 180 Cal. 714, 182 P. 440; Gramson v. Geniella (Cal. Sup.) 289 P. 817. In the present case, however, there was no proof that the appellant paid any sum of taxes, penalties, or costs upon acquiring the tax deed. In the absence of evidence of the actual payment of such taxes, the holder of a void tax deed may not complain of a failure to make the decree quieting title conditional upon reimbursing him for the taxes paid. There is therefore no error in the decree on that account.

[10-12] It is a cardinal doctrine of law that the plaintiff in a suit to quiet title must prevail on affirmative proof of the validity of his own title rather than upon the weakness of the title of the defendant. 22 Cal. Jur. 167, § 42. The plaintiff has sustained this burden of proof in the present case. It was unnecessary to prove the entire chain of title since both parties to the action rely upon the same source of title. Denning v. Green, 88 Cal. App. 379, 263 P. 819. The plaintiff purchased the lot in question from Sarah W. Hughes and A. S. Hughes in February, 1922. The tax title deed under which the appellant claims title was executed April 22, 1924, for delinquent assessments for municipal improvements founded upon the resolution of the city council of Hermosa Beach which was adopted December 5, 1922. The assessment became a lien on the property subsequent to that date. This delinquent assessment for the nonpayment of which the property was sold, and pursuant to which the tax deed under which the appellant claims title was executed, accrued while Sarah W. and A. S. Hughes, the owners of the lot under whom the plaintiff claims title, held the record title and while the plaintiff held the equitable title thereto under her contract of purchase. Therefore both parties to this action rely upon title emanating through the same individuals.

[13] Instead of a deed of conveyance the plaintiff relies upon her decree of specific performance which provides for an actual conveyance of title to her. This decree is equivalent to the possession of a deed of conveyance and establishes a prima facie case of

title in the plaintiff. Chapman v. Moore, 151 Cal. 509, 515, 91 P. 324, 121 Am. St. Rep. 130; 51 C. J. 283, § 281; Lockwood v. Meade Land & Cattle Co., 71 Kan. 739, 81 P. 496; Woolworth v. Root (C. C.) 40 F. 723, affirmed 150 U. S. 401, 14 S. Ct. 136, 37 L. Ed. 1123. In 51 C. J. page 283, it is said: "Where the decree includes an order for defendant to convey to plaintiff whatever interest he may have in the realty involved, it of course affects a transfer of title as effectually as a voluntary conveyance."

The appellant contends that, since she was not a party to the action wherein the judgment for specific performance was rendered upon which the plaintiff relies, she is therefore not bound thereby. It is true that, since the appellant was not a party to that suit, the judgment would not furnish evidence to defeat any valid title which she might possess. But the appellant had no title. The only instrument upon which she relied was a void tax deed. It is not a question as to whether plaintiff's title is superior to that of the appellant. It is only a question as to whether the decree in the specific performance suit furnishes any evidence of plaintiff's title. If it does, it is competent testimony in the present case, regardless of the fact that the appellant was not a party to that action. The decree directing conveyance of the property to the plaintiff constitutes a muniment of title which is prima facie evidence of her ownership and right of possession. In the absence of any evidence to the contrary, it will prevail. The decree is valid and binding. The mere omission to perform the ministerial duty of actually executing and delivering the deed required by the decree in no wise affects the plaintiff's title under the facts of this case.

Under circumstances similar to those of the present case it was held in Chapman v. Moore, 151 Cal. 509, 91 P. 324, 326, 121 Am. St. Rep. 130, that a decree quieting title in one of the parties to a former action was competent evidence, not to defeat any title which his adversary might possess, but as a muniment of title which established a prima facie case. It is there said: "While the general rule undoubtedly is that judgments bind only parties and privies, still there is an exception to the rule universally recognized which sustains their admissibility against third parties who are not parties or privies to the judgments for certain purposes. This exception is that the judgment rendered in an action involving title to property, and in which it is determined that the title is in one of the parties to the action, is admissible in evidence in behalf of the party claiming under the judgment, and subsequently asserting a claim to the property affected by it as a link in his chain of title, although such judgment would not be conclusive on the party against whom it is offered because he was not a party or privy thereto. It is admissible in evidence, not for the purpose of defeating or affecting any claim or title of a party who was not a party or privy to such judgment, but solely as a muniment in an asserted title."

There is nothing in Williams v. Cooper, 124 Cal. 666, 57 P. 577, or Snodgrass v. Errengy, 86 Cal. App. 664, 261 P. 497, upon which the appellant relies, in conflict with the foregoing.

It follows that the plaintiff Scott having established prima facie evidence of her title to the property in question, since there is no evidence to the contrary and the appellant has no title, judgment was properly rendered quieting title in the respondent. The findings and judgment to the effect that the plaintiff is the owner and entitled to the possession of the lot in question are adequately supported by the evidence.

The judgment is affirmed.

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112 Cal. App. 22

PEOPLE v. CORTEZ.

Cr. 115.

District Court of Appeal, Fourth District, California.

Feb. 16, 1931.

1. Criminal law ⚷1169(12).

In prosecution of alien for possession of firearms capable of being concealed, introduction of extrajudicial statement of defendant admitting his foreign nativity and that he had not been naturalized *held* not prejudicial (Code Civ. Proc. § 1983).

2. Aliens ⚷17.

In prosecution of alien for possession of firearms capable of being concealed, people need not prove alienage and lack of naturalization as part of corpus delicti (Code Civ. Proc. § 1983).

Appeal from Superior Court, Fresno County; Denver S. Church, Judge.

Juan Cortez was convicted of the crime of possession by an unnaturalized foreign-born person of a firearm capable of being concealed about his person, and he appeals.

Affirmed.

J. F. O'Sullivan, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and John D. Richer, Deputy Atty. Gen., for the People.

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

MARKS, J.

Appellant was charged, by an information filed by the district attorney of Fresno county, with the crime of possession by an unnaturalized foreign-born person of a firearm capable of being concealed about his person. The jury returned a verdict of guilty and judgment was pronounced upon him. His motion for new trial was denied. This appeal was taken from the judgment and from the order denying the motion for new trial.

[1, 2] Appellant presents but one ground upon which he urges a reversal of the judgment. Evidence was introduced of the arrest of appellant and the finding of the firearm in his possession. Over his objection, the people were permitted to introduce an extrajudicial statement made by him in which he admitted his foreign nativity and that he had not been naturalized. This ruling is complained of by him. He maintains that while section 1983 of the Code of Civil Procedure places upon him the burden of proving, either that he was not a foreign-born person, or that, if foreign born, he was naturalized, this section does not change the rule announced in the case of People v. Quarez, 196 Cal. 404, 238 P. 363, that the extrajudicial statements of a defendant cannot be used to establish any part of the corpus delicti of the crime charged. He urges that the people, as a part of the corpus delicti, must prove both alienage and lack of naturalization, as well as possession of the weapon.

The Quarez Case was decided before the adoption of section 1983 of the Code of Civil Procedure. To hold that the people must prove alienage and lack of naturalization in cases of this kind, as a part of the corpus delicti, would in effect nullify the provisions of this section. This contention of appellant has been decided adversely to him in the cases of People v. Osaki (Cal. Sup.) 286 P. 1025, 1034; People v. Gugman (Cal. Sup.) 286 P. 1037; and People v. Bruno (Cal. Sup.) 286 P. 1037. In the Osaki Case the court said: "Conceding, as contended by appellants, that foreign nativity forms a part of the corpus delicti, the allegations of the indictment that the defendant was an alien not eligible to citizenship must be taken as true in the absence of proof to the contrary."

In the instant case appellant offered no evidence on this question. In the Bruno Case the court said: "The objections made as to the validity of the judgment are, in the main, the same as those urged in the case of People v. Guzman (Cal. Sup.) 286 P. 1037, this day filed, with the additional assignment of the introduction in evidence of the extrajudicial statement, made at the time of his arrest, that he was of foreign birth. Whether or not this statement was admissible is not important in view of section 1983, Code of Civil Procedure, which placed the burden upon him to prove that he was a citizen of the United States and was, therefore, entitled to exercise all of the prerogatives of citizenship. The appellant offered no evidence whatever as to that issue."

The judgment and order appealed from are affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

111 Cal. App. 663

TRADERS' CREDIT CORPORATION v. SUPERIOR COURT IN AND FOR ALAMEDA COUNTY et al.

Civ. 7807.

District Court of Appeal, First District, Division 2, California.

Feb. 11, 1931.

1. Appeal and error ⚿795(2).

Notice of motion to dismiss appeal *held* defective for failure to state grounds on which it would be made (Code Civ. Proc. § 1010).

2. Appeal and error ⚿795(2).

Failure of notice of motion to dismiss appeal to state ground on which it would be made was not cured by statement therein that motion would be based on affidavit attached and papers and files in case (Code Civ. Proc. § 1010).

> The affidavit stated no more than that the attorney for the defendant had not received notice of the time when appellant's surety would justify, and had no knowledge thereof. The papers and files of record in the case disclosed that such notice was duly given to defendant's attorney, as required by law. Hence it was impossible to determine by reference to the affidavit or to the papers on what ground the defendant was moving to dismiss the appeal.

3. Appeal and error ⚿381.

Appellee's attorney having refused to receive mail coming from appellant's attorneys, his evidence showing nonreceipt of notice of justification of appellant's sureties *held* inadmissible under statutes (Code Civ. Proc. §§ 1012, 1013).

> Under Code Civ. Proc. §§ 1012, 1013, service of the notice is completed at time of mailing.

4. Certiorari ⚿66.

Presumption is that service of notice of time of justification of surety by appellants was made as required by statute (Code Civ. Proc. §§ 1012, 1013).

5. Justices of the peace 🔑183(1).

Justice of peace, at time of justification of surety, having before him proof of service of notice, is presumed to have proceeded regularly in determining due notice was given and approving appellant's surety.

6. Action 🔑37.

Where pleadings asking certiorari justify mandamus, court may grant mandamus.

7. Mandamus 🔑31.

When trial court decides it is without jurisdiction, as matter of law, mandamus requiring court to proceed with trial is proper remedy.

Original proceeding in certiorari by the Traders' Credit Corporation against the Superior Court in and for Alameda County and others.

Writ of mandate granted.

Bernard B. Stimmel and Morris M. Grupp, both of San Francisco, for petitioner.

Earl Warren, Dist. Atty., Ralph E. Hoyt, Chief Asst. Dist. Atty., James H. Oakley, Deputy Dist. Atty., and Paul A. Lindley, all of Oakland, for respondents.

NOURSE, P. J.

This is an original proceeding in certiorari.

The petitioner sued in the justice's court of Oakland township against Lindley Marinello Shop on an open book account for $99.63. The defendant answered, and by way of counterclaim demanded the sum of $175 as damages for a writ of attachment levied by the plaintiff in the cause. Defendant had judgment for the sum prayed for, and plaintiff appealed to the superior court of Alameda county, and in due time filed with the justice the required undertaking with the United States Fidelity and Guaranty Company as surety thereon. Thereafter the defendant served notice of exception to this surety, and within due time the plaintiff served upon defendant's attorney a notice of the time of justification of the surety on appeal; said notice having been served by depositing the same in the United States mail at the post office in San Francisco addressed to the office of defendant's attorney in the city of Oakland. At the time specified, the surety appeared and justified, and, the appeal to the superior court being perfected according to law, the defendant appeared in the latter court, and moved that the appeal be dismissed. This motion was granted, and thereupon the plaintiff moved the court to set the order aside and to restore the appeal for hearing. This motion being denied, the plaintiff, as petitioner herein, sued out this writ.

[1, 2] The notice of motion to dismiss the appeal was defective because it failed to state the grounds upon which it would be made. Section 1010, Code Civ. Proc. This defect was not cured by the statement therein that the motion would be based upon the affidavit attached and upon the papers and files in the case. The affidavit stated no more than that the attorney for the defendant had not received notice of the time when the surety would justify and had no knowledge thereof. The papers and files of record in the case disclose that such notice was duly given the defendant's attorney as required by law. Hence it is impossible to determine by reference to the affidavit or to the papers upon what grounds the defendant was moving to dismiss the appeal (Ross v. San Diego Glazed C. P. Co., 50 Cal. App. 170, 194 P. 1059), and the case does not come within the exception noted in Reher v. Reed, 166 Cal. 525, 137 P. 263, Ann. Cas. 1915C, 737, and Savage v. Smith, 170 Cal. 472, 150 P. 353.

[3] Though the Superior Court did not have before it a sufficient notice of motion to support its order dismissing the appeal, the jurisdiction of that court was exceeded in another respect in granting the motion. The showing made upon the hearing of the motion was that, during the pendency of the trial in the justice's court, defendant's counsel moved his office from 1106 Broadway, Oakland, to 3286 Adeline street, Berkeley, that correspondence was had between him and the attorneys for the plaintiff in that action addressed to the Broadway number, and that, after the attorney for the defendant had filed his notice of exception to the surety, he refused to receive or open mail addressed to him coming from the attorneys for the plaintiff. Upon this showing he based the claim that he had not actually received notice of the time of the justification of the surety. All this evidence was inadmissible, and was beside any issue before the court. The rights of the parties in this case are clearly fixed by statute and a long line of decisions—that, when service is made by mail in the cases permitted by section 1012, Code of Civil Procedure, such service is declared to be complete at the time of the deposit in the post office of the sender in a sealed envelope addressed to the person on whom it is to be served. Section 1013, Code Civ. Proc. In the early case of Heinlen v. Heilbron, 94 Cal. 636, 640, 30 P. 8, 9, the Supreme Court declared that: "The service by mail authorized by section 1012 does not contemplate a delivery as a part of the service, as is seen by the provision of section 1013, that 'the service is complete at the time

of the deposit' in the post office. Such a service is termed a 'substituted service,' and is intended to take the place of and be equivalent in point of law and effect to a personal service." In Gill v. Southern Pacific Co., 174 Cal. 84, 87, 161 P. 1153, 1154, the court said: "The presumption is that such proof was duly made. The only evidence to the contrary is that he did not receive such notice. Upon the deposit of such notice in the mail, properly addressed the service thereof would be complete. Code Civ. Proc. § 1013. The record is silent upon the question whether or not such notice was deposited. The presumption that the fact was established must therefore prevail." The Heinlen Case was quoted with approval in McKeon v. Sambrano, 200 Cal. 739, 741, 255 P. 178, and we have found no authority to the contrary.

[4, 5] It will be noted that neither the notice of motion nor the affidavits attack the service of the notice of time of justification of the surety, and the uncontroverted evidence is that such service was made in the manner required by the statute. In addition to this evidence, the presumption is that such service was made as required (Gill v. Southern Pacific Co., supra); and then the further presumption applies here that the justice of the peace, at the time of the justification of the surety, having before him proof of service of the notice, must be presumed to have proceeded regularly and in accordance with law when he determined that due notice was given and thereafter approved the surety.

[6, 7] The only real opposition to the writ before this court is the attack upon the mode of procedure; the respondent insisting that certiorari is not the proper remedy. The cases when certiorari will or will not lie to review an order of this character are not clear, and we are not now disposed to enter into a discussion upon the mere question of the title to the remedy when we are satisfied that the petitioner is entitled to the relief. Though he has named his petition a proceeding in certiorari, he has pleaded everything which is essential to the issuance of a writ of mandate, and, when this is so, the rule is that this court may grant to the petitioner such relief as is warranted in the premises. Golden Gate Tile Co. v. Superior Court, 159 Cal. 474, 476, 114 P. 978; Van Hoosear v. Railroad Commission, 189 Cal. 228, 236, 207 P. 903; Finn v. Butler, 195 Cal. 759, 235 P. 992.

That mandamus is the proper remedy here is demonstrated in Hennessy v. Superior Court, 194 Cal. 368, 374, 228 P. 862, and the many authorities there cited holding that, when the trial court has decided, as a matter of law, upon its construction of a statute that it is without jurisdiction, mandamus to require the court to proceed with the trial is the proper remedy.

For the reasons stated, it is ordered that a peremptory writ of mandamus issue out of this court requiring the respondent to set aside its order dismissing the appeal in the action entitled Traders' Credit Corporation v. Lindley Marinello Shop et al., No. 115429, and to restore said cause for trial.

We concur: STURTEVANT, J.; SPENCE, J.

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111 Cal. App. 720

TUCKER v. CITY AND COUNTY OF SAN FRANCISCO et al.

Civ. 7304.

District Court of Appeal, First District, Division 2, California.

Feb. 13, 1931.

Rehearing Denied March 14, 1931. Hearing Denied by Supreme Court April 13, 1931.

1. Automobiles ⚷245(6).

In action for pedestrian's death, whether motorist driving automobile from 15 to 20 miles per hour on dark stormy night was negligent *held* for jury.

2. Automobiles ⚷244(6).

In action for pedestrian's death, evidence warranted inference that pedestrian was struck by defendant's automobile and dropped on street car tracks.

> There was evidence to the effect that the deceased pedestrian was walking to the right of and a short distance behind his wife, and that a guest of defendant observed the faint outline of a man a short distance behind deceased pedestrian's wife just before the automobile struck the wife, and that the deceased pedestrian's body was lying on the street car tracks some distance away from the place where the wife was struck.

3. Automobiles ⚷201(9).

Even if death of pedestrian struck by motorist had not occurred when pedestrian's body was run over by street car, such fact would not defeat motorist's liability.

4. Appeal and error ⚷930(1).

Appellate court must assume, in support of judgment for administratrix, that jury adopted administratrix' evidence.

5. Trial ⚷191(7).

In action for pedestrian's death, refusing requested instruction assuming facts contrary to uncontradicted evidence *held* proper.

6. Trial 🔑260(8).

In action for pedestrian's death, instruction addressed to subject covered by instruction given *held* properly refused.

7. Trial 🔑253(7).

Requested formula instructions which did not purport to state all of facts *held* properly refused.

8. Street railroads 🔑81(5).

Although street car motorman's headlight equipment be such as complies with legal regulations, nevertheless, motorman must keep vigilant lookout.

9. Street railroads 🔑114(8).

Although street car motorman's headlights may comply with legal regulations, such fact is not conclusive that there was no negligence in failing to discover body on tracks.

10. Street railroads 🔑114(8).

Verdict that municipality owning street railroad and motorman of car running over body lying on track on dark stormy night were negligent *held* supported, although car was equipped with proper headlights.

11. Street railroads 🔑117(5).

Where automobile struck pedestrian and dropped body on street car track, whether pedestrian was alive at time street car passed over body *held* for jury.

12. Appeal and error 🔑930(4).

Appellate court assumed, in support of judgment against municipality owning street railroad and motorman, that jury drew inference that deceased was alive at time street car passed over body on track.

Appeal from Superior Court, City and County of San Francisco; Edmund P. Mogan, Judge.

Action by Nellie M. Tucker, as administratrix of the estate of James L. Tucker, deceased, against the City and County of San Francisco and others. From a judgment for plaintiff, defendants appeal.

Affirmed.

Superseding opinion in 290 P. 924.

John J. O'Toole, City Atty., and Henry Heidelberg, Deputy City Atty., both of San Francisco, for appellants City and County of San Francisco and William F. Croteau.

Hadsell, Sweet & Ingalls, of San Francisco, for appellant Frank Lambertson.

Robert H. Borland and Charles Josef Carey, both of San Francisco, and Henry & Bedeau and G. W. Bedeau, all of Sacramento, for respondent.

STURTEVANT, J.

This is an appeal from the judgment awarding damages for death of the plaintiff's husband. The plaintiff and her husband at about 10 o'clock at night January 13, 1928, alighted from the front end of a west-bound Municipal street car at the safety station on Ocean avenue opposite Cedro avenue in San Francisco. To what extent that neighborhood is populated the record does not disclose, nor does it disclose ordinary traffic conditions. The diagram brought up as a part of the record on appeal shows a light opposite the west end of the safety station. It shows another one on the south side of Ocean avenue about seventy feet west from the western property line of Cedro avenue. These lights were forty-four candle power. The streets in that part of the city are laid out in curves. The ground is hilly, and the streets are on grades up and down. On the night of the accident it was very dark. A storm of heavy wind and rain was taking place. Both Mr. and Mrs. Tucker were dressed in dark clothing. When they alighted from the street car Mrs. Tucker raised an umbrella. She testified that when the street car passed on she and her husband crossed directly to the southern sidewalk on Ocean avenue. If they did so, that course would take them within the bounds of the cross walk. Other witnesses testified that both Mr. and Mrs. Tucker were in the street some distance east of the crosswalk. As they were crossing the street Mrs. Tucker testified that her husband was at her right and slightly behind her. Just before they reached the southern side of Ocean avenue the defendant Frank Lambertson and two other men were driving east on Ocean avenue. They were in an automobile and Lambertson was driving. It is an admitted fact that Lambertson's car struck Mrs. Tucker, and that she fell over in the street, but this action is not maintained for injury to her. Seeing that he had hit a woman, Lambertson turned to his left, describing almost a complete circle, crossed the street car tracks, and, returning, parked in the intersection of the two avenues and went to the assistance of the plaintiff. After Lambertson and his companions got out of their automobile they saw the body of a man lying on his back across the rails of the east-bound street car tracks. Before the body could be removed a street car came from the west and ran over the body which was the body of the plaintiff's husband. In her complaint the plaintiff named as defendants Frank Lambertson, the owner of the automobile, the city of San Francisco, and W. F. Croteau, the motorman. The jury returned a verdict against all of the defendants, and all of them have appealed, bringing up one transcript but two sets of briefs.

[1] Appeal by Lambertson. The defendant claims the court erred in denying his motion

for nonsuit and his motion for a directed verdict because there was no evidence in the record establishing any negligence on the part of this defendant. The respondent replies that there is. She calls to our attention the following facts: The night was very dark. It was storming quite heavily, and Lambertson's windshield was so covered with water that he could see through only a little space immediately in front of him and could not see to his right or left. Notwithstanding these facts he proceeded to drive forward at a speed of from fifteen to twenty miles an hour, and at the time of the accident his right wheels were approximately eight feet from the curb line and about the same distance from the nearest street car track. Driving in that manner he did not see the plaintiff until he was within four feet of her, whereupon he swerved to the left, but his right fender struck her and knocked her down. The decedent he did not see at all. Having called our attention to these facts the respondent asserts that there was evidence to take the case to the jury, and she relies on the rule which is succinctly stated in Reaugh v. Cudahy Packing Co., 189 Cal. 335, at page 340, 208 P. 125, 127: "So, therefore, even though the statutory limitation of speed has not been exceeded, the rate of speed at which an automobile may be traveling may be held under some circumstances to be negligent. That is to say, the operator of an automobile is not necessarily exempt from liability for injuries to other persons occurring in a public street by showing simply that at the time of the accident he was running at a rate of speed allowed by law. He still remains bound to anticipate that he may meet persons at any point of the street, and he must, in order to avoid a charge of negligence, keep a proper lookout for them and keep his machine under such control as will enable him to avoid a collision with another person using proper care and caution, and if the situation requires he must slow up and stop." We think the rule is applicable to the facts, and that the point may not be sustained.

[2-4] The defendant also claims that there is no evidence in the record showing that the defendant's automobile ever came in contact with the deceased. That point involves a consideration of the conditions existing at the time and place. When the west-bound street car moved on, so far as the record discloses, there was no traffic, and there were no obstructions in the immediate neighborhood of the accident. Mr. Owen who was riding with the defendant testified that he saw Mrs. Tucker hit by the defendant's right-hand headlight. He first saw her just a flash of a second before that. He was seated on the front seat on the right-hand side of the defendant. When he saw Mrs. Tucker he also saw a faint outline of a man who seemed to be standing by the car track. The defendant's automobile at that time was about midway between the car track and the curb. The witness marked on the map the spot where he saw the man. That spot is almost directly opposite the place where Mrs. Tucker lay after she fell to the street. When the street car hit it, Mr. Tucker's body rested on the street car track some distance east of that point. The distance given by different witnesses varied. In view of the fact that Mr. Tucker was walking so close to his wife as testified to by her and as seen by Mr. Owen, the jury was justified in drawing the inference that Mr. Tucker was also hit by the defendant's automobile. As no intervening cause appears in the story told by the witnesses, the jury was justified in inferring that after being hit by the automobile the decedent fell over on the automobile and was by it carried forward and fell off on the street car tracks. While the body rested on the street car track it was motionless. Whether death had occurred we need not stop to inquire. Before the body could be removed from the track it was run over and mangled by the street car. Assuming that death had not ensued at the time the street car ran over and mangled the body of the decedent the jury was within its rights in bringing in a verdict against the defendant. 19 Cal. Jur., pp. 570–573; Sawyer v. So. Cal. Gas Co., 206 Cal. 366, 274 P. 544. The defendant claims that the decedent at the time of the accident was violating Ordinance 7691, New Series. That ordinance prohibits jay-walking. That claim was presented by evidence tendered by the defendant and by the instructions given by the trial court. The evidence on the subject is conflicting. Mrs. Tucker testified that when she and her husband got off the car they waited for the car to pass; that thereafter they walked directly to the sidewalk on the south side of Ocean avenue. If they did so they were not guilty of jay-walking. In support of the judgment, we must assume that the jury adopted the story as told by Mrs. Tucker and rejected the measurements as given by some of the other witnesses. Under these circumstances the point may not be sustained.

The defendant further claims that as Mrs. Tucker is the sole heir of her deceased husband, and as she was personally guilty of contributory negligence, which was a proximate cause of the death of her husband, therefore she may not recover. However, as we have just stated, the record does not show that the husband was guilty of contributory negligence. For the same reasons set forth above, it does not show that Mrs. Tucker was guilty of contributory negligence.

[5-7] The defendant complains because the court did not give certain instructions. The defendant's proposed instruction No. 8 assumed that Mrs. Tucker with her umbrella raised blanketed the view of the decedent. But the uncontradicted evidence is that he was between her and the on-coming automobile. Defendant's proposed instruction No. 10 was addressed to the subject of the defendant's acts when confronted with imminent danger. That subject was covered by instruction 109. Furthermore defendant's proposed instructions 8, 10, and 11 were all formula instructions, but no one of them purported to state all of the facts. The trial court did not err in refusing to give any one of them. Douglas v. Southern Pacific Co., 203 Cal. 390, 264 P. 237.

[8-12] Appeal of Croteau and of the city. These two defendants assert that they were not negligent, and that the verdict of the jury is not supported by the evidence. The plaintiff replies that the street car was not equipped with proper headlights so the motorman could see the track in front of him. He testified that he could not. To this reply these defendants quote section 9 of Ordinance 581 and assert that the headlight on the car complied with that ordinance. However, it is conceded that a person operating a street car must keep a lookout. Although his equipment may be such as complies with legal regulations, nevertheless the operator is bound to keep a vigilant outlook. 36 Cyc. 1460. Although his lights may conform with the calls of the statute, such fact is not conclusive that there was no negligence. 45 C. J. 689. These defendants ask us to hold that, if the car was equipped with a light complying with all of the calls of the ordinance mentioned, and, if at the time and place of the accident by reason of some other circumstance or circumstances the motorman could not see the track before him, nevertheless he was entitled to proceed through a populous district without exercising any additional care. By its verdict the jury has found the issue of negligence against these defendants. On the facts before us we are not disposed to say that it erred in doing so. The plaintiff contends that, when the deceased was seen standing by the street car track, manifestly he was alive. Therefore she contends that the presumption of law (Code Civ. Proc. § 1963, subd. 32) comes to her assistance, and that it will be presumed her husband continued to live until the street car ran over him. But, in almost the same breath that the foregoing testimony was developed, evidence came into the record that the decedent was, almost immediately thereafter, hit by an automobile, that he fell on its fender, that he was carried about seventy-five feet, and that his body was then dropped on the street car track, and that, for several seconds before the street car reached that point, his body lay on the track inert and motionless. In view of these additional facts, we are not called upon to say whether the presumption cited continued or was dispelled. Out of the same set of facts certain inferences may be drawn. Reasonable men contemplating the facts recited might draw different inferences. One man might reach the conclusion that Mr. Tucker was dead before the street car ran over him. Another man might reach the conclusion that he was not dead and that the street car ran over and killed him. The jury was thus called upon to select one inference or the other. These two defendants earnestly contend that under such circumstances the evidence is insufficient, and they cite and rely on such authorities as Wilbur v. Emergency Hospital Ass'n, 27 Cal. App. 751, 151 P. 155, and the cases there cited and reviewed. Those authorities are hardly in point. They deal with instances where one sought to build one inference on another inference. Of course our statute does not permit of such reasoning. Code Civ. Proc. § 1960. We think that the rule applicable in the instant case is to be found in Mah See v. North American Acc. Ins. Co., 190 Cal. 421, 213 P. 42, 26 A. L. R. 123. At page 426 of 190 Cal., 213 P. 42, 44, the court said: "This court has frequently held that even though all the facts are admitted or uncontradicted, nevertheless, if it appears that either one of two inferences may fairly and reasonably be deduced from those facts there still remains in the case a question of fact to be determined by the jury (or by the trial judge where the case is tried without a jury), and that the verdict of the jury or the finding of the trial judge thereon cannot be set aside by this court on the ground that it is not sustained by the evidence. Anderson v. Los Angeles Transfer Co., 170 Cal. 66, 148 P. 212. In so far as the evidence is subject to opposing inferences, it must upon a review thereof be regarded in the light most favorable to the support of the judgment. Woodard v. Glenwood Lumber Co., 171 Cal. 513, 519, 520, 153 P. 951; Hassell v. Bunge, 167 Cal. 365, 367, 139 P. 800. 'In reviewing a question of this kind, all the inferences reasonably possible from the evidence favorable to the plaintiff (the prevailing party) must be indulged by this court.' Bandle v. Commercial Bank of Los Angeles, 178 Cal. 546, 547, 174 P. 44, 45." The rule there stated was repeated by the Supreme Court in denying a transfer in the proceeding entitled Estate of Wallace, 64 Cal. App. 107, 117, 220 P. 682. See, also, Ley v. Bishopp, 88 Cal. App. 313, 263 P. 369; Giannini v. S. P. Co., 98 Cal. App. 126, 276 P. 618. Following the rule stated in the cases last cited in support of the judgment, we must assume that the jury drew the inference that Mr. Tucker was not dead at the time the street car passed over his body.

As to each and all of the defendants the judgment is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

111 Cal. App. 728

BUSH v. BASTIAN et al.

Civ. 6377.

District Court of Appeal, Second District,
Division 1, California.

Feb. 13, 1931.

Rehearing Denied March 9, 1931.

1. Landlord and tenant ⚿231(8).

Finding that lessor, notifying lessee of intention to relet for lessee's benefit, did not occupy premises, nor prevent lessee from re-entering, *held* authorized.

2. Landlord and tenant ⚿195(1).

Lessee, sued for rent of cottages after abandonment, could not complain of lessor's necessary occupancy of cottage, reasonable rent for which was allowed.

3. Landlord and tenant ⚿184(1).

Lessor foreclosing mortgage on furnishings and crediting proceeds to delinquent lessee did not lose right to recover loss of rent.

Appeal from Superior Court, Los Angeles County; George W. McDill, Judge.

Action by Mrs. S. E. Bush against Mary Bastian and another. Judgment for plaintiff, and defendant named appeals.

Affirmed.

Buel R. Wood, of Los Angeles, for appellant.

Willebrandt & Horowitz, of Los Angeles, for respondent.

CONREY, P. J.

The plaintiff executed to appellant a five-year lease of real property, consisting of a lot and several unfurnished bungalows. Appellant furnished the bungalows, and executed to the plaintiff as security for performance of the covenants of the lease a chattel mortgage on the furniture. Thereafter appellant assigned said lease to the defendant Herbert. In connection with said assignment, appellant agreed with plaintiff that appellant would continue to be bound by the terms of the lease. On February 10, 1925, three and one-half months' rent being at the time delinquent, the complaint alleges that the defendants vacated and abandoned the premises, and that the plaintiff informed each of them that she would endeavor to lease the premises and keep them rented for and on account of the defendants, and, if the amounts received were insufficient to meet the obligations of the lessees under the lease, plaintiff would hold them accountable for the difference; that pursuant thereto plaintiff did endeavor to keep the premises rented for and on account of the defendants and each of them, and by reason thereof received certain rentals. This action was brought to recover the difference between the net amount received (after paying certain necessary expenses) and the accrued rent for the time to and including the month of October, 1926. The principal litigated issue relates to said alleged abandonment of the premises and the conduct of the plaintiff on reassuming possession after the alleged abandonment. On these issues the decision of the trial court was in favor of the plaintiff.

The chattel mortgage provided that the mortgagee might take possession of the mortgaged property upon failure of appellant to pay rents when due. Upon the 5th day of February, 1925, by reason of rent being unpaid at that time, plaintiff commenced an action for possession of the mortgaged personal property. The writ of replevin was issued. On February 10, the sheriff, proceeding under said writ, took possession of said personal property on the leased premises. According to the testimony of the plaintiff, she went to the premises at that time, but did not take possession of anything. The sheriff was there proceeding under the writ, and Mrs. Herbert was "packing to leave." Plaintiff came back the following day and found that Mrs. Herbert had moved away and the premises were unoccupied.

Appellant first contends that the evidence is insufficient to prove abandonment of the premises on the part of the defendants. We are satisfied that there is no merit in this point.

[1, 2] It is next contended that "the court erred in finding under the evidence that the same was sufficient to allow the respondent to enter the leasehold and rent the premises for the benefit of appellant, holding the appellant accountable for the difference between the highest rent obtainable and the sum specified in the lease." The third and last point is that: "There is no evidence in the record that supports or tends to support findings of fact No. XIII and XIV and it was error of the court to find from the evidence that the plaintiff and respondent did not remain in occupancy." Said finding XIII is to the effect that it is not true that the plaintiff remained in occupancy of the leased premises and all or each of the units of said bungalow court. Finding XIV is in effect that it is not true that by any act of the plaintiff the defendants, or either of them, were prevented from re-entering the demised premises or continuing the business of renting the said property, or were compelled to lose any of the personal property in the way of furnishings of said apartments. The findings are amply sustained by the evidence. The defendants having abandoned the leased premises, plaintiff in connection with her resumption of posses-

sion thereof very clearly notified the defendants that she was proceeding to relet the bungalows for the benefit of the defendants and with the intention of requiring them to pay the rent provided for in the lease, or so much thereof as she could not obtain from the tenants to whom the bungalows would be rented. The fact that respondent herself occupied one of the bungalows appears to have been a necessary incident to her effort to rent the others, since, in order to conduct the business, it was necessary for her to be on the premises. Credit was given to the defendants for the reasonable value of the bungalow occupied by the plaintiff, as well as for the rents received from tenants obtained for the other bungalows.

[3] So far as the personal property is concerned, it appears that judgment for possession was obtained by the plaintiff, and, in accordance with the terms of the chattel mortgage, the mortgaged property was sold by the plaintiff, and the proceeds of sale were credited to the defendants. It appears to us that the respondent proceeded in accordance with her rights under the lease in such manner that she did not lose her right to recover judgment against the defendants for the unpaid balance of rent which became due; that is to say, for the difference between what she was able in good faith to let the property for and the amount provided to be paid under the lease agreement. Rehkopf v. Wirz, 31 Cal. App. 695, 161 P. 285.

The judgment is affirmed.

We concur: HOUSER, J.; YORK, J.

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111 Cal. App. 714

BAGNALL v. TRAVELERS' INS. CO. OF HARTFORD, CONN.

Civ. 7741.

District Court of Appeal, First District, Division 2, California.

Feb. 13, 1931.

1. Insurance 🔑528.

Under disability provisions, insured *held* entitled to recovery for total disability which might have, but did not, become permanent.

> Policies involved provided that on due proof that insured has become wholly disabled and will be wholly prevented for life from engaging in any occupation for profit, insurer will pay specified disability; and that pending due proof that existing total disability will be permanent, when insured has been wholly disabled for three months or more, insurer will pay disability during continuance of such disability. The word "pending" usually means while awaiting, and the word "due" means adequate or sufficient.
>
> [Ed. Note.—For other definitions of "Due" and "Pending," see Words and Phrases.]

2. Pleading 🔑127(2).

Admission in insurer's answer that insured gave notice of disability *held* sufficient; no particular form of notice being required by policies.

3. Evidence 🔑219(1).

In action on disability provisions of life insurance policies, evidence of payments under health policies *held* properly admitted, as admission of total disability.

4. Appeal and error 🔑1050(1).

Error, if any, in admitting parol evidence regarding effect of life insurance policies, *held* harmless; insured being entitled to recover regardless of parol evidence.

Appeal from Superior Court, Los Angeles County; J. O. Moncur, Judge.

Action by Chester Gilbert Bagnall against the Travelers' Insurance Company of Hartford, Conn. Judgment for plaintiff, and defendant appeals.

Affirmed.

O'Melveny, Tuller & Myers and J. R. Girling, all of Los Angeles, for appellant.

F. Britton McConnell, of Los Angeles, for respondent.

SPENCE, J.

Plaintiff sought to recover the benefits to which he claimed to be entitled under the disability provisions of three life insurance policies. Upon a trial by the court sitting without a jury, judgment was entered in favor of plaintiff, from which judgment defendant appeals.

On July 19, 1926, plaintiff became totally disabled as the result of a disease known as hyper-thyroidism and remained so totally disabled from that date until February 14, 1927. Plaintiff returned to work on February 15 and was not totally disabled thereafter. The court found that "plaintiff became wholly disabled by a disease and was prevented thereby from engaging in any occupation or employment for wages or profit for a period of more than three consecutive months, to-wit, from July 19, 1926, to February 14, 1927 * * *"; that "said disease was of such a nature that such total disability might have been and was likely to have been permanent.

and have continued for life"; and that "during said period, due proof of a claim under said policies that such disability would be permanent and continue for life, was pending." Thereupon the court awarded plaintiff disability benefits under the policies covering the period from July 19, 1926, to February 14, 1927.

[1] The main question presented on this appeal involves the construction of the disability provisions of the policies. Appellant contends that recovery under the policies depends upon due proof of a disability which is both total and permanent.

The disability provisions of the three policies were the same, and the following paragraphs contained in all three of the policies will be numbered to facilitate reference thereto.

1. "Upon due proof that * * * the insured has become wholly disabled by bodily injuries or disease and will be continuously and wholly prevented thereby for life from engaging in any occupation or employment for wage or profit, the company will waive the payment of any premiums which may fall due on this contract during such disability and will pay from the commencement of such disability and during its continuance the disability income stated on the first page of this contract. * * *"

2. "Independently of all causes the company will consider as permanent total disability the entire and irrecoverable loss of the sight of both eyes, or of use of both hands or of both feet, or of one hand and one foot.

3. "Pending due proof of a claim hereunder in behalf of the insured that an existing total disability will be permanent and continue for life, when it shall appear that the insured has been wholly disabled by bodily injuries or disease and has been prevented thereby from engaging in any occupation or employment for wage or profit for a period of not less than three consecutive months, the company will grant the aforesaid benefits from the commencement of such disability and during its continuance."

We find no merit in appellant's contention that the insured was not entitled to the benefits of the policies in the absence of due proof that the disability was both total and permanent. The authorities in other jurisdictions construing somewhat similar policies are not harmonious. Penn. Mutual Life Insurance Co. v. Milton, 160 Ga. 168, 127 S. E. 140, 40 A. L. R. 1382; Wenstrom v. Ætna Life Insurance Co., 55 N. D. 647, 215 N. W. 93, 54 A. L. R. 289; Shipp v. Metropolitan Life Insurance Co., 146 Miss. 18, 111 So. 453; Hawkins v. John Hancock Mutual Life Insurance Co., 205 Iowa, 760, 218 N. W. 313; Ginell v. Prudential Insurance Co., 237 N. Y. 554, 143 N. E. 740, reversing 205 App. Div. 494, 200 N. Y. S. 261. But in none of the policies involved in the cases cited were provisions to be found similar to those contained in the above paragraph 3. We may assume that in the absence of paragraph 3 recovery by the insured would depend in all cases, except those specifically mentioned in paragraph 2, "upon due proof" that the insured had become totally and permanently disabled, but in the nature of things the difficulty of making due proof that a total disability is permanent is at once apparent. Injuries or diseases, including hyper-thyroidism, tuberculosis, and others, may totally disable a person for a long period of time. The person so injured or afflicted may be totally disabled for life or on the other hand skillful care and treatment over a period of time may demonstrate that he has made a complete or practically complete recovery resulting only in a partial disability, if any. In many cases time alone will determine whether the total disability was in fact permanent or temporary. Until the necessary time has elapsed in a given case, the making of due proof that the total disability is permanent is practically impossible.

As we view the policies, the difficulty of making such proof of the permanency of the total disability is recognized and paragraph 3 is added to cover the numerous cases in which a total disability exists for more than three months with a possibility that such total disability will continue indefinitely. The first words of paragraph 3 are, "Pending due proof of a claim. * * *" None of the words employed in this phrase are defined in the policies. It should be further noted that the policies are silent regarding the type of notice, claim, or due proof that is required. In modern usage, the word "pending" more frequently has the sense of "while awaiting" and the word "due" means "adequate; sufficient." Webster's New International Dictionary. Without resorting to a liberal construction but merely giving to these words their ordinary meaning, we construe paragraph 3 to mean that while awaiting adequate and sufficient proof of a claim that an existing total disability lasting for at least three months will be permanent, the company will grant the benefits during the continuance of such total disability. As so construed, the insured was not only entitled to the disability benefits under the policy upon "due proof" as provided in paragraph 1, but was also entitled to the benefits while awaiting "due proof" of his claim under the circumstances set forth in paragraph 3. Where, as found by the court in the present case, there is a total disability exceeding three months occasioned by a disease which is of such a nature that it may result in permanent total disability and a claim that such total disability will be permanent is pending and awaiting adequate and sufficient proof of such permanency, the insured is clearly entitled under paragraph 3 to the disability benefits of the policy during the continuance of the total disability.

[2] The findings made by the trial court find adequate support in the evidence and admissions made by the pleadings and no direct attack is made upon any of said findings. Appellant in its briefs lays great stress on the fact that respondent admitted on the trial that he was not totally disabled on February 16, 1927, at which time he filed with the company a statement on the company's form entitled "Claimant's Statement—Permanent Total Disability Claim," in which statement he said "only recently recovery of my condition was assured me." If we understand appellant's contention, it claims, first, that such testimony and statement affirmatively show that the total disability was not in fact permanent, and, second, that such testimony and statement further show that respondent's total disability had terminated when this claim or claimant's statement was filed. We find no merit in the first point that the total disability was not in fact permanent for the reasons hereinabove stated. We believe that the second point is likewise without merit owing to the answer in which appellant "admits that on or about October 19, 1926, plaintiff gave an alleged notice to defendant that he, the plaintiff, claimed to be wholly disabled by a disease of such a nature that such total disability might be permanent and continue for life and was then, and for more than three consecutive months immediately preceding had been, prevented by such alleged disability from engaging in any occupation or employment for wage or profit." Conceding without deciding that under paragraph 3 of the policies the assured must give notice of a claim during the existence of the total disability and before its termination, the admission by appellant that respondent gave notice of such claim on October 19, 1926, is sufficient; no particular form of claim or notice of claim being required by the terms of the policy.

[3, 4] Two further points are urged by appellant. Error is claimed in the admission of certain oral and documentary evidence relating to two health policies which the respondent carried with the appellant company, which policies covered total disability without regard to its permanency. By its answer appellant had denied that respondent's disability was either total or permanent. The admission of the evidence relating to the health policies was not error, as it was offered and admitted solely on the issue of whether the disability was total and as an admission of the appellant by the payment of the benefits under the health policies that respondent's disability was total. The other point raised relates to alleged error in admitting evidence of conversations with appellant's agent relating to the coverage of the policies at the time of their purchase. If any error existed in the admission of this testimony, it was not prejudicial. Under the wording of paragraph 3 of the policies, construed without resort to parol evidence, respondent was entitled to recover.

The judgment is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

111 Cal. App. 754

JIANOU v. PICKWICK STAGES SYSTEM.

Civ. 4085.

District Court of Appeal, Third District, California.

Feb. 16, 1931.

Rehearing Denied March 18, 1931.

1. Negligence 🔑121(2).

One who relies on doctrine of res ipsa loquitur to establish cause based on negligence must allege merely general acts of negligence.

2. Negligence 🔑121(2).

Pleading which alleges specific acts of negligence refutes theory of res ipsa loquitur.

3. Carriers 🔑316(1).

Complaint for injuries to passenger in auto stage did not plead specific acts of negligence relieving defendant of application of doctrine of res ipsa loquitur.

> Allegation of complaint that defendant carelessly and negligently operated and conducted its automobile stage so that a wheel broke or collapsed constituted mere general averment that negligent conduct of defendant caused the wheel to break, and warranted inference from language employed that plaintiff was ignorant of specific acts of negligence which caused the accident.

4. Carriers 🔑280(1).

Carriers of passengers for hire are required to use utmost precaution and diligence for their safety (Civ. Code, § 2100).

5. Pleading 🔑36(3).

Admission in answer in action to recover for injuries to passenger in auto stage that accident was result of defective or broken rim of wheel was binding on defendant.

6. Carriers 🔑311.

Question of inspection of wheel on auto stage causing accident was matter of defense in passenger's action to recover for injuries.

7. Carriers 🔑320(4).

Whether operator of auto stage exercised due care to discover defect in wheel and avoid accident was question for court trying action without jury.

8. Appeal and error 🔑1071(6).

Failure of court to adopt findings on issue raised by answer is not reversible error, where findings would necessarily be adverse.

9. Carriers 🔑318(3).

Evidence warranted finding that examination of rims of wheels on auto stage was insufficient, as respected liability for injury to passenger.

Appeal from Superior Court, Humboldt County; Harry W. Falk, Judge.

Action by Gust E. Jianou against the Pickwick Stages System. Judgment for plaintiff, and defendant appeals.

Affirmed.

B. P. Gibbs, of Los Angeles, and Barry J. Colding, Theodore Hale, and Carroll B. Crawford, all of San Francisco, for appellant.

Henry L. Ford, and Eugene S. Selvage, both of Eureka, for respondent.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

This is an appeal from a judgment for damages for personal injuries which were sustained as a result of an auto stage casualty.

The plaintiff was riding as a passenger in the defendant's auto stage from Eureka to Crannell. At a point near McKinleyville, the stage suddenly plunged from the highway into a ditch where it turned partly over against an embankment. The plaintiff was thrown violently against a seat in the car. His shoulder was broken. His back and face were cut and bruised. He also received some internal injuries. He suffered much pain and was confined in a hospital for several months for treatment for these injuries. Considerable expense for medical and hospital treatment was incurred by him.

This suit for damages was tried by the court without a jury. Findings were adopted favorable to the plaintiff. A judgment was thereupon rendered in his behalf for the sum of $2,692.50. From this judgment the defendant has appealed.

The appellant contends the court erred in failing to grant its motion for a nonsuit. The amount of the judgment is not questioned. The chief point relied upon for reversal of the judgment is a claim that the evidence fails to support the finding that the defendant was guilty of negligence which proximately caused the injuries sustained by the plaintiff. It is assumed the plaintiff relies upon the doctrine of res ipsa loquitur, and that, having proved the accident from which the injuries resulted, the burden shifted to the defendant to refute the inference of negligence. The appellant asserts, however, that the plaintiff, having alleged the specific acts of negligence upon which he relies, thereby waived the application of the doctrine of res ipsa loquitur.

[1, 2] It is the established rule that one who relies upon the doctrine of res ipsa loquitur to establish a cause based upon negligence must allege merely general acts of negligence. Upon the contrary, when one alleges specific acts of negligence upon which he relies, the pleading refutes the theory of res ipsa loquitur. The very hypothesis of the doctrine is that the plaintiff has no knowledge of just what caused the accident, and that, since the instrumentality by means of which the accident occurred is solely within the control of the defendant, negligence will be inferred upon proof of a prima facie case, in the absence of an adequate explanation on the part of the defendant exempting him from liability. Connor v. Atchison, T. & S. F. Ry. Co., 189 Cal. 1, 207 P. 378, 26 A. L. R. 1462; Ingledue v. Davidson, 102 Cal. App. 697, 283 P. 837; 19 Cal. Jur. 713, § 127.

[3] We are of the opinion the complaint in the present action does not plead such specific acts of negligence as will relieve the defendant of the application of the doctrine of res ipsa loquitur. But, assuming without so deciding, that the allegations of the complaint result in a waiver of that doctrine, and that the plaintiff failed to affirmatively prove specific facts constituting negligence on the part of the defendant which proximately caused the injuries sustained by the plaintiff, this omission is fully supplied by the specific admissions of the defendant which are contained in its answer. The answer affirmatively alleges the precise defects of the auto stage wheel as the cause of the accident which were referred to and relied upon by the plaintiff as actionable negligence.

The complaint alleges: "The said defendant so carelessly and negligently operated and conducted its said automobile stage that a wheel broke or collapsed thereon." It will be observed that the complaint does not state what specific acts of the defendant caused the wheel to collapse or break. It is merely averred generally that the negligent conduct of the defendant caused the wheel to break. The nature of the acts which caused the wheel to break are not even suggested. It is inferred from the language employed that the plaintiff was ignorant of the specific acts of negligence which caused the accident. The doctrine of res ipsa loquitur is therefore applicable. Lawrence v. Pickwick Stages, Inc., 68 Cal. App. 494, 229 P. 885; Leitert v. Pickwick

Stages, Inc., 68 Cal. App. 504, 229 P. 889; 19 Cal. Jur. 714, § 129.

[4] Carriers of passengers for hire are required to use the utmost precaution and diligence for their safety. Section 2100, Civ. Code; Kline v. Santa Barbara, etc., Ry. Co., 150 Cal. 741, 745, 90 P. 125; Drury v. Los Angeles Ry. Corp., 102 Cal. App. 58, 63, 282 P. 525.

The fact that the accident was caused by a broken, defective, and disconnected rim on one of the wheels of defendant's auto stage was admitted by the answer, which avers: "For a further, separate and distinct answer and defense * * * defendant alleges: That the tire-rim on one of the wheels of defendant's said automobile, which (defect) caused the tire to blow out on said automobile stage of defendant became broken and disconnected and was defective, thereby rendering further control of said automobile stage by the operator thereof impossible; that defendant used all reasonable precaution and diligence and the highest degree of care by way of inspecting the said automobile stage, and especially the wheels and tire-rims and tires on said automobile stage immediately prior to the accident * * * but that said defect, or defects were latent and not susceptible to discovery and that said accident was wholly unavoidable on the part of this defendant."

[5, 6] The cause of the accident is therefore admitted by the pleadings to have been a defective or broken rim of an automobile wheel. This admission is binding on the defendant so far as the actual cause of the accident is concerned. It required no further proof on the part of the plaintiff. 19 Cal. Jur. 688, § 111. The question of inspection was a matter of defense. The motion for a nonsuit was therefore properly denied.

[7] Having admitted that the accident was caused by a defective or broken rim of a wheel, the question as to whether the defendant exercised due care to discover and repair this defect, and thus avoid the accident, was a problem for the court to determine from the evidence adduced. By the rendering of the judgment against the defendant, its affirmative allegation that an adequate inspection of the wheel was made must be assumed to have been found against the defendant.

[8] A failure of the court to adopt findings upon an issue raised by the answer is not reversible error, where the finding, if made to support the judgment, would necessarily be adverse to the appellant. 2 Cal. Jur. 1033, § 614; Kling v. Gustafson, 101 Cal. App. 58, 63, 281 P. 407. The court would have been warranted in finding from the evidence that no adequate inspection of the wheel in question was made by the defendant sufficient to purge it of negligence. The only evidence which the record contains on this subject of inspection was furnished by defendant's witness, Shirley Callahan. He testified:

"I am employed by the Pickwick Company * * * to inspect * * * the tires on each bus as it comes in. * * *

"Q. Have you ever worked manufacturing tires more than two weeks? A. No sir. * * *

"Q. What did you do to inspect that tire? * * * A. I had the wheels off of the ground and turned the wheels around to inspect the tire to see if there was any cuts on it anywhere, or if it was worn. * * *

"Q. Now what did you do to inspect the rims? A. You can also inspect the rims as you are turning the wheel around from the outside and you can also get the looks of the rim from the inside. * * *

"Q. You didn't have the rims off of each of the wheels though, did you? A. No sir.

"Q. You didn't take the tire off the rims, did you? A. No sir.

"Q. Now there are machines * * * to test the metal condition or soundness of those rims aren't there? A. I don't know.

"Q. You are not familiar with that? A. No sir.

"Q. But at any rate you didn't do that? A. No sir. * * *

"Q. Did you look at this rim after the collision? A. No. sir.

"Q. Have you seen either one of those rims since? A. No sir. * * *

"Q. Are you familiar with the tests that they make there to determine whether wheels are sound? A. No sir.

"Q. Did you make any tests that day to determine whether or not that wheel would dish in or out? A. No sir.

"Q. (Addressed to Mr. Hale, attorney for the defendant): Do you happen to have either of the wheels here, or the rims here? A. No sir. I have not them here and I couldn't produce them. I tried to get them, and they are not here. * * *

"Q. Now, Mr. Callahan * * * you simply checked up the tires, tested the air and looked at the two tires and looked at the rim, isn't that correct? A. Yes."

[9] It is fair to assume from the foregoing testimony that Shirley Callahan was employed to examine the rubber tires and see that they contained the proper amount of air. All that he did to inspect the metal rims was to observe the portion which was visible as he turned the wheels around. He does not even pretend to have critically examined the rims. He was busily engaged in looking at the rubber tires for incisions or worn places. Absolutely nothing of real value was done to detect any flaws or defects in the metal rims. A little hammering with a mallet might have

detected a crack or defect in the rim from the vibration or sound. The court was warranted in holding this superficial examination of the rims was insufficient to constitute adequate inspection thereof. If it be true, as the defendant alleges, that "the tire-rim on one of the wheels * * * (was) broken and disconnected and defective" so as to cause the blowing out of the tire, it would seem that a casual inspection should have disclosed the defect. At least the evidence regarding the inspection of the wheels fails to furnish that degree of "utmost care and diligence" required of a common carrier of passengers to insure their safety. The broken wheel was not even produced at the trial. Its production might have disclosed a crack in the rim which had existed for some time prior to the accident. We are of the opinion the evidence is ample to support the findings.

The judgment is affirmed.

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112 Cal. App. 39

SWEAT v. JAMESON et al.

Civ. 4229.

District Court of Appeal, Third District, California.

Feb. 17, 1931.

1. Contracts 🔑**99(3).**

Evidence did not warrant finding contract to audit freight bills was obtained by fraud.

2. Principal and agent 🔑**123(1).**

In suit on freight audit contract, evidence showed defendant's manager had authority to sign complaint filed for excess charges.

3. Partnership 🔑**284.**

Defendant's manager's signing complaint filed to recover excess freight charges constituted ratification of everything member of dissolved partnership employed to audit freight bills had done.

> After partnership contracted to audit freight bills for defendant, the partnership was dissolved, and plaintiff partner thereafter completed the audit and had a complaint for excess freight charges prepared, and the complaint was signed by defendant's manager.

4. Contracts 🔑**328(1).**

That subscriber filed renunciation of award of excess freight charges, and elected to accept payment in another case did not affect auditor's right to compensation under agreement.

> Under the agreement, auditors agreed to make audit of freight bills, and parties to agreement agreed that collections from audit were to be divided equally between the parties on a 50 per cent. basis, and that collections were to be made payable to subscriber but transmitted to subscriber through auditors. After auditor had filed claim with Railroad Commission and Railroad Commission had made an award of excess charges, subscriber filed renunciation of such claim and requested Railroad Commission to enter supplemental order requiring payment of excess charges under provisions of another complaint which had been filed.

5. Contracts 🔑**190.**

Reasonable construction of freight auditing agreement was that subscriber would not withdraw any freight bills covered by contract until final conclusion had been reached.

> The agreement provided that claims would be handled to conclusion by auditors and that their action would in no manner interfere with claims which subscriber might file, and provided for return of freight bills to subscriber after the audit.

6. Contracts 🔑**190.**

Under freight auditing agreement, auditor was entitled to compensation based upon collections made irrespective of party making collection.

7. Contracts 🔑**170(1).**

Meaning attached to word "audit" by parties to freight audit agreement was controlling.

Appeal from Superior Court, Los Angeles County; Guy F. Bush, Judge.

Action by Walter A. Sweat against J. W. Jameson, doing business under fictitious name of the Jameson Oil Company, and another. From the judgment, defendants appeal.

Affirmed.

Glensor, Clewe, Van Dine & Turcotte, of Los Angeles, for appellants.

Hugh Gordon, of San Francisco, for respondent.

Mr. Justice PLUMMER delivered the opinion of the court.

The plaintiff had judgment in this action against the J. W. Jameson Corporation, from which judgment the corporation appeals.

The record shows that on January 14, 1924, the following instrument was executed by the

Jameson Oil Company, and delivered to the plaintiff in this action, to wit:

"Freight Audit Contract. Bailey & Sweat,
"San Francisco. * * *

"The undersigned hereby agrees to permit, and Bailey & Sweat hereby agrees to make, an audit of the freight bills of the undersigned for any period agreeable to the undersigned (but not to exceed eight years) prior to this date.

"In full consideration of said service, both parties agree that collections from this audit are to be divided equally between the undersigned and Bailey & Sweat on a fifty (5) per cent basis.

"It is expressly understood and agreed that aforesaid collections are to be made payable to the undersigned but transmitted to the undersigned, through Bailey & Sweat.

"It is also understood that claims will be handled to conclusion by Bailey & Sweat and that their action will in no manner interfere with claims which the undersigned may file. After audit the aforesaid freight bills are to be returned to the undersigned.

"Subscriber Jameson Oil Co.
"[Signed] L. F. Alker,
"Address 2501 E 28th St.,
"Los Angeles, Calif."

At the conclusion of the trial the court made its findings, from which we summarize the following: That the plaintiff and A. L. Bailey were associated and engaged in business as traffic managers and rate experts; that the writing which we have set forth was duly executed and delivered to Bailey & Sweat; that Bailey & Sweat accepted the employment and proceeded to audit the various freight bills of the defendant for shipments made over the Atchison, Topeka & Santa Fé Railway, and that the audit disclosed overcharges in the sum of $5,006.38; that the firm of Bailey & Sweat, as partners, was dissolved on June 1, 1924; that, on or about the date of the dissolution of said partnership, the plaintiff gave written notice of such dissolution to the defendant, by causing a letter announcing such dissolution to be inclosed in a sealed envelope, with the postage prepaid thereon, and directed to the defendant at its place of business; that, after said dissolution, the business theretofore conducted by the copartnership of Bailey & Sweat was carried on by the plaintiff; that, after the completion of the audit referred to herein, the plaintiff filed with the Railroad Commission of the state of California, on behalf of said defendant, a claim for the recovery of said excessive charges, and prosecuted the same to conclusion, and recovered judgment thereon in a proceeding before the Railroad Commission designated as "Case No. 2038"; that said claim was set forth in a formal complaint, prepared in the manner required by the Railroad Commission, which complaint was signed by the defendant on August 29, 1924; that same was filed with the Railroad Commission on September 6, 1924; that, at the time said complaint was signed by the defendant, and at all times thereafter, said defendant had full knowledge of the contents thereof, and of the purpose for which the same was filed, and of the fact that said action was being prosecuted by the plaintiff as the successor in interest of the copartnership of Bailey & Sweat; that on or about March 5, 1925, the Railroad Commission filed its opinion and order in said cause No. 2038, directing the said Atchison, Topeka & Santa Fé Railway Company to refund and repay to the said J. W. Jameson Corporation, defendant herein, the excessive charges in the sum of $5,006.38, with interest thereon in the sum of $831.48, aggregating the total sum of $5,837.86; that thereafter, and on or about the 11th day of March, 1925, the defendant filed with the said Railroad Commission a renunciation of its claim as set forth in case No. 2038, and requested the said Railroad Commission to enter a supplemental order requiring that said Atchison, Topeka & Santa Fé Railway Company refund and repay the said excessive charges to the defendant herein, under the provisions of a complaint which had been filed with said Railroad Commission by the defendant on or about July 16, 1924, in a proceeding designated as "Case No. 2023"; that, in pursuance of said renunciation and request, the Railroad Commission made and entered its supplemental order directing said excessive charges to be refunded to the defendant in the proceeding designated as "Case No. 2023." The court further found that the hearing in case No. 2023 was held on September 11, 1924, and judgment of the Railroad Commission rendered thereon on February 5, 1925; that the hearing before the Railroad Commission in case No. 2038 was had on December 17, 1924, and judgment rendered therein on March 5, 1925; that all the work of prosecuting the claim set forth in case No. 2038, and all of the work auditing said freight bills and transportation records upon which said case was based had been fully performed and completed by the said Bailey & Sweat, and the plaintiff herein, prior to the date on which judgment was rendered by said Railroad Commission in case No. 2023; that thereafter, and on June 27, 1925, the Atchison, Topeka & Santa Fé Railway Company paid the said defendants, in pursuance of said orders heretofore referred to, the sum of $8,374.32, and that said payment included the sum of $5,837.86, which constituted the excessive charges disclosed by the audit made by Bailey & Sweat, as set forth in the complaint filed in case No. 2038.

The findings further show the assignment by L. A. Bailey to the plaintiff herein of all of his interest in and to the contract, and the proceedings arising therefrom mentioned in this opinion. The court further found that the defendant was not prejudiced in any particular by reason of the dissolution of the partnership of Bailey & Sweat. Judgment accordingly went for the plaintiff with the compensation specified in the written contract of employment.

The record in this case shows that, some time after the execution of the agreement made and delivered to Bailey & Sweat, on January 14, 1924, the defendant retained the Carmichael Traffic Corporation to \institute proceedings before the Railroad Commission for the purpose of obtaining reparation and repayment of excessive rate charges made by the Atchison, Topeka & Santa Fé Railway Company, and that thereafter, and on July 6, 1924, the Carmichael Traffic Corporation filed, on behalf of the defendant, a claim against the Atchison, Topeka & Santa Fé Railway Company, in a case known as, and designated "Case No. 2023." Thereafter, and on August 23, 1924, the defendant telegraphed to the plaintiff as follows: "Gentlemen: This will acknowledge receipt of freight bills that you have audited for us. You did not return the freight bills covering shipments from Santa Fe Springs, moving prior to April 26, 1923, and since we have filed a formal complaint with California Railroad Commissioners, involving rates from Santa Fe Springs to Los Angeles, during the period July 1, 1922, to April 26, 1923, it is imperative that we have all those freight bills, and will thank you to return them to us at once. Yours truly, (Signed) Jameson Oil Company." The reply to this telegram was made by an attorney by the name of G. H. Baker, from which letter we take the following excerpts: "Bailey & Sweat have turned over to me for reply your telegram of the 23rd relative to the return of freight bills covering the period to April 26th." This letter further states that the defendant was advised by Mr. Sweat that the purpose of collecting the bills was to file a formal complaint for reparation, and that a complaint for that purpose was being prepared, further stating that the interest of the defendant would be looked after, etc. Following this, the defendant wrote the following letter: "Los Angeles, August 28, 1924. Mr. Gwyn H. Baker, Attorney-at-Law, American Bank Bldg., San Francisco, Calif. Dear Sir: Yours of the 23rd at hand. According to our understanding with Bailey & Sweat, the contract calls for an audit of our freight bills only; the right to file complaint we reserved ourselves, and have appointed Mr. Carmichael to handle such complaints for us. We would ask you to deliver our outstanding freight bills to Messrs. Glensor, Clewe and Van Dine, attorneys, located in the Mills Bldg., San Francisco, when they call for same. We believe this will clear the matter up, and remain, Very truly yours, Jameson Oil Co., M. P. Simon, Manager."

A few days after the writing of this letter it appears that a complaint was prepared by G. H. Baker, at the request of the plaintiff, for and on behalf of the defendant, based upon the claims to which we have referred as having been audited by the plaintiff, and this complaint was signed by M. P. Simon as manager of the defendant. This complaint, as we have stated, was filed with the Railroad Commission on September 8, 1924, and constituted the basis of case No. 2038, as hereinbefore stated.

The claim of the appellant is that the plaintiff is not entitled to recover upon the contract hereinbefore set forth, and that, if any cause of action exists in favor of the plaintiff, as against the defendant, it is one for damages.

[1] It is likewise claimed on the part of the appellant that the instrument of employment set forth herein was obtained by fraud and misrepresentation. We may here state that a careful study of the transcript fails to disclose any testimony upon which a finding to that effect could be based. The record shows that a man by the name of Hutchinson, who had been connected with traffic associations and engaged in business as the traffic manager and rate expert, took the complaint constituting the basis for action No. 2038, to Mr. Simon; that Mr. Simon read it; that, at the very time that Hutchinson took the complaint to Mr. Simon for his signature, Mr. Carmichael of the Carmichael Traffic Corporation, was present; that some considerable conversation was had relative to the signing of the complaint, and in that conversation Mr. Simon stated that Bailey & Sweat were the first to discover the overcharges, and were entitled to handle the claim. The record shows further testimony to the effect that Simon stated that it did not matter to him whether Bailey & Sweat or Sweat handled the matter, this, in relation to the dissolution of the partnership of Bailey & Sweat. The record also shows that Simon stated that his telegram relative to return of the freight bills might be disregarded.

[2] Upon this appeal it is claimed that Simon had no right or authority to sign the complaint filed in action No. 2038, as manager of the defendant. A complete answer to this contention is found in the letter dated August 28, 1924, addressed to Gwyn H. Baker, and signed "Jameson Oil Co., M. P. Simon, Manager." This letter shows clearly that the testimony of Simon taken upon the trial of this action, as to his authority to sign the complaint as manager for the defendant, might very well be disregarded by the trial court.

[3] We do not need to discuss any questions relating to the dissolution of the partnership of Bailey & Sweat, nor as to the authority of Sweat to complete the business un-

dertaken by the partnership, and to retain the services of G. H. Baker to prepare the complaint filed in action No. 2038, by reason of the fact that the signing of the complaint by the manager of the appellant, as we have just stated, constituted a ratification of everything that the plaintiff in this action had done. The record in this case furnishes sufficient testimony to this effect, if the trial court believed the testimony of the witness Hutchinson. This testimony shows that the defendant did not desire to discontinue or dispense with the services of the plaintiff by reason of the dissolution of the partnership, and, in signing the complaint which had been prepared at the request of the plaintiff and filing with the Railroad Commission, only one conclusion can follow therefrom, and that is that the plaintiff was authorized to proceed.

Appellant likewise attacks several of the findings of the trial court, the first of which is directed against finding No. 4, which is to the effect that Bailey & Sweat accepted employment, audited the various freight bills, and that the audit disclosed that the Atchison, Topeka & Santa Fé Railway Company had exacted and collected from the defendant for shipments made by said defendant over its lines excessive charges in the aggregate sum of $5,006.38. Technically, the contention of the appellant is true; as a matter of fact, it is untrue, because the exact amount of the excessive charges were undetermined until the Railroad Commission had filed its orders and judgments in the cases heretofore referred to. Likewise finding No. 5 to the effect that the auditing of the freight bills had been concluded prior to June 1, 1924, is not strictly accurate, but the materiality of this finding is not apparent, for the simple reason that, after auditing, the defendant, by signing the complaint, authorized whatever further proceedings were necessary to prosecute the claims to judgment. Finding No. 6, to the effect that the plaintiff gave notice to the defendant of the dissolution of the partnership of Bailey & Sweat, does not appear to be supported by the testimony. This again is wholly immaterial by reason of what we have stated herein of the occurrences that took place at the time of the signing of the complaint by M. P. Simon as manager for the defendant in this action.

The record further shows, as we have stated, that judgment was entered in both cases; that the testimony used in the hearing had upon case No. 2023 was also used, by stipulation, at the hearing upon case No. 2038.

[4] It is true that no money was collected under case No. 2038, but the mere fact that the defendant filed a renunciation of the award in that case, and elected to accept payment under the orders made in case No. 2023, cannot make any difference as to the right of the plaintiff to compensation, as provided for in the written agreement.

Nothing has been called to our attention which shows that the appellant did not understand fully just what it was doing when the written instrument, dated January 14, 1924, was executed and delivered to Bailey & Sweat. Nothing has been called to our attention showing that the appellant objected in any manner to the handling of claims against the Atchison, Topeka & Santa Fé Railway Company, until the Carmichael Traffic Corporation sought employment to prosecute actions based upon the same claims. Nor does the record in fact show any complaint made by the appellant as against anything done or not done by the plaintiff, save and except as to the return of the freight bills, and here again the record shows testimony to the effect that the manager stated the telegram in relation to the return of the freight bills might be disregarded.

[5, 6] The controversy in this action appears to have arisen by reason of the fact of there being two competing agencies for the business of prosecuting claims for the recovery of excessive rate charges, and that the appellant is in the position of having retained both agencies for the same work, or practically for the same work. While the original agreement does specify that the action of the plaintiff shall in no manner interfere with claims which the defendant might file, the reasonable interpretation of the agreement is that the defendant did not intend to withdraw from the plaintiff any of the business covered by the contract, and which, by the terms thereof, were placed within the custody of Bailey & Sweat to handle, until a final conclusion had been reached. However, the agreement provides for compensation at a certain rate upon collections being made, and that agreement holds, irrespective of the party making the collection, so far as it pertains to the claims intrusted to Bailey & Sweat. This portion of the agreement appears to be entirely overlooked by the appellant.

[7] The appellant's contention that no audit was ever made, and the citation of authorities as to what constitutes an audit, we think entirely immaterial, as the appellant, a party to the agreement, being in the transportation business, knew practically what work had to be performed, and technical definitions would neither add to nor take away from the meaning attached to the word "audit" by the parties to the instrument, upon which this action is based.

A number of other technical objections are urged by the appellant, which we have considered, but, as they do not go to the merits of this cause, it would serve no useful purpose to set forth reasons why they do not affect the judgment which was rendered in this cause.

Being of the opinion that the material findings of the trial court, upon which the judgment in this action rests, are supported by the testimony, it follows that the judgment must be affirmed, and it is so ordered.

112 Cal. App. 1

ENZ v. JOHNS.

Civ. 4162.

District Court of Appeal, Third District, California.

Feb. 16, 1931.

1. Automobiles 🔑244(11).

In automobile collision case, evidence supported finding driver of automobile approaching intersection from right was negligent (St. 1923, pp. 553, 560, § 113, and § 131 as amended by St. 1925, p. 412, § 15).

2. Automobiles 🔑171(4).

Motorist entering intersection when automobile approaching from right was approximately 100 feet distant had right of way (St. 1923, p. 560, § 131, as amended by St. 1925, p. 412, § 15).

> California Vehicle Act (St. 1923, p. 560) § 131, as amended by St. 1925, p. 412, § 15, provides that when two vehicles approach intersection of public highways at approximately the same time, vehicle approaching from right shall have right of way, provided such vehicle is traveling at lawful speed.

3. Appeal and error 🔑931(1).

In determining whether finding for plaintiff was against evidence, appellate court must view testimony in light most favorable to plaintiff.

4. Automobiles 🔑245(80).

Contributory negligence of motorist proceeding across street intersection in advance of automobile he saw approaching from right approximately 100 feet distant, and which collided with his automobile, *held* fact question for trial court (St. 1923, p. 560, § 131, as amended by St. 1925, p. 412, § 15).

5. Appeal and error 🔑1011(1).

Trial court's finding of fact upon conflicting testimony was conclusive on appeal.

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

Action by Joseph Enz against Mary Esther Johns. From a judgment for plaintiff, defendant appeals.

Affirmed.

J. Hampton Hoge, of San Francisco, and Len. H. Honey, of Stockton (A. Dal Thomson, of San Francisco, of counsel), for appellant.

Martin I. Welsh, of Sacramento, for respondent.

McDANIEL, Justice pro tem.

This is an appeal from a judgment for plaintiff in a personal injury case tried without a jury by the court.

The cause of action arose from an automobile collision which occurred at about 4:30 p. m., June 30, 1929, at the intersection of Twenty-Seventh street and S street, which streets intersect at right angles, Twenty-Seventh street extending north and south and S street east and west, in the city of Sacramento, Cal. Plaintiff and respondent was driving his automobile toward the south on Twenty-Seventh street as he approached the intersection. The defendant and appellant approached the intersection from the west on S street. The machines collided in the intersection at a place on the west side of Twenty-Seventh street, about 7 feet from the west curb line of Twenty-Seventh street and 9 or 10 feet north of the south curb line of S street, and near the southwest corner of the intersection. When the respondent, at the lawful rate of 15 miles per hour, reached the intersection, he looked to the left for traffic, then to the right, and saw appellant approach from his right at a place distant 75 to 100 feet west of the intersection, driving at an estimated speed of 40 to 45 miles per hour. Plaintiff's car, after the impact, swung to the left, stopping near the southeast corner of the intersection. Plaintiff was thrown to the pavement, receiving the personal injuries of which he complains. The appellant's car after the impact swung to the right and came to rest at the curb line of Twenty-Seventh street, south of the intersection.

Respondent saw appellant's car at all times from the moment he first observed it until the moment of collision. He testified that the brakes on his car were in good order; that, however, he did not apply his brakes because he believed defendant would yield the right of way to him; and that defendant had "plenty of time to let me pass her." There is some conflict in the testimony as to the exact manner in which parts of the respective cars contacted. Respondent did not change his speed of 15 miles per hour, nor did appellant slow down at all from her speed of 40 to 45 miles per hour. The right front wheel of respondent's car was "broken and busted,

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the axle bent very bad." (Plaintiff's testimony.)

Defendant's car was damaged on the left side, the left front door being curved in, the glass broken, the left-hand wheel "smashed," and the sun visor broken. There is no evidence of the swerving of either car before the impact; each had continued in an undeviating path of travel until after the impact. The physical marks of the collision upon the automobiles, notwithstanding the conflict in the testimony, seem to indicate that appellant's automobile had reached a point, possibly 3 or 4 feet in advance of the right front car wheel of respondent's car.

On cross-examination plaintiff was asked the following questions:

"Q. Why didn't you put your brakes on? A. Well, I was going right along, because I think she give me right of way.

"Q. You saw her 75 to 100 feet back from the property line going 40 to 45 miles an hour, didn't you? A. Oh, have plently of room to let me pass her."

[1] The evidence upon the trial supports the court's finding as to defendant's negligence. She was violating the provisions of the California Vehicle Act (St. 1923, pp. 553, 560) § 113 (as amended by St. 1927, p. 1436, § 30), and section 131 (as amended by St. 1925, p. 412, § 15), in effect at the time of the accident. The sole question on this appeal is whether or not there is sufficient evidence to support the court's finding that there was no contributory negligence on respondent's part.

The appellant insists that the finding is against the evidence and argues that: "In zeal to establish the negligence of the defendant, the plaintiff has testified to facts which convict him of contributory negligence, as a matter of law. Without slackening his speed for an instant, according to his own story, he drove in a direct line across the intersection, taking no single measure to prevent the accident. Was the plaintiff ordinarily, or in any other wise, prudent, and if so, in what did his prudence consist?"

Appellant cites many cases from other jurisdictions to support her argument, but has cited no California case in point. As to the cited authorities from other states, and we have examined with care every case cited, they need not be discussed nor analyzed in this opinion, though it may be conceded that some are in their facts quite similar to those in the instant case. The Minnesota cases, for instance, spring out of violations of intersection crossing statutes different from the California statutes. The same is true of the Washington case. If it be conceded that any case cited holds that, under the facts of the case here on appeal, no issue of fact, but a sole question of law is presented, it would be opposed to the unbroken line of California cases herein referred to, which are sufficient and must be relied on to determine the simple question presented by this appeal.

[2] Section 131 of the Vehicle Act (as amended by St. 1925, p. 412, § 15) in effect at the time of the accident was as follows, to wit: "When two vehicles approach an intersection of public highways at approximately the same time, the vehicle approaching from the right shall have the right of way, provided such vehicle is traveling at a lawful speed." Under that section and legal inferences flowing from it, the respondent was entitled to the right of way in crossing the intersection. He actually had entered upon it when appellant's car was approximately 100 feet distant. The latest expression of the Appellate Court yet printed in the reports is Couchman v. Snelling, 295 P. 845. We quote in reverse order herein two paragraphs of this opinion, which we believe in point, and under the cited authorities therein are decisive of the question involved in this appeal:

"Where a car has actually entered an intersection before the other approaches it, the driver of the first car has the right to assume that he will be given the right of way and be permitted to pass through the intersection without danger of collision. He has a right to assume that the driver of the other car will obey the law, slow down, and yield the right of way, if slowing down be necessary to prevent a collision. Keyes v. Hawley, 100 Cal. App. 53, 60, 279 P. 674. Nor is a plaintiff required to yield the right of way to one a considerable distance away whose duty it is to slow down in crossing an intersection. Whitelaw v. McGilliard, 179 Cal. 349, 176 P. 679. Whether or not, therefore, plaintiff, after observing the approach of defendant's car, its position, and the rate of speed it was traveling, and keeping the same within his side vision, was justified in proceeding upon his rightful way across the intersection in advance of defendant presents a question upon which reasonable minds might differ, and was therefore one for the jury to determine. Johnson v. Southern Pacific Railroad Co., 154 Cal. 285, 295, 97 P. 520; Kienlen v. Holt (Cal. App.) 288 P. 866; Palmer v. Schultz (Cal. App.) 290 P. 79.

* * *

"The circumstances under which a court can declare that certain acts constitute contributory negligence as a matter of law are rare. Swartz v. Acme Express & Drayage Co., 102 Cal. App. 615, 283 P. 358. It can seldom happen that the question is so clear from doubt that the court can undertake to say as a matter of law that the jury could not fairly and honestly find for the plaintiff. Schierhold v. N. B. & M. R. Co., 40 Cal. 447, 453. The question is usually one of fact and becomes a question of law only when the evidence is of such a character that it will support no other legitimate inference. Zibbell v. Southern Pacific Co., 160 Cal. 237, 116 P. 513. Contributory negligence being an affirmative defense, the burden of proving it is on the defendant. It is necessary, therefore, for him to show that the acts of plaintiff failed to meet some standard of prudence in order to take the issue from the jury as a question of law alone."

[3] The testimony on this appeal viewed in the light most favorable to plaintiff, as it must be, shows no affirmative act of negligence on the part of respondent. He had the right of way, was driving at a lawful speed, had almost succeeded in crossing the intersection when the machines collided, and his only legal sin, if any, was one of omission and not of commission.

[4, 5] The situation presents an interesting point for mathematical analysis in determining the question as to what an ordinarily reasonable and prudent person, in respondent's then situation, would or should have done. A car traveling 45 miles per hour covers 66 feet per second. At 15 miles per hour it covers 22 feet per second. In the 1½ seconds immediately preceding the accident, appellant's car must have been distant from the place of impact and west thereof 99 feet; respondent at the same time, at the rate of his car's speed, was 33 feet north from the same place. Respondent proceeded on his way, notwithstanding appellant's speed, upon the assumption that appellant would yield the right of way. If at the end of the first second after his entrance into the intersection, and he first saw the other car, he had known or then had reason to realize his assumption was erroneous, he then had remaining 11 feet of space to travel in one-half second of time within which to decide whether or not he should proceed or apply his brakes. At the end of that same second appellant having just traveled 66 feet, was still 33 feet distant from the place of collision, and respondent believed that appellant had "plenty of room to let me pass her." Evidently appellant tried to pass in front of respondent's car. If she had slackened speed, she probably could have let him pass or have swerved her car to the left and north and passed behind respondent's car. The latter could not well foresee what she might try to do. If she were to retard her speed merely or to try to pass to the rear of respondent's car, the application of the brakes on his car would have been an unwise move. The danger of collision might thereby be enhanced. He did nothing except to keep traveling. The one-half second or even the whole second and a half is a short interval of time; is so short, that an ordinary, reasonable person in such situation might not do the wise thing, or make the right move to avoid an accident. This computation serves to show that a question of fact as to contributory negligence was presented to the trial court for determination. That court's finding, although upon conflicting testimony, is conclusive on appeal.

The following authorities cited by respondent are all in point in support of this court's conclusion that the judgment of the lower court must be affirmed: Commonwealth Ins. Co. v. Riverside-Portland Cement Co., 69 Cal. App. 165, 230 P. 995, McMullen v. Davenport, 44 Cal. App. 695, 186 P. 796; Collom v. Block, 70 Cal. App. 33, 232 P. 486; Robinson v. Clemons, 46 Cal. App. 661, 190 P. 203; Simonsen v. Christopher, 186 Cal. 788, 200 P. 615; Gilmore v. L. A. Ry. Co. (Cal. Sup.) 290 P. 22; Sites v. Howrey (Cal. App.) 291 P. 597; and Wynne v. Wright (Cal. App.) 286 P. 1057.

The judgment is affirmed.

All concur.

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111 Cal. App. 659

CITY OF MONROVIA v. SOUTHERN COUNTIES GAS CO.

Civ. 7745.

District Court of Appeal, First District, Division 2, California.

Feb. 11, 1931.

Rehearing Denied March 13, 1931. Hearing Denied by Supreme Court April 6, 1931.

Gas 🔑10.

Under gas franchise, grantee's assignee serving customers from general system reaching several communities *held* required to pay city only percentage of receipts in city after eliminating portion of receipts attributable to property outside city (St. 1905, p. 777).

The franchise granted under Broughton Act (St. 1905, p. 777) required the original grantee which operated an artificial gas plant within the city of Monrovia to pay 2 per cent. of the gross annual receipts to the city, but as the grantee's assignee served 57 cities and 5 counties with its general system, receipts collected for the sale of gas within Monrovia arose in part from the franchise within the city and in part from its properties and rights of way outside the city.

Appeal from Superior Court, Los Angeles County; W. D. McConnell, Judge.

Action by the City of Monrovia against the Southern Counties Gas Company. Judgment for plaintiff, and defendant appeals.

Reversed.

Le Roy M. Edwards, of Los Angeles, for appellant.

Thomas J. Reynolds and L. T. Rice, both of Los Angeles, amici curiæ on behalf of appellant.

William Fleet Palmer, of Los Angeles, for respondent.

NOURSE, P. J.

Plaintiff sued for an accounting of the amount due from the defendant under its franchise to use the public streets of the plaintiff city for the distribution of gas. Plaintiff had judgment for $894.44, and the defendant appeals on typewritten transcripts.

Defendant is the successor in interest of a franchise granted in September, 1905, under the terms of the Broughton Act (Stats. 1905, p. 777). The franchise stipulated that the grantee should pay to the city annually "two (2%) per cent of the gross annual receipts * * * arising from the use, operation or possession of such franchise." For some years after the date of the franchise the grantee maintained and operated a gas manufacturing plant within the city limits of Monrovia where artificial gas was manufactured and distributed to consumers. In 1920, upon the discovery of natural gas fields in the southern part of the state, the defendant abandoned its manufacturing plant in the city of Monrovia and since has supplied its consumers with natural gas from a widely scattered general system which reaches fifty-seven municipalities and five counties. In the operation of this business the company's transmission lines occupy public highways to and through the various counties and municipalities, but a considerable portion of its investment is located on private property and private rights of way. In order to determine the proper proportion of its gross proceeds which should be allocated to the various counties and municipalities served by it through this system, the company followed the method laid down for that purpose by the Supreme Court in County of Tulare v. City of Dinuba, 188 Cal. 664, 206 P. 983, 984. In accordance with this method the defendant paid to the various counties and municipalities within its system an amount estimated on the basis of the total mileage in each, eliminating that portion of its earnings attributable to the use of its properties located on private property. This allocation was accepted by all the counties and municipalities within the system except the city of Monrovia, which asserted that it should be paid 2 per cent. of the gross receipts from the sale of gas within its boundaries. The trial court adopted the city's theory and the correctness of its judgment as matter of law is the only question on this appeal.

The question is not one of first impression. The Supreme Court in County of Tulare v. City of Dinuba, supra, took great pains to outline and explain what it deemed to be the fair and equitable interpretation of the uncertain provisions of the Broughton Act—a statute which did not fully take into consideration the changing conditions under which it has been called to operate. The method of allocation of the percentages due the independent public agencies in a case of this kind was definitely determined and declared by the court in that decision as the fair and equitable interpretation of that act. The facts involved in the Tulare Case were the same as those in the case at hand with the single exception that the city of Monrovia had granted a separate franchise before the consolidation of the public service company, whereas, in the Tulare Case, the city of Dinuba was incorporated after the organization of the power company. This point we do not deem to be of any importance because the franchise was expressly made assignable, and no rights are here asserted by the appellant which could not have been, with equal force, asserted by its assignor.

In the Tulare Case the Supreme Court pointed out that the percentages were to be based upon the gross receipts "arising from the 'use, operation, or possession' of the franchise," but said that these receipts arise not alone from the use of the streets for pipe lines, "but likewise from the use, operation, or possession of the power houses and private rights of way." But, said the court:

"It will be noticed that the act in question makes no reference to compensation for the franchise over public highways, from the revenues arising within the county by which the franchise was granted. If that had been the intention, the very obvious way of expressing it would have been to say 'two per centum of the gross annual receipts within the county,' instead of using the expression 'two per centum of the gross annual receipts' arising from 'the use, operation, or possession' of the franchise. The reasonable construction of the language used, is that each county or municipality is entitled to its percentage of the gross earnings arising from the use of its highway, in the proportion that the receipts arising from the use of such highways bear to the receipts attributable to all the rights of way of the entire system.

"We see no reason why this cannot be estimated on a mileage basis."

Respondent endeavors to draw a distinction between the Tulare Case and this in that when the franchise was granted to appellant's predecessors it contemplated an entire plant to be located entirely within the city limits and that such was the situation for some years after the date of the franchise. But the record does not support respondent. The franchise contains nothing more than the usual grant to use the public streets for the purpose of laying gas pipes. There is nothing in the franchise relating to the character of gas to be furnished or to the method or place of production. When the appellant changed from the artificial to natural gas, to the great benefit of the consumers, it, of course, became necessary to install transmission pipes to bring that gas to the city limits. These pipes necessarily passed through other cities and counties from which similar franchises were necessary. The receipts collected for the sale of gas within the city of Monrovia arose in part from appellant's franchise within the city and in part from its properties and rights of way outside the city.

This is a feature which the trial court did not take into consideration in its judgment. It is an essential part of the method of allocation approved by the Supreme Court in the Tulare Case, hence further discussion is unnecessary.

The judgment is reversed.

We concur: STURTEVANT, J.; SPENCE, J.

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111 Cal. App. 683

BOOJA SINGH v. WHITE.

Civ. 4053.

District Court of Appeal, Third District, California.

Feb. 11, 1931.

1. Bills and notes 🔑520.

In suit on note for balance due on settlement of account, evidence did not show note was result of either fraud or misrepresentation.

2. Bills and notes 🔑527(1).

Objection that plaintiff did not testify specifically note sued on was unpaid was without merit, where there was no pretense of payment other than by way of offsets.

3. Appeal and error 🔑994(3).

It was for trial court to determine what testimony of defendant was worthy of belief.

4. Evidence 🔑419(1).

Consideration for written instrument may always be inquired into between parties thereto.

5. Contracts 🔑88.

Presumption that written instrument is supported by valid consideration may be rebutted by testimony showing there was no consideration.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by Booja Singh against H. S. White. From a judgment for plaintiff, defendant appeals.

Affirmed.

Marvin C. Hix, of San Francisco, for appellant.

Ralph H. Lewis, of Sacramento, for respondent.

PLUMMER, J.

The plaintiff had judgment against the defendant for the principal and interest due upon a promissory note executed by the defendant and delivered to the plaintiff, which note is in the following words and figures, to wit:

> $1400.00 September 25/28
>
> "For value received I promise to pay to Bujah Singh Fourteen Hundred 00/100 1400.-00. In ninety days from date at West Island, Calif.
>
> "H. S. White
>
> "This note is to cover labor bill in full for all Hindu help."

From the judgment in favor of the plaintiff, the defendant appeals.

The record shows that an answer was filed by the appellant which, among other things, alleges that the note was secured by fraud and misrepresentation, and that at the time of the execution of the note, items aggregating the sum of $1,344.72 were paid by the defendant for the uses and purposes of the plaintiff, and were not taken into consideration in the settlement of an account which terminated in the execution of the note sued upon. The record shows that H. S. White was the owner of certain lands situate on what is known as West island, in the San Joaquin river; that the plaintiff, during the years 1927 and 1928, the period involved in this action, had been in the employ of the defendant, operating the farm lands referred to. The record further shows that in September, 1928, the plaintiff and the defendant had a settlement of accounts, and at the time of the settlement the accounts showed a balance due in favor of the plaintiff in the sum of $1,410.21, and that at said date, to wit, September 25, 1928, the defendant executed and delivered to the plaintiff the promissory note sued upon in this action.

The allegations of the defendant's answer are to the effect that subsequent to the 1st day of April, 1927, the defendant paid to plaintiff either in cash or in cash paid to third parties, for and on behalf of the defendant, the following items: $617 to Gianelli Company at Stockton; to various persons, cash in the sum of $626.30; for doctors and hospital bills, $63.25; and cash to the plaintiff in the sum of $55; aggregating, as we have stated, the total sum of $1,344.72, and that these various payments were not taken into account at the settlement had between the plaintiff and the defendant on September 25, 1928. At the time of the settlement it appears that various papers, vouchers, checks, and bills were in the possession of the plaintiff and the defendant, and were used by them in making up the statement of account appearing in the transcript. This statement was made out by the defendant, he copying items from the various papers had by the parties covering the transactions between them. This statement of account, made out by the defendant, shows an indebtedness on the part of the defendant to the plaintiff in the sum of $1,410.21. To cover this indebtedness, the $1,400 note was executed. The defendant's testimony as to this statement is as follows: "We figured it all up, of course; subsequently, straightened it out; deducted the amount that we claimed was not coming. It was in my handwriting, at Tara Singh's place of business; that was the last settlement; I cannot tell you the date; I gave him all my deductions; approximately all the time was considered from one date to another without deducting for the times of absences, and the second sheet of exhibit 2 (the account referred to), is the account of Tara Singh's conclusions and myself, as I went over the whole thing."

[1] It is further claimed on the part of the appellant that Booja Singh was absent from the farm at different times, and that no deduction was made for such absences. The testimony, however, when fairly considered, justified the conclusion of the trial court that whenever the plaintiff was absent from the ranch, he had a man working in his place, and that only the services or labor of one person was charged for during such period. This, of course, if believed by the trial court, eliminated all questions of deductions for absences from the farm.

In relation to the various items claimed as deductions by the defendant, aggregating $626.30, we find only the following in the transcript: "There was then offered and admitted in evidence a group of papers, being the itemized accounts of said sum of $626.30, and marked 'Defendant's Exhibit 3.'" These papers do not appear in the transcript. Exhibit 3 is absent, and we have no means of knowing what items are covered thereby. The same is true of Defendant's Exhibit 1, being a number of checks payable to Booja Singh, and the record does not show for what purpose any of these checks were executed; Exhibit 1 not being included in the transcript.

It is further alleged on the part of the defendant that at the time of the execution of the promissory note for $1,400, the plaintiff stated that they would have a further settlement, and that the matter would be straightened out.

[2] Tara Singh, a witness on the part of the plaintiff, testified that he is an interpreter and was acquainted with both the plaintiff and the defendant; that he figured up the accounts, and that he "figured pretty near $1400.00 was due Booja at the time." This witness testified that he did not make any deductions for Booja's absence. There is no showing whatever in the record that the note was the result of either fraud or misrepresentation. The whole case was tried upon the theory as to whether the defendant had any offsets as against the promissory note sued upon. There is no pretense that there was any payment, other than by way of the alleged offsets which we have been considering. This being true, the appellant's objection that the plaintiff did not testify specifically that the note was unpaid, is without merit.

[3] It is further contended on the part of the appellant that there is no contradiction of the defendant's testimony as to the payment of the items which we have been considering. This contention, however, overlooks the direct testimony of the defendant himself, where he says, "I gave him all my deductions." The statement made out by the defendant shows deductions in his favor in the sum of $4,681.29. This amount of credit to which the defendant was entitled may have been made up exclusively of labor items, but there is nothing in the record from which we can conclude that such is the case, nor is there anything in the record which would justify us in concluding that the trial court should not have accepted the statement of the defendant that he had given all of his deductions to the plaintiff at the time of the execution of the promissory note, rather than accept the defendant's statement that he had omitted the items in the amounts which we have mentioned. In fact, it is hardly conceivable that in making up credits to the amount of $4,681.29, the defendant should have overlooked items aggregating $1,344.72. At least the defendant was a witness before the trial court and it was for the trial court to determine what statements of the defendant were worthy of belief, if at all.

[4, 5] Considerable attention has been given by counsel with respect to the circumstances and conditions under which testimony may be given to vary the terms of a written instrument. It would serve no useful purpose to review these cases. The law is well established that the consideration may always be inquired into between the parties to a written instrument, and that the presumption that the instrument is supported by a valid consideration may be rebutted by testimony showing that there was no consideration.

If the testimony in this case, so far as the record sets it forth, supporting the conclusions reached by the trial court, was accepted by the trial court as being the true version, then and in that case all of the material findings of the trial court are sufficiently supported by the testimony. This being true, a further discussion of the alleged errors committed by the trial court would serve no useful purpose.

The judgment is affirmed.

All concur.

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111 Cal. App. 742

NIELSEN v. WITTER.

Civ. 7148.

District Court of Appeal, First District, Division 1, California.

Feb. 16, 1931.

1. Insane persons ⚿74.

One having no mental capacity when executing contracts for attorney's services was not bound by them.

2. Trial ⚿403.

Where findings were filed nunc pro tunc before appeal was taken, judgment was not void on ground no findings were filed.

Appeal from Superior Court, Alameda County; J. D. Murphey, Judge.

Action by Mads Nielsen, an incompetent person, by W. E. Most, guardian of the estate of said incompetent, against George F. Witter. From a judgment for plaintiff, defendant appeals.

Affirmed.

See, also, In the Matter of Nielsen's Guardianship, 296 P. 122.

George F. Witter, of Oakland, in pro. per.

W. E. Most, for respondent.

PER CURIAM.

Action on a common count for money had and received.

Plaintiff, an incompetent, through his guardian in substance alleged that on or about July 19, 1927, defendant received from plaintiff the sum of $500 to and for the use of plaintiff; that on or about the 24th day of August of the same year he received the further sum of $1,000 for plaintiff's use. The complaint further alleged that on the 19th day of July, 1927, and long prior thereto, and before defendant had relations of any kind with plaintiff, and ever since said date, plaintiff was an incompetent and incapable of handling his business affairs or managing his property; that on the 8th day of December his guardian rescinded any and all contracts or agreements had between defendant and plaintiff and demanded payment from defendant of said sums. The complaint prayed for judgment in the sum of $1,500. To this complaint defendant demurred upon various grounds. The demurrer was overruled, and defendant answering alleged that plaintiff had paid to defendant as retaining fees the sum of $500 and the further sum of $1,000, and prayed judgment. For a further answer and by way of counterclaim defendant set up an employment by plaintiff of defendant as attorney and that the reasonable value of said services was the sum of $2,000. The counterclaim was subsequently dismissed, leaving the original answer standing.

The case went to trial, and it appeared in evidence that plaintiff had called upon defendant and sought his advice upon certain legal questions. Defendant informed plaintiff that he would attend to the matters and his fee would be $500. Defendant was subsequently informed by plaintiff that he had other affairs that needed the attention of an attorney. He suggested that defendant bring a suit to quiet title to his home. This defendant agreed to do, but told plaintiff that it would require an additional payment of $1,000. Both amounts were paid by plaintiff to defendant. After defendant had instituted certain proceedings on behalf of plaintiff, he concluded that plaintiff was mentally incompetent, and he caused proceedings to be instituted which resulted in plaintiff being declared an incompetent. Defendant offered evidence as to the various services he had rendered plaintiff and also as to plaintiff's competency to transact business at the time he employed defendant. The evidence upon this subject was conflicting. The trial court found, upon the issue of incompetency, that, at the time plaintiff employed defendant to transact business for him, he was mentally incompetent to deal with defendant with full understanding of his rights, and did not understand the effect of his agreement with defendant. It further found that plaintiff's guardian had served written notice of rescission of the contracts upon defendant. As conclusions of law, the court found that plaintiff had a right to rescind, and defendant was indebted to plaintiff for money had and received in the sum of $1,500, and judgment was rendered accordingly.

[1, 2] Defendant urges several grounds for a reversal. He first claims that plaintiff was not entitled to rescind until he had restored or offered to restore to defendant whatever of value he had received. It is manifest that plaintiff could not restore to defendant the services defendant had rendered to him, nor was plaintiff by reason of his adjudicated incompetency in a position to set any value thereon. The court having found that plaintiff had no mental capacity when he executed the contracts, he was not bound by them. Upon the trial, plaintiff, through his guardian, offered to do equity and include in his account such amount as would compensate defendant for such services as might be deemed beneficial to defendant. This matter is disposed of in Guardianship of Nielsen (Cal. App.) 296 P. 122, this day decided. Defendant next contends that the judgment is void for the reason that no findings were ever prepared, signed, or filed. Findings were filed nunc pro tunc before appeal was taken. There is no merit in this objection. Other points do not require consideration.

The judgment is affirmed.

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111 Cal. App. 744

In the Matter of the GUARDIANSHIP of the Estate of Mads NIELSEN, an Incompetent Person.

Mads NIELSEN, by W. E. Most, Guardian of said Estate, Appellant, v. George F. WITTER, Attorney, etc., Respondent.

Civ. 7512.

District Court of Appeal, First District, Division 1, California.

Feb. 16, 1931.

Appeal by guardian from an order of the Superior Court of Alameda County, Lincoln S. Church, Judge, allowing attorney's fees for services rendered an incompetent. Affirmed.

W. E. Most, for appellant.

George F. Witter, of Oakland, in pro. per., for respondent.

PER CURIAM.

Application for allowance of attorney's fees due for services rendered an incompetent.

On May 28, 1929, George F. Witter, Esq., served upon the guardian of Mads Nielsen, an incompetent, a copy of a petition for allowance of fees, wherein it was prayed that the court make its order fixing an amount as a reasonable compensation for services rendered by said Witter to said incompetent before his incompetency was declared. The petition came on for hearing, and, the application being submitted, the court ordered that the sum of $1,250 be allowed Witter, as attorney's fees in full for services rendered the incompetent and also the guardian. Witter had heretofore received from the incompetent the sum of $1,500 for which sum a judgment has been rendered against him. Nielsen v. Witter (Cal. App.) 296 P. 121, this day decided. The court being advised in the premises, incorporated in the order a recital that Witter was to pay to the guardian the sum of $250, said sum being the difference between the amount he had received from the incompetent and the proper amount awarded him. This is an appeal from such order. In support thereof it is claimed that there is no warrant or authority for an attorney to make such a motion, the matter being one that can be considered only in the settlement of the account of the incompetent, and that a court has no jurisdiction to award or make such an allowance, for which reason it should be annulled. However this may be, the record presents no such question. The order in express terms recites that the petition of Witter for attorney's fees is denied and that the allowance is made on the petition and application of the guardian of the incompetent. Appellant raises the further claim that the evidence is insufficient to justify the order of the court that the reasonable value of Witter's services was the amount fixed. There is nothing in the record to show that the court abused its discretion in fixing said sum as the reasonable amount to which Witter was entitled.

The order is affirmed.

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111 Cal. App. 767

In the Matter of the GUARDIANSHIP of the Estate of Mads NIELSEN, an Incompetent Person.

Geo. F. WITTER, Attorney, etc., Appellant, v. Mads NIELSEN, by W. E. Most, Guardian of Said Estate, Respondent.

Civ. 7361.

District Court of Appeal, First District, Division 1, California.

Feb. 16, 1931.

Appeal from an order of the Superior Court of Alameda County, Lincoln S. Church, Judge, fixing attorney's fees in the estate of an incompetent. Affirmed.

George F. Witter, of Oakland, in pro. per.

W. E. Most, for respondent.

PER CURIAM.

Appeal from an order fixing attorney's fees in the estate of an incompetent.

The order is affirmed on authority of Nielsen v. Witter (Cal. App.) 296 P. 121, this day decided.

112 Cal. App. 26

SERVAIS et al. v. KLEIN et al.

Civ. 6464.

District Court of Appeal, Second District,
Division 2, California.
Feb. 17, 1931.

1. Landlord and tenant 🔑184(1).

Lease provision that advance payment was security for performance and applicable to rent, *held* inapplicable, after breach, in construing forfeiture provision.

> Language of first provision, to effect that money and notes passed as security for performance to be applied to last three months' rent "in event lessees shall faithfully perform all of said terms, covenants and conditions," must be considered as if it read that they so passed if and in event all terms were performed, and could not be applied to provision that, in event lessees should fail to perform terms, payment should be forfeited, and forfeiture should not preclude lessors from recovering, in addition thereto, rent due and damages.

2. Landlord and tenant 🔑184(1).

In view of forfeiture clause, *held*, advance payment could not, after breach, be considered as security and applied to payment of rent.

3. Damages 🔑78(6).

Lease provision that advance payment be forfeited in case of breach and that forfeiture should not preclude lessors from recovering rents and damages *held* void (Civ. Code, §§ 1670, 1671).

4. Estoppel 🔑3(3).

Having treated lease as terminated and, in unlawful detainer action, claimed advance payment under forfeiture clause, lessors could not retain payment under clause for application to last three months' rent.

> Lessors filed action for unlawful detainer and, answering lessees' counterclaim for return of advance payment, claimed that sum had been absolutely forfeited to them under forfeiture clause in lease. Hence they were not entitled to retain such sum under clause in lease providing that in case lessees should faithfully perform terms, such payment should be applied by lessors as payment of rent for last three months of term of lease.

5. Landlord and tenant 🔑291(14).

In unlawful detainer action, $800 attorney's fee, fixed by court under lease, *held* excessive in view of reversal of judgment for retention of advance payment.

6. Pleading 🔑411, 428(2).

Point counterclaim was improper pleading in action *held* not waived by answer, but preserved by objection to admissibility of evidence thereunder.

7. Landlord and tenant 🔑290(5).

Generally, neither cross-complaint nor counterclaim may be interposed in unlawful detainer action.

8. Landlord and tenant 🔑290(5).

Where, in action of unlawful detainer, there was no issue regarding possession of premises, counterclaim for return of advance payment *held* proper.

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

Action by Charles T. Servais and another against Benjamin Klein, Joseph Weiss, Thomas B. Key, and Nellie Key. Thomas B. Key having died, John S. Fraser, administrator, was substituted in his place. From a judgment in favor af plaintiffs against the administrator and Nellie Key, such defendants appeal.

Reversed, with directions.

Halverson & Halverson, of Los Angeles, for appellants.

Thomas A. Berkebile, of Los Angeles, for respondents.

WORKS, P. J.

This is an action for unlawful detainer, arising upon the terms of a written lease. The instrument was entered into between plaintiffs as lessors and the defendants Klein and Weiss as lessees, but the latter assigned their interest under it to Thomas B. Key, formerly a defendant in the action, and the present defendant Nellie Key. Pending proceedings in the trial court, Thomas B. Key died and defendant Fraser as administrator of his estate was substituted in his place. Judgment went against Fraser as administrator and Nellie Key. They appeal.

The principal point in the case is that which requires the construction of a certain paragraph of the lease, which reads:

"At the time of the execution of these presents the Lessees have paid to the Lessors in addition to the sum of Thirty-five Hundred ($3500.00) Dollars as the first month's rent of the term of the lease the sum of Eight Thousand ($8000.00) Dollars, and have executed to the Lessors two (2) promissory notes each for the sum of Two Thousand ($2000.00) Dollars and due one (1) year from date, as security for the faithful performance by the Lessees of all of the terms, covenants and conditions of this lease, and in the event said Lessees shall faithfully perform all of said terms, covenants and conditions, said total sum of Twelve Thousand ($12000.00) Dollars shall be applied by the Lessors as payment of rent for the last three (3) months of the terms of this lease. In the event, however, said Lessees shall fail to perform all of the terms, covenants or conditions of this lease they shall forfeit all right of every kind and nature in and to said sum of Twelve Thousand ($12000.00) Dollars, and such forfeiture shall not preclude the Lessors from recovering in addition thereto all rents due or damages suffered by reason of a violation by the Lessees of any of the terms, covenants or conditions of this lease."

[1, 2] The question concerning the paragraph is presented under these circumstances: Appellants contend that a certain portion of it is void as providing for a forfeiture. The trial judge adopted the contrary view and made findings and rendered judgment accordingly.

Before taking up the authorities upon which the parties respectively rely for a solution of the question presented, it becomes necessary to make some analysis of the paragraph of the lease from which the controversy between them springs. It is provided therein: First, that the $8,000 and the two notes were deposited with the lessors "as security for the faithful performance by the lessees of all the terms, covenants and conditions of this lease, and in the event the lessees shall faithfully perform all of said terms, covenants and conditions, said total sum of $12,000 shall be applied by the lessors as payment of rent for the last three months of this lease"; and, second, "In the event, however, they shall fail to perform all the terms, covenants and conditions of this lease they shall forfeit all right of every kind and nature in and to said $12,000 and such forfeiture shall not preclude the lessors from recovering in addition thereto all rents due or damages suffered by reason of a violation of the terms, covenants and conditions of this lease." If these two provisions, thus segregated, be set each against the other, to put it differently, if each be construed in connection with the other, it must appear that the first has passed out of existence as an operative factor in the lease, because of the default in payment of rent from which the litigation has ripened, while because of that default the second has sprung up as the sole provision from which the litigation, so far as the present point is concerned, must be determined. The language of the first provision to the effect that the money and notes passed as security for the performance of all the terms, etc., of the instrument must be construed as if it read that they so passed if and in the event all the terms were performed. This for several reasons. It will be observed that the language as to security is followed by a provision that the $12,000 is to be applied to the payment of rent for the last three months of the term of the lease, but that language can be operative only "in the event the lessees shall faithfully perform all of said terms," etc. Specifically, the provision means, then, that the $12,000 is security and is to be applied on the last three months' rent only in the event that the lessees shall voluntarily pay all rent except that for the last three months. In other words, if the lease terminated before the expiration of the full term provided in it, because of breach of condition, there is nothing to which the security can be applied, and it has so terminated, upon the election of the lessor, because of the nonpayment of rent during the progress of the full term and before the last three months has been reached. Here it should be observed that the rent reserved by the lease was $4,000 per month. The last three months' rent, if the tenancy went the full term, would therefore exactly consume the $12,000.

The view we have above expressed as to the wiping out of the first segregated clause is irrefutably confirmed by a view of the second clause. The latter begins, "In the event, however," thus setting that clause in direct opposition to the first. The "event" referred to by this expressive language is that the lessees "shall fail to perform all the terms," etc., one of which, of course, was the payment of rent. In that event, not only does the second clause provide that the lessees shall forfeit the $12,000, but that "such forfeiture shall not preclude the lessors from recovering in addition thereto" all rents due or damages caused by reason of a violation of the terms, etc., of the lease. It is plain that under such language the $12,000 cannot now be considered as security and that it cannot now be applied to the payment of any portion of the rent if the clause be operative under the law. The clause providing for a forfeiture is therefore, we repeat, the only one of the segregated clauses which requires our attention.

[3, 4] In considering the paragraph of the lease which is now before us, appellants rely upon Schnittger v. Rose, 139 Cal. 656, 73 P. 449; Baker v. Eilers Music Co., 26 Cal. App. 371, 146 P. 1056; Rez v. Summers, 34 Cal. App. 527, 168 P. 156; Green v. Frahm, 176 Cal. 259, 168 P. 114; Curtis v. Arnold, 43 Cal. App. 97, 184 P. 510; Parish v. Studebaker, 50 Cal. App. 719, 195 P. 721; Knight v. Marks, 183 Cal. 354, 191 P. 531; and Wetzler v. Patterson, 73 Cal. App. 527, 238 P. 1077.

In presenting their views respondents depend upon Curtis v. Arnold, supra; Wetzler v. Patterson, supra; McArthur v. Kluck, 75 Cal. App. 785, 243 P. 453; Pigg v. Kelley, 92

Cal. App. 329, 268 P. 463; and Gordon v. Harris, 94 Cal. App. 682, 271 P. 779.

These cases have all been considered by us, but with very little profit. In none of them was there considered such a lease as the one before us now, as it is viewed in the analysis above set forth. There is general language in several of the cases which seems upon a mere reading to apply here, but such language, of course, must be measured by the terms of the instrument under consideration by the court in each particular case. The only authority which has been of material aid to us is Green v. Frahm, 176 Cal. 259, 168 P. 114, 115. In that case Frahm was the lessor and one Cohn was the lessee. The lease provided: "Cohn hereby deposits with Frahm the sum of $3,000, receipt whereof is hereby acknowledged, said sum of $3,000 to be retained by Frahm as a guarantee that Cohn will pay the rent as herein provided, and in the manner herein specified, and will keep and perform each and every covenant herein contained to be performed by Cohn, and in the event of the failure of Cohn to pay the rent or to keep or perform any of the covenants herein contained to be performed by Cohn, then and in that event the said sum of $3,000 shall become forfeited unto Frahm." Concerning this provision the Supreme Court said, the italics being those of the court: "The first paragraph of the above-quoted provisions of the lease naturally divides itself into two parts: One, a provision that the $3,000 deposit with Frahm was to be a guarantee for the performance by Cohn of the covenants of the lease, including the payment of rents; the other, that in the event of the failure of Cohn to perform any of said covenants, the said money should become forfeited to Frahm. The provision for a forfeiture upon the failure of Cohn to pay the rent was either a penalty, or a provision that the $3,000 should be liquidated damages for the breach of the covenants. In either aspect, the provision was void. Whether as liquidated damages, or as a penalty, it comes within the terms of section 1670 of the Civil Code, that is, it is an attempt to fix by contract 'the amount of damage to be paid, *or other compensation to be made,* for a breach of an obligation,' in anticipation thereof, and by that section it is declared to be void, unless the case is of such a nature that 'it would be impracticable or extremely difficult to fix the actual damage,' as provided in section 1671 of the Civil Code. Jack v. Sinsheimer, 125 Cal. 563, 58 P. 130. Calling it a penalty instead of liquidated damages does not change its nature. The case cited also declares that the fixing of damages for breach of an obligation to pay rent is not impracticable or extremely difficult. There was no evidence in the case showing any peculiar circumstance which would make such damages more difficult to fix in this case than in the ordinary case. Such difficulty is not to be presumed. Long Beach v. Dodge, 135 Cal. 404, 67 P. 499. This part of the clause must therefore be treated as a void provision and disregarded entirely. The other part of the clause, providing for the deposit of $3,000 as a guarantee for the payment of rent, was for a legal purpose, and was in all respects valid and enforceable. In virtue of that clause, Frahm had the legal right, in case of the failure of Cohn to pay rent, to retain the $3,000 and apply it on the rent until the same was exhausted. He did not choose to do this, but on the contrary, he immediately began proceedings for the restitution of the premises, and the recovery of the rent due, and succeeded in obtaining judgment for both, and also for the cancellation of the lease. He is, of course, bound by his own judgment, and therefore the lease must be considered as having been terminated on March 1, 1912. The complaint alleged that Frahm refused to return any portion of the $3,000 to Cohn, or to apply any portion thereof to the rent due. The answer admits this to be true, and alleges that by the terms of the contract it was to be retained by Frahm as a guarantee for the payment of the rent, as it came due. Frahm did not ask that he be allowed to retain $500 of the money in satisfaction of his judgment for rent. He defended on the ground that the whole sum had become absolutely forfeited to his use and was his own property, by reason of the failure of Cohn to pay the rent, and notwithstanding the early termination of the lease at his own request. Under these circumstances, the conduct of Frahm must be deemed to be a repudiation of the security and a waiver of the right to retain the $3,000 as security for the payment of rent subsequently accruing, and of his right to apply any portion thereof to the rent due. The fund deposited is therefore to be considered as money held by Frahm, as bailee, for the use of Cohn, and due demand having been made for its return, the plaintiff was entitled to recover it."

We think the provision passed upon by the Supreme Court in that case is enough like the one before us to render the case controlling here. Indeed, the provision we now consider is more clear, as looking toward invalidity, than the one considered by the Supreme Court. Respondent points to the fact that the lease dealt with in Green v. Frahm, contained a provision to the effect that if Cohn paid all the rent the $3,000 was to be returned to him, but that provision, as it will be noted, cut no figure in the decision of the point before the court.

The Supreme Court said in its opinion that "Frahm did not ask that he be allowed to retain $500 of the money in satisfaction of his judgment for rent. He defended on the ground," the suit being one to recover from him the $3,000, "that the whole sum had become absolutely forfeited to his use and was his own property, by reason of the failure of Cohn to pay the rent, and notwithstanding the early termination of the lease at his own request." We do not pause to consider whether respondents here could have asked that the $12,000 be applied to the payment of their judgment for rent. It is enough to say that they did not make the attempt. They demeaned themselves exactly as Frahm did in the action brought against him. The defendants here filed a counterclaim asking for the return of the $12,000 and respondents interposed an answer under which they claimed, as they now claim, that the sum had been absolutely forfeited to them. On the whole, we are convinced that respondents are not entitled to retain the $12,000.

[5] Under a clause of the lease providing for attorneys' fees, the trial court allowed respondents the sum of $800 in that behalf. Appellants contend that the allowance was excessive. In view of the disposition we have made of the question as to respondents' right to retain the alleged forfeit of $12,000, we think too much was allowed as attorneys' fees. No evidence was introduced upon the issue and the trial judge was left to fix the fee upon his knowledge of the nature and progress of the litigation. The question as to the disposition of the $12,000 was evidently the most important point litigated in the case, and the decision of the trial judge that respondents should retain the amount must have influenced greatly the fixing of the fee. It is to be noted upon this point, also, that there was evidence that it was unnecessary to maintain an action to recover possession of the demised premises, and respondents direct our attention to no evidence to the contrary. We find it impossible to fix the fee ourselves. We can have from the record no complete knowledge of the facts in the trial judge's mind which should govern in the determination of the amount to be allowed. Upon a retrial of the cause therefore, the trial court will fix a fee, in lieu of the former allowance of $800, which shall be proper under such evidence as may be submitted to it upon the issue, subject, however, to what is said above in this paragraph.

[6-8] We have already observed that defendants interposed a counterclaim asking for a return of the $12,000 in litigation between the parties and that respondents filed an answer thereto. At the trial the court refused to hear evidence in support of the counterclaim on the ground that the pleading was not proper in the action, and also found, at the conclusion of the trial, that defendants were entitled to take nothing under the counterclaim. Appellants contend that in these rulings the court erred. It is asserted that the counterclaim was proper but that, if it was not, respondents by answering waived all objection to it.

Taking these points in their inverse order, we think respondents, by answering the counterclaim, did not waive the point that the pleading was not a proper one in the action, but preserved it by objecting to the admissibility of evidence under it. Placerville Gold Min. Co. v. Beal, 168 Cal. 682, 144 P. 748. This conclusion makes it necessary to determine whether the counterclaim was proper to the litigation. Certainly, it is the general rule that neither a cross-complaint nor a counterclaim may be interposed in the action of unlawful detainer (Warburton v. Doble, 38 Cal. 619; Rydell v. Beverly Hills P. & P. Co., 88 Cal. App. 216, 262 P. 818), for the reason that "in an action in unlawful detainer for the restitution of premises withheld by tenants in violation of the covenants of their lease they cannot frustrate the extraordinary remedy provided by the statute through the means of a cross-complaint or counterclaim." Smith v. Whyers, 64 Cal. App. 193, 221 P. 387, 388. The language just quoted is immediately followed, in the opinion from which it is taken, by this expression of doubt: "What the rule would be if the tenant should relinquish possession and join issue solely on the rent money need not be determined, because the appellant here was not satisfied to make that issue, but insisted upon retaining possession throughout the litigation."

This expression, so far as we may discover, has never been noticed in any later case, but because of the showing made by the record in the present instance it becomes necessary to give it some attention now. We have already observed that there was undisputed evidence at the trial tending to prove that it was not necessary for respondents to institute an action for the recovery of possession of the property demised by the lease. It now becomes advisable to state what that evidence was. After service upon him of three days' notice to quit possession of the premises and before service of summons in the action, Dr. Key had a conversation with respondent Charles T. Servais. The testimony of the doctor shows the nature of it:

"Q. And what did you tell him? A. That I could not raise the money for the rent and he could take possession. * * * He said 'Well, I have got to have the rent or possession.' * * * I says 'You know your rights, Mr. Servais. It is optional with you as to what steps you take.'

"Q. But you told him that he would have to take possession? A. That he could take possession." A little later Dr. Key testified further:

"Q. Now, Doctor, after the suit was brought did you see Mr. Servais, or at the time the suit was brought did you see Mr. Servais? A. Yes, sir.

"Q. And what did he say to you or you say to him with reference to possession of the property? * * * A. I said that he could have possession.

"Q. And what did he say? A. He wished to protect his interests."

At the commencement of the litigation a receiver was appointed to take possession of the demised premises and possession was surrendered to him upon demand. Soon after the appointment the counsel for appellants wrote the counsel for respondents a letter which was, in part, as follows: "Inasmuch as you are asking for a forfeiture of the lease and we by our answer consent thereto, there is absolutely no need of a receiver in the case, and we suggest that the order appointing the receiver be forthwith set aside in order to avoid any further cost or expense. Your stenographer said that you would be out all day, and in order that the matter may not be overlooked we call your attention to it by letter. We will appear in court at any time and join with you in a request to set aside that order, if our joinder is necessary. Please care for the matter at once. * * *" The verified answer of defendants to the complaint contains the following matter: "Admit all the allegations of [a certain paragraph] of said complaint, except these defendants deny that they neglected or refused for the space of three days or upward after demand was made, or that they still neglect or refuse to pay said rent or to surrender possession of said premises, furniture, furnishings or equipment; and in this connection these defendants alleged that on the 16th day of June, 1925, they were unable to pay said rent and that after the demand aforesaid was served upon these defendants the plaintiffs and these defendants entered into negotiations for the purchase or exchange of the interest of plaintiffs in and to the property herein mentioned, and that while said negotiations were still pending the plaintiffs brought this action and procured the appointment of a receiver herein, without notice, and that upon the demand of said plaintiffs and said receiver, these defendants immediately surrendered possession of said premises and property to the plaintiffs and said receiver." It is also alleged in the answer "that upon demand after the commencement of said action they surrendered said property to said plaintiffs and they now confirm said surrender and hereby surrender and confirm said property and said lease and the term thereof, to said plaintiffs. * * *" The counterclaim interposed by defendants contains matter similar to that above quoted from the answer.

It will be observed from all these items of evidence and matters of pleading that there was never an issue between the parties upon the question of the possession of the demised premises. Both as a matter of procedure and as a matter of substance the case was one in which was actually litigated only a question of rent, a question as to the disposition of the $12,000 and a question as to counsel fees. Defendants, then, had placed themselves in legal effect in the position of the tenant in the quotation last above taken from the opinion in Smith v. Whyers. They, so far and as completely as lay in their power, had relinquished possession of the property and had joined issue only upon questions which were entirely apart from the question of possession. The filing of their counterclaim could in no way "frustrate the extraordinary remedy provided by the statute" in detainer cases. The rule that a cross-complaint or counterclaim may not be interposed in such cases is an exception to the general rule which allows such pleadings in other cases, and it should not be extended beyond the reason which lies behind it. That is, the exception should not be invoked to nullify the general rule in cases where there is no basic reason for the existence of the exception. Further, the exception, wherever it is made operative, tends to the necessity for a multiplicity of suits, for where the tenant may not urge any claim by way of cross-complaint or counterclaim he is compelled to enforce his rights by the prosecution of an independent action. Such a situation is intolerable except in those cases in which it is necessary, upon reason, to enforce the rule against the filing of pleadings by defendants asking affirmative relief. No such necessity existed in the present case. We think the counterclaim was therefore proper.

The judgment is reversed. The trial court is directed to render judgment in favor of appellants for $12,000, less the amount declared by the judgment appealed from to be due plaintiffs for rent and any amount hereafter found to be due as counsel fees, a new trial being ordered on the issue of counsel fees alone.

We concur: CRAIG, J.; IRA F. THOMPSON, J.

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111 Cal. App. 667

SMITH v. GOLDEN STATE HOSPITAL et al.

Civ. 6519.

District Court of Appeal, Second District, Division 2, California.

Feb. 11, 1931.

Rehearing Denied March 13, 1931. Hearing Denied by Supreme Court April 10, 1931.

Master and servant ⚿393½.

Allowance of additional compensation in consequence of permanent injuries did not bar action against hospital and physician for malpractice (St. 1917, p. 831, as amended; Const. art. 20, § 21).

Appeal from Superior Court, Los Angeles County; B. Rey Schauer, Judge.

Action by Lawrence W. Smith against the Golden State Hospital and others. Judgment sustaining a demurrer to the complaint, and plaintiff appeals.

Reversed.

⚿For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

V. P. Lucas and H. G. Bodkin, both of Los Angeles, for appellant.

Kidd, Schell & Delamer, George L. Greer, and Jennings & Belcher, all of Los Angeles, for respondents.

CRAIG, J.

Having received personal injuries resulting in disability during the course of his employment, appellant instituted proper proceedings and was allowed compensation and medical treatment under the provisions of the Workmen's Compensation, Insurance and Safety Act (St. 1917, p. 831 as amended). Thereafter he filed an action against his employers and the hospital and physicians to whom he had been referred for medical and surgical treatment by the employers, praying damages for alleged permanent injuries subsequently incurred as a result of malpractice. Pending trial of the civil action, appellant was allowed additional compensation in consequence of the permanent injuries, upon further hearing before the industrial accident commission. When said action was called for trial, demurrers to the complaint and objections to the introduction of evidence were interposed, upon the ground that a cause of action was not stated. The defendants' objections were sustained, and the demurrers were sustained without leave to amend the complaint. The only parties defendant upon this appeal by the plaintiff are the hospital and the physicians, and the sole question presented is as to the right of the employee to maintain an action against them for malpractice after allowance of compensatory relief from the employers.

This question has not to our knowledge been determined in California, and the cases in other jurisdictions wherein it has been given especial consideration are conspicuously few. Those from which the parties to the instant appeal seek to deduce their respective theories of the rule are admittedly not precisely in point. Nor are we convinced that a failure of either party to reconcile rulings in such instances with the pending cause is due wholly or even approximately, as is argued, to differences in the various legislative provisions. A true comprehension of the purposes and intentions of such legislation precludes a judicial expansion of its terms to embrace more than allowances properly chargeable to the business, for defraying expenses necessitated only by injuries arising in the course of and incident to the employment, and from the relationship of employer and employee. A brief review of the cited cases readily reveals their distinction from existing conditions and principles of law presented by the controversy before us. Fields v. Mankato Electric Traction Co., 116 Minn. 218, 133 N. W. 577, and Goss v. Goss, 102 Minn. 346, 113 N. W. 690, quoted therein, were actions for damages alleged to have proximately resulted from negligent conduct of the defendants and subsequent inattention of the latters' medical agents. In each case the rule obtaining in Minnesota was stated as follows: "Where one person is injured by the wrong or negligence of another, and he himself is not negligent in the selection of a medical attendant, the wrongdoer is liable for all the proximate results of his own act, although the consequences of the injury would have been less serious than they proved to be if the attendant had exercised proper professional skill and care." In neither instance was a compensation act under consideration, nor was there room for discussion of the liability of a physician in the event of previous limited compensatory relief under the provisions of such an act. Three decisions from Kansas and Wisconsin are urged by respondents as analogous. Hooyman v. Reeve, 168 Wis. 420, 170 N. W. 282; Retelle v. Sullivan, 191 Wis. 576, 211 N. W. 756, 50 A. L. R. 1106; Bidnick v. Armour & Co., 113 Kan. 277, 214 P. 808. In the Wisconsin cases the plaintiffs released their employers and the physicians from all claims, for a consideration, and the court remarked that "to permit plaintiffs to recover in these actions would enable them to recover damages twice for the same injuries." Retelle v. Sullivan, supra. In Bidnick v. Armour & Co., supra, it was expressly observed that no element of recovery could be attributed to improper treatment or malpractice. In Lincoln Park C. & B. Co. v. Ind. Comm., 317 Ill. 302, 148 N. E. 79, 80, and kindred cases cited, additional remuneration in the nature of damages as for a tort, independent of the compensatory liability of the employer, as such, was not in issue. It there appeared that the applicant suffered burns from an X-ray examination after allowance and acceptance of an award, for which he was entitled to additional compensation, although the burns "did not aggravate the original injury or cause a recurrence or increase of the disability directly caused by that injury." Respondents rely with confidence on the following language of the Supreme Court of Illinois, which we think in view of what remains for later consideration confirms the result at which we arrive in the instant case. It was said that: "if there had been no injury there would have been no examination, and if there had been no examination there would have been no burn. The burn resulted in the examination which the law authorized defendant in error to require to be made to ascertain whether plaintiff in error was entitled to further compensation for the injury of February, 1921. In undergoing the examination plaintiff in error received the injury *for which he asks compensation*." (Italics supplied.) But that decision expressly recognized the conceded fact "that the employer is not liable, under the Workmen's Compensation Act, for injury resulting from malpractice of a physician.

They admit that is a different question from the one here involved, but say there is some analogy between the two questions." It would seem unnecessary to do more here than say of numerous other authorities cited that while kindred questions presented therein prompted expressions capable of carrying interpretation, none of them held that an apportionment of wages or an allowance based upon a wage scale as compensation as maintenance and in payment of proper professional services, would create a bar to an independent action found upon a sufficient showing of malpractice. And as heretofore stated, we do not so construe the intent of the statute in this state. By section 21, article 20, of the Constitution it is provided, in part: "The legislature is hereby expressly vested with plenary power, unlimited by any provision of this Constitution, to create, and enforce a complete system of workmen's compensation, by appropriate legislation, and in that behalf to create and enforce a liability on the part of any or all persons to compensate any or all of their workmen for injury or disability, and their dependents for death incurred or sustained by the said workmen *in the course of their employment* irrespective of the fault of any party." (Our italics.)

Applying this provision in Pacific Coast Casualty Co. v. Pillsbury, 171 Cal. 319, 153 P. 24, 26, our Supreme Court said:

"* * * It follows that this section measures and limits the legislative power in that respect. * * * It is these injuries only the redress of which may be committed by the Legislature to a state Industrial Accident Board. Hence it follows necessarily that the Legislature cannot give such board power to settle disputes and allow compensation from the employer to a person who has been or is an employee, for a personal injury which was not incurred by him 'in the course of' his employment, or which happened after the employment had ceased, and was not the natural and proximate result of the employment, or of some injury which did occur in the course of his employment. It could not give such board power to allow compensation to McCay for the additional disability or expenses arising from the slipping of the broken bone, unless such slipping was the natural or proximate result of the original injury. * * *

"This would be true as well where the subsequent injury is occasioned by the negligence of the injured person, or of some third person, without accident, as where it is accidental, if the subsequent injury occurs after the employment has ceased, and is neither the natural nor the proximate result of the injury received in the course of the employment."

Without conceivable exception, it must occur that by the construction universally placed upon humane workmen's compensation legislation, employees are so restricted with respect to relief for proximate injuries that their right to other recourse in the event of subsequent injury by independent third parties over whose discretion and actions neither employer nor employee has control, should be and is unfettered. "The lawmaking power has taken from him all of his common-law rights and all of his previous statutory rights, and has given him new rights. He does not, and cannot, have a hand in writing the insurance. * * * Before the enactment of these statutes the injured employee could sue for any sum designated in his complaint. Now he can apply for the statutory allowance which is secured by insurance." Zurich Gen. Acc. & L. Ins. Co. v. Stadelman, 276 P. 407, 409, superseded by 208 Cal. 151, 280 P. 687. That independent professions by the fact of business contact with the employer should be absolved of responsibility for mistake, avoidable or unjustified neglect resulting in secondary affliction, seems obnoxious to the purpose and spirit of such a statute. To so hold might induce industry to encourage quackery, and place a premium upon negligence, inefficiency, and wanton disregard of the professional obligations of medical departments of industry, toward the artisan. Such is the view entertained by courts of last resort in other jurisdictions where the subject has required specific attention. In Ruth v. Witherspoon-Englar Co., 98 Kan. 179, 157 P. 403, L. R. A. 1916E, 1201, an allowance under the Kansas form of procedure of compensation and damages emanating from improper medical treatment was reversed for the reasons herein stated, with the following comments: "* * * If it should be proved here, for instance, that the whole effects of the plaintiff's injury would under proper treatment have disappeared within a year, that would obviously be the limit of the period for which he could recover compensation in this action. His judgment here could not be increased by the fact that through the incompetent or negligent handling of the case by physicians a disability which would otherwise have been merely temporary was rendered permanent. Della Rocca v. Stanley Jones & Co. (1914) W. C. & Ins. Rep. 33 [7 B. W. C. C. 101], annotated in 6 N. C. C. A. 624. Even if circumstances had been shown sufficient to charge the defendant with responsibility for the fault of the physicians, the rule would not be altered; for liability under the compensation act cannot be made to depend upon the degree of care exercised. A part of the loss occasioned by an accidental injury to a workman is cast upon the employer, not as reparation for wrongdoing, but on the theory that it should be treated as a part of the ordinary expense of operation. So much of an employee's incapacity as is the direct result of unskillful medical treatment does not arise 'out of and in the course of his employment' within the meaning of that phrase as used in the statute. Laws 1911, c. 218, § 1. For that part of his injury his remedy is against the persons answerable therefor under the general law of negligence, whether or not his employer be of the number."

Viita v. Fleming, 132 Minn. 128, 155 N. W. 1077, 1078, L. R. A. 1916D, 644, Ann. Cas. 1917E, 678, is strikingly similar to the instant case. An injured employee was sent to a hospital by his employer for treatment by physicians with whom the employer had an arrangement for treatment of employees in such cases. It was alleged that unskillful or negligent treatment and appliances administered resulted in permanent injury, which otherwise would not have occurred. The employer submitted to the court for approval a proposed settlement reciting that "the employer shall be and hereby is released from all claims on account of said injury, under said act or otherwise." In an action against the physicians for damages it was contended by them that the cause of action had been included in and was barred by the settlement of their principals with the employee. The opinion proceeds:

"The contention that the relation of physician and patient did not exist between defendant and plaintiff is based upon the facts hereinbefore stated as to the arrangement under which plaintiff was admitted to the hospital and treated by defendants. We see nothing in these facts to justify a decision that defendants did not owe plaintiff the duty to use ordinary care and skill in treating his injury. It is true that Johnson-Wentworth Company, under the terms of the Compensation Act, was required to provide medical and surgical treatment to the injured employee during the first 90 days of his disability and to an amount not exceeding $100. But we are unable to see how this changes the relationship between the injured employee and the physician or surgeon employed, or affects the duty of the latter to the former. It may be true in a sense that Drs. Fleming and Dolan were the agents of the employer for the purpose of minimizing the results of the injury and shortening the period of disability. Even if it be conceded that the employer might be liable for the negligence of the physicians on this theory of agency, this is no reason why the physicians are not liable directly to the patient. It is not material that plaintiff did not know the physicians, engage their services himself, or pay for the services in the ordinary way. Plaintiff, in fact, paid for medical and surgical treatment, and it surely can make no difference that this was by monthly deductions from his wages. Indeed, it is the law that the fact that a physician or surgeon renders services gratuitously does not absolve him from the duty to use reasonable care, skill, and diligence. * * *

"We need add little to what is said in the preceding paragraph in order to dispose of the argument that the settlement under the Workmen's Compensation Act by which the employer was released from 'all claims on account of said injury' operated as a settlement and release of any claim the employee might have against the physicians for malpractice. The employer, as we have seen, was not liable to the employee for the negligence of the physicians. It was not required to compensate plaintiff for damages sustained by their malpractice, and the settlement did not purport to include any such element. This is not contrary to the well-known rule, existing before the Compensation Act, that where one is injured by the negligence of another, and uses due care in the selection of a physician or surgeon, the wrongdoer is liable for all the proximate results of his own act, although the injury has been aggravated by improper treatment by the physician. It by no means follows that the one whose negligence causes the original injury is liable for the negligence of the physician employed to treat it, and it is clearly not true that the physician is not liable to the patient for such negligence. When it appears, as it clearly does here, that there is a liability on the part of the physician to the patient, it is a strain to hold that a settlement between the injured man and the wrongdoer for the injury by the accident, whether made under the Compensation Act or outside of it, includes the claim that the injured man has against his physician for a separate and subsequent injury."

To like effect is Pawlak v. Hayes, 162 Wis. 503, 156 N. W. 464, L. R. A. 1917A, 392. Further comment by us, in face of the obvious result, and in the absence of contrary authority, becomes unnecessary.

The judgment is reversed.

We concur: WORKS, P. J.; IRA F. THOMPSON, J.

111 Cal. App. 482

LINDSEY et al. v. PACIFIC ELECTRIC RY. CO. et al.

Civ. 80.

District Court of Appeal, Fourth District, California.

Feb. 2, 1931.

Rehearing Denied March 2, 1931. Hearing Denied by Supreme Court April 2, 1931.

1. Railroads 🔑309.

Duties and rights of interurban electric railroad in operating trains over crossing in rural territory were similar to those of company operating steam-propelled trains.

Right of way was owned by company which maintained depots for convenience of freight and passenger service, and maintained regular schedule of arrival and departure of freight and passenger trains.

2. Evidence 🔑586(3, 4).

Testimony that witnesses heard no train signals is sufficient to support finding no warning was given if witnesses were so situated they would have been able to hear signals.

3. Railroads 🔑330(2).

That crossing signals were out of order and continually operating did not absolve deceased, familiar with condition, from exercising due care.

Deceased must have known of defective condition of signals, as he had passed over crossing several times during period they were out of order.

4. Railroads 🔑328(3).

Failure of driver approaching unprotected crossing, view being obstructed, to alight from automobile and advance to ascertain if train is approaching, is contributory negligence.

5. Railroads 🔑350(16).

Where work train, not on regular schedule, followed regular passenger train on single-track road at interval of between 30 and 90 seconds, whether motorist, struck by work train, was contributorily negligent in not observing all precautions *held* for jury.

The passing of the passenger train in front of motorist was sufficient indication to him that tracks would remain clear for more than ninety seconds, so that quantum of care required of him as reasonably prudent man before proceeding onto tracks was question of fact for jury. Whether automobile was moving at time when struck did not definitely appear from evidence, but eyewitnesses were positive deceased did not stop before the front of his truck was on the tracks or stopped so near thereto it was struck by train.

6. Appeal and error 🔑999(1).

Case being properly before jury, finding could not be disturbed.

7. Railroads 🔑350(16).

Whether approaching electric train was heard by deceased motorist *held* for jury.

8. Trial 🔑194(3).

Instruction that, if jury believed negative testimony of witnesses who heard no signal prior to accident, conclusion was warranted no signal was given *held* not erroneous as on weight of evidence.

Jury was elsewhere correctly instructed on burden of proof, credibility of witnesses, that jurors were sole judges of value and effect of evidence and not bound to decide in conformity with declarations of any number of witnesses not producing conviction in their minds, and that testimony of one witness entitled to full credit is sufficient for proof of any fact if it satisfied their minds, as against other witnesses not so satisfying them.

9. Appeal and error 🔑930(2).

Where word of common import is used in instruction, jury is deemed to have understood and applied to it ordinary meaning.

10. Trial 🔑296(3).

Instruction referring to whistle signal "immediately prior to accident" *held* not misleading or prejudicial in light of other instructions.

Jury must be held to have understood given instruction and applied to it its usual and ordinary meaning, as against contention that phrase was indefinite as to time and might be construed to refer to whistle, which was allegedly sounded when work train was about eight hundred feet from place of accident. "Immediately" is word of common use, the meaning of which is well understood and is variously defined as "without interval of time; without delay; straightway; instantly; at once; without lapse of time; without the intervention of anything; directly; forthwith."

[Ed. Note.—For other definitions of "Immediately," see Words and Phrases.]

11. Appeal and error 🔑1064(1).

Instruction that, if crossing bell was out of order and rang continuously to deceased's knowledge, it gave no warning of approach of train, *held* not to warrant reversal.

Conclusion to be drawn from facts should have been left to jury, but instruction merely stated logical and obvious conclusion, a mere commonplace within general knowledge of jurors, and would not warrant a reversal.

12. Railroads ⚿347(11).

When admissible, evidence of deceased's habit as to stopping, looking, and listening at crossing must be limited to place of accident.

13. Death ⚿60.

Evidence of deceased's habit at railroad crossing is inadmissible, where there are eyewitnesses to accident.

14. Appeal and error ⚿1050(1).

Erroneous admission of deceased's habit at railroad crossing, in view of slight evidence thereof and positive testimony deceased did not stop, *held* not prejudicial.

Appeal from Superior Court, San Bernardino County; Benjamin F. Warmer, Judge.

Action by Thelma Lindsey and others, by Lillian E. Lindsey, their guardian ad litem, and another, against the Pacific Electric Railway Company and another. From a judgment in favor of plaintiffs, defendants appeal. Affirmed.

Superseding opinion in 294 P. 469.

Frank Karr, E. E. Morris, and C. W. Cornell, all of Los Angeles, for appellants.

McNabb & McCloskey, of San Bernardino, and Kenneth C. Wiseman, of Los Angeles, for respondents.

MARKS, J.

This is an appeal from a judgment entered in favor of respondents for damages resulting from the death of Peady Gilbert Lindsey. The case was tried before a jury.

Respondents are the widow and minor children of Peady Gilbert Lindsey, deceased, who was killed at about 8:20 o'clock on the morning of March 20, 1928, in a collision between a truck which he was driving north on Hellman avenue and a west-bound work train of the Pacific Electric Railway Company operated by A. V. Ringo as motorman. The accident occurred at the crossing of the railway company's single track road over Hellman avenue, a public road in San Bernardino county. Hellman avenue runs north and south and is crossed at an acute angle by the railroad track, which runs from northeast to southwest on the company's right of way, which is privately owned. The roadway on Hellman avenue approaches the railway crossing on an ascending grade of about 2 per cent. from the north and about 3½ per cent. for about two hundred feet from the south. At the time of the accident there was an earth bank about four feet high on the east side of Hellman avenue south of the crossing and on the right of way extending northeasterly along the southerly side of the tracks. On this bank, oats and weeds had grown to a height of about two feet. There was an orange orchard on private property to the southeast of Hellman avenue and the right of way so that the view of the tracks to the northeast of a traveler approaching the intersection from the south was thoroughly obscured until he had reached a point about ten feet south of the southerly rail. In approaching the crossing from the south in a truck similar to the one driven by the deceased the front wheels would have to be very close to the track before the driver could see four or five hundred feet of the tracks to his right. The usual cross-arm warning signal was maintained by the railway company north of the track on Hellman avenue. It also maintained an electrically operated wigwag on the west side of Hellman avenue south of the crossing. This wigwag was out of order on the morning of the accident and operated continuously without regard to whether or not trains were approaching. This condition had existed for three or more days prior to the accident. The railway company operated about twelve passenger trains and three freight trains traveling on regular schedule over the crossing each way every day. Deceased had passed the crossing every day, Sundays excepted, for several months, and was familiar with the conditions existing there, including the defective operation of the wigwag.

On the morning of the accident two witnesses traveling south on Hellman avenue saw the wigwag working and stopped their automobile about fifty feet north of the crossing. They saw deceased approaching the crossing from a point about one hundred and sixty feet south of it. He was driving his truck at a speed of not more than fifteen miles per hour, which was gradually decreased until the time of the impact. Whether or not it was moving at this time does not definitely appear. However, both witnesses were positive that he did not stop before the front of his truck was on the track or so near thereto that it was struck by the electric box car of the railway company. We conclude from the undisputed evidence of these witnesses that, while deceased may have listened for an approaching train, he could not look until he was in a position of danger on account of his obstructed view and he did not stop his truck until it, or a portion of it, was in front of the approaching train. It should be noted that these witnesses heard the noise of the freight train as it approached the Hellman avenue crossing.

Under the facts which we have stated appellants maintain with every show of confidence that the judgment cannot be sustained because the evidence shows that the deceased was guilty of contributory negligence as a matter of law, which will defeat a recovery on the part of respondents. They rely upon the familiar rule in California that, in a case where the view of the driver of an automobile was so obstructed that he could not see a train approaching on a track intersecting his path until his automobile was in grave danger, ordinary care and prudence required him to stop, alight, and walk ahead to a point where he could see down the tracks before he proceeded onto the crossing. Respondents seek to escape the rigors of this rule in the instant case by applying an exception to it which finds authority in other jurisdictions, and which has been considered in the case of Pietrofitta v. Southern Pacific Co. (Cal. App.) 290 P. 597, 599. They rely upon this rule, which we may summarize as follows: That where the driver of a vehicle on a public highway sees a train running on a regular schedule over a single track road pass in front of him, and then proceeds upon his way and is struck by a second train not running on a regular schedule which is following the first train very closely in point of both time and distance, an unusual circumstance is presented which removes the case from the general rule and makes the question of contributory negligence one of fact to be determined by the jury.

In the instant case it appears that the deceased came into collision with a work train of the railway company which was not running upon any schedule. It was preceded at a distance of from eleven to thirteen hundred feet by a passenger train running on regular schedule. Witnesses for respondents fixed the time elapsing between the passing of the two trains at from one to one and a half minutes. The passenger train was traveling at a speed of from fifty to fifty-five miles per hour and the work train at a speed of about forty miles per hour. Taking the distance separating the two trains as given by the witnesses for respondents and the number of feet the work train would travel in one second at forty miles per hour as furnished by the counsel for appellants and allowing for the reduced speed of the work train just before the accident, the time elapsing between the two trains passing the same point would be about thirty seconds.

There is no direct evidence in the record that the deceased saw the passenger train cross the intersection. However, the crossing was clearly visible for at least one-half a mile south on Hellman avenue. The deceased must be charged with seeing that which was plainly within his vision.

[1] The railway tracks crossing Hellman avenue were part of an interurban electric railroad connecting the cities of Los Angeles and San Bernardino. The right of way was owned by the railway company, which maintained depots for the convenience of its freight and passenger service. It maintained a regular schedule of arrival and departure of freight and passenger trains. The accident we are considering occurred outside of the limits of an incorporated city in rural territory. Under these circumstances the duties and rights of the appellant railway company in operating its trains are similar to those of a company operating steam-propelled trains under similar circumstances. 22 Cal. Jur. 237.

[2] There is evidence in the record which would support the finding that no warning was given of the approach of the work train. In the case of Thompson v. Los Angeles, etc., Ry. Co., 165 Cal. 748, 134 P. 709, 711, the court said: "But we think it must be held that there was enough in the evidence to justify the jury in finding that the motorman was negligent in not giving proper warning, by bell or whistle, of his approach. It is true that the only evidence that he did not give such warning was negative, consisting of the statements of the people in the automobile that they heard no signal. But, if they were so situated, as they undoubtedly were, as to have been able to hear a bell or whistle sounded from the motor car, their failure to hear is some evidence that no such signal was given. 1 Wig. Ev. § 664; Stotler v. Chicago & A. Ry. Co., 200 Mo. 107, 98 S. W. 509; Cotton v. Wilmar, etc., Ry. Co., 99 Minn. 366, 116 Am. St. Rep. 422, 9 Ann. Cas. 935, 8 L. R. A. (N. S.) 643, 109 N. W. 835. That there was positive testimony to the contrary does not conclusively establish that a warning was given. It creates merely a conflict of testimony, which is finally resolved, so far as this court is concerned, by the verdict of the jury. This circumstance alone supports the finding of negligence." Badostain v. Pacific Electric Ry. Co., 83 Cal. App. 290, 256 P. 576.

[3] We are of the opinion that the fact that the wigwag and crossing bell were out of order, so that they were in continuous operation regardless of whether or not a train was approaching, is of little importance in this case. The deceased must have known of the defective condition of these warning signals, as he had passed over the crossing several times during the period they were out of order. He must have known that their operation did not convey a true notice of the approach of a train, or that the track was clear. He knew that they could not be relied upon, and that he should use the same care to determine the approach of a train before attempting to cross the track that would have been required of him had there been no such warning device maintained at the crossing.

[4] It is well-settled law in California that when the driver of a vehicle approaches a

railway crossing not protected by a flagman, gates, or signal devices, where his view of approaching trains is obscured and he cannot otherwise determine whether he can safely proceed, due care requires him to "stop, and get out of his automobile, and go forward on foot, to ascertain if a train is approaching." Koster v. Southern Pacific Co., 207 Cal. 753, 279 P. 788, 794. It has been repeatedly held that under these circumstances the standard of ordinary care required of a motorist is so well and clearly established that his failure to observe and follow this standard constitutes contributory negligence as a matter of law and leaves no issue to be submitted to the jury. It was said in the case of Chrissinger v. Southern Pacific Co., 169 Cal. 619, 149 P. 175, 177, where "the standard of conduct is so obvious as to be applicable to all persons, and the plaintiff has failed to measure up to that standard under the circumstances shown he is not entitled to have his case go to the jury."

[5] It remains for us to determine whether or not the instant case presents any new or added circumstances not appearing in those cases upon which the established rule is founded, which will release the rigor of the general rule by presenting facts not contemplated by it and thereby make the question of contributory negligence a question of fact for the jury instead of one of law for the court. The only fact suggesting itself which might accomplish this result is that of the work train, not on regular schedule, following on a single track road a passenger train on regular schedule at an interval of time not less than thirty nor more than ninety seconds. Would the fact that the regular passenger train had passed over the crossing in front of deceased and proceeded upon its way lull him into a sense of security and give him a sufficient promise of safety and assurance that another train would not follow in such a short space of time, that it would change the quantum of care required of him?

The case of Pietrofitta v. Southern Pacific Company, supra, is the only case in California of which we have knowledge where this question was considered. In this case the court said: "In determining the degree of care which would be expected from a reasonably cautious person in crossing the railroad track under the circumstances of this case the jury might consider the fact that a freight train had just passed and that one would not ordinarily expect another train so soon." A petition for hearing of this case by the Supreme Court after judgment in the District Court of Appeal was denied.

The only case directly in point to which we have been cited is McGhee v. White (C. C. A.) 66 F. 502, 504, decided by Mr. Justice Taft. The facts of this case are so exactly similar to those of the instant case that it would seem a waste of space to set them out here. The court said: "The work train had passed over the crossing not more than one and a half minutes before Kennedy was struck, and he had good reason to believe, therefore, that another train was not following within so short a time and distance. The shortness of time between the two trains * * * would indicate a distance of not more than a sixth or a seventh of a mile between the two trains, running at 20 miles an hour. This is very much less than the usual distance between trains running in the same direction, and is most dangerous. Kennedy might, therefore, reasonably presume that, in the 40 yards he had to go to reach the track, another train would not pass the crossing. At least, this circumstance prevents us from holding as a matter of law that his failure to look was contributory negligence."

There are many cases decided in other states which recognize the rule of contributory negligence in not stopping, looking, and listening at railroad crossings where the view is obstructed, in which the reasoning used lends support to the exception to the rule recognized in the McGhee Case.

In the case of Bonnell v. D., L. & W. R. R. Co., 39 N. J. Law, 189, the driver of a vehicle upon a highway, on approaching a crossing, saw to his right the rear of a train headed away from him. Without doing anything further for his own safety he proceeded upon his way, and was injured at the crossing by the train backing into him. In deciding the case, the court said: "But the plaintiff had looked when about one hundred yards from the crossing, and saw, as he supposed, a train going in the opposite direction, with the rear towards him. He was not required, by any legal rule, to look continually until he crossed the track. A man of prudence might have received a fixed impression, from the appearance of the train, that it was going away from the station. * * * He saw Fancher's wagon crossing just before him, and this circumstance was likely to confirm his belief that there was no train near. It was for the jury to weigh all these facts, and say whether his mistake and consequent feeling of security were unreasonable, and manifested a want of proper care. * * * There were inferences to be drawn from all the facts of this case, upon the question of contributory negligence, which were proper for the jury."

In the case of Duame v. Chicago & N. W. Ry. Co., 72 Wis. 523, 40 N. W. 394, 7 Am. St. Rep. 879, the court used the following language: "The train, which consisted of the locomotive, two box cars, and a caboose, had come out on the main tracks from one of the side tracks, and run north across the street; and, when it had passed about two or three car-lengths north of the street, it stopped, and immediately backed down towards the street. * * * There was no flag-man at this crossing, and no one on the rear end of the train, to give warning to those about to cross the track at that place, and whether the bell was rung was a fact in dispute; witnesses for the defendant testifying that it was, and other witnesses testifying that they did not hear it. The deceased, in a one-horse vehicle, was driving west on Main street, towards his home, about seven miles in the country; and had approached within seven or eight rods of the crossing from the east, when the train passed over it, and went on north, out of his sight, and he continued on a trot towards the crossing, and, as his horse stepped on the track, the rear car of the train was very near it, and whether he attempted to back or turn around or pass over the evidence is uncertain, but his carriage came in contact with the rear car, and he was thrown under its wheels, and killed. * * * The evidence tending to prove the negligence of the employees of the defendant is very strong, if not conclusive; and we infer, therefore, that the court directed the verdict on the ground of the contributory negligence of the deceased. * * * As a general rule, and unaffected by other circumstances, the proposition urged in the brief of the learned counsel of the respondent, that one approaching a railroad crossing who may, by looking, have a timely view of an approaching train, is bound to look and listen for its approach, before attempting to cross the track, and that a failure to do so is negligence, may be correct, and the circuit court most probably applied this strict rule to the plaintiff's case. We do not think that such a rule would be applicable to this case. There is a most important fact in this case, that materially modifies this strict rule, and makes it inapplicable, and that is that this train had just passed this crossing while the deceased was within a few rods of it and driving upon a trot, and had passed on out of his sight, and he had reason to suppose that it would continue on, it being upon the main track, like any other train upon its regular route, and had no reason to suppose that it would immediately return. The presumption was that it would go on, and not return. He was thus thrown off his guard. * * * He was entrapped by this unexpected return of the train, for its sudden return over the crossing without warning was to him a trap."

The case of Palmer v. Detroit, etc., Co., 56 Mich. 1, 22 N. W. 88, also recognizes the exception to the general rule. The railroad track ran north and south, crossed by a street at right angles. Plaintiff was proceeding west on the street and saw an engine and tender going north over the crossing. When it passed he proceeded onto the crossing, watching for trains from the south, but not the north. He was injured by the engine and tender backing onto the crossing from the north, which he did not see until too late to avoid injury. It was held that under the circumstances contributory negligence was a question of fact for the jury.

In the case of Chicago & E. I. R. Co. v. Hedges, 105 Ind. 398, 7 N. E. 801, 805, the engine and tender of a train passed over a crossing followed closely by several cars which caused the injury complained of. In holding that the question of contributory negligence was one for the jury, the court said: "The interval of time between the passing of the engine and the coming of the train might, under the evidence, have been found by the jury to have been very short; and considering this fact in connection with the evidence that the whistle was sounded as the engine approached; that the bell was rung as the engine passed; that the cars, only six feet in height, came on without signal; that the view was obstructed; and that the intestate had no knowledge of the time of the train—the jury might conclude that the attention of the intestate was diverted, so that, without negligence on his part, he, for this reason, did not see the train in time to escape; that his conduct was influenced by the defendant's negligent acts, and he was thus thrown off his guard, so that without his having acted otherwise than as might have been excusable in a prudent man, under the circumstances, he was run down. Where the conduct of the defendant was plainly negligent and caused the injury, and there is dispute or doubt as to the negligence of the plaintiff, the conclusion of one man, though learned in the law, should not be forced upon 12 men sworn to try the facts. If there was any evidence tending to show that the plaintiff's intestate was thrown off his guard by such means as might have such effect upon an ordinary prudent man—and we think there was some such evidence—it was not wrong to submit to the jury the question of contributory negligence."

In the case of York v. Maine Central Ry. Co., 84 Me. 117, 24 A. 790, 792, 18 L. R. A. 60, the court said: "But sometimes there may be indications that nothing will pass along the railroad for some minutes at least. The gates (where there are gates) may be up,—a standing assurance to the traveler that no cars or engines are coming. Hooper v. Railroad Co., 81 Me. 260, 17 A. 64. The retiring of a flagman from the crossing may inform the traveler that he may now cross safely. In view of the well-known and necessary rule requiring considerable space and time between successive trains, the passage of one train may be an indication that no other will pass the same way for some minutes. These and other acts upon the part of the railroad may throw the usually prudent traveler off his guard, and free him from the reproach of negligence in attempting to cross at such a time."

Other cases which lend support to the exception we are considering are Bowen v. N.

Y. Central Ry. Co., 89 Hun, 594, 35 N. Y. S. 540; Phillips v. Milwaukee, etc., Co., 77 Wis. 349, 46 N. W. 543, 9 L. R. A. 521; French v. Taunton, etc., Co., 116 Mass. 537; and Scott v. St. Louis, etc., Ry. Co., 79 Ark. 137, 95 S. W. 490, 116 Am. St. Rep. 67, 9 Ann. Cas. 212. The following cases do not recognize the exception to the general rule that one must stop and look and listen before entering upon a railway crossing or be adjudged guilty of contributory negligence. Bush v. Union Pacific Ry. Co., 62 Kan. 709, 64 P. 624; Long v. Pacific, etc., Ry. Co., 74 Or. 502, 144 P. 462, 145 P. 1068, L. R. A. 1915F, 1151; and Durbin v. O. R. & N. Co., 17 Or. 5, 17 P. 5, 11 Am. St. Rep. 778.

The rule that one approaching an unguarded railroad crossing where his view is obstructed must stop, look, and listen or be found guilty of contributory negligence is based upon the fact that the law has established a rule of conduct which the ordinarily prudent person must follow under given and fixed circumstances. Where different circumstances are presented, the reason for the rule fails. We believe that the passing of the passenger train in front of Lindsey was a sufficient indication to him that the tracks would remain clear for more than ninety seconds, so that the quantum of care required of him as a reasonably prudent man before proceeding onto the tracks was a question of fact to be determined by the jury.

In the case of Herbert v. Southern Pacific Co., 121 Cal. 227, 53 P. 651, the court said: "The rule is that negligence is a question of fact for the jury, even when there is no conflict in the evidence, if different conclusions upon the subject can be rationally drawn from the evidence. This proposition has been frequently declared by this court. [Citing cases.] The rule is general, and appellant presents a very long list of cases in which the rule has been stated. The effect of all is the same. If but one conclusion can reasonably be reached from the evidence, it is a question of law for the court; but if one sensible and impartial man might decide that the plaintiff had exercised ordinary care, and another equally sensible and impartial man that he had not exercised such care, it must be left to the jury. McKune v. Santa Clara Co., 110 Cal. 480, 42 P. 980." Seller v. Market-Street Ry. Co., 139 Cal. 268, 72 P. 1006; Hoff v. Los Angeles Pacific Co., 158 Cal. 596, 112 P. 53; Gregg v. Western Pacific Co., 193 Cal. 212, 223 P. 553.

The following reasoning used in the case of Vaca v. Southern Pacific Co., 91 Cal. App. 470, 267 P. 346, 349, is pertinent: "While a traveler about to cross a railroad track is generally charged with the duty of stopping and looking before crossing the tracks, in each particular case his discharge of that duty and his care or negligence is to be measured in the light of surrounding conditions and circumstances. It is true that he may not seek redress for an injury caused solely through his own carelessness, but in measuring his conduct a jury may take into consideration that the railroad company has created a condition which has caused the traveler to relax his own vigilance so that he is brought to his destruction or injury. Scott v. San Bernardino Valley Co., 152 Cal. 610, 93 P. 677; Runnels v. United Railroads, 175 Cal. 528, 166 P. 18. It is only when the evidence is such that the court is impelled to say that it is not in conflict on the facts and that from these facts reasonable men can draw but one inference, and that an inference pointing unerringly to the negligence of the plaintiff contributing to his own injury, that the law steps in and forbids the plaintiff a recovery. Zibbell v. Southern Pacific Co., 160 Cal. 237, 240, 116 P. 513. In Smith v. Southern Pacific Co., 201 Cal. 57, 255 P. 500, the court uses this language: 'The rights and obligations of all persons using a public street are, in this respect, reciprocal. Each may rightfully expect that the other will, at the proper time, discharge his proper duty toward others. He cannot rely wholly on the care of others, nor, on that account, neglect to use the precautions which the particular situation demands of him. But he frequently must, to some extent, depend on others in such situations, and his conduct must be considered in view of that fact in determining whether or not it is negligent. His care, or want of care, in such cases is generally a matter to be determined by the jury from all the circumstances surrounding him at the time.' See, also, Marini v. Southern Pacific Co., 201 Cal. 392, 257 P. 74, and Clark v. Bennett, 123 Cal. 275, 277, 55 P. 908."

[6] Applying these rules to the unusual facts and circumstances of this case, and having in mind the fact that the question of what would or would not constitute ordinary care on the part of deceased in approaching the crossing under these unusual facts and circumstances has not been fixed by a definite rule of law in this state, we therefore conclude that what was or was not ordinary care on his part was a question of fact properly left to the jury. The jury absolved the deceased from the charge of contributory negligence. Its finding is final and cannot be disturbed by us.

[7] Appellants also attempt to predicate contributory negligence of deceased on the noise made by the work train in approaching the crossing. They argue that since this noise was heard by others it was or should have been heard by deceased and constituted sufficient warning of the approach of danger to require him to heed the warning and stop. Whether or not he heard or should have heard the noise was a question of fact for the jury. Skaggs v. Willhour (Cal. Sup.) 292 P. 649.

[8] Appellants complain of an instruction given by the trial court at the request of respondents, as follows: "Testimony of several witnesses near the crossing where deceased met his death, to the effect that they heard no whistle of the train of the Pacific Electric Railway Company which collided with the truck of the deceased, until immediately prior to the accident, is sufficient, if believed by the jury, to warrant the conclusion that no such signal was given prior to said time, and you are instructed that a failure to give due and timely warning of the approach of said train would be negligence on the part of said motorman and on the part of the Pacific Electric Railway Company."

They insist that this is an instruction on the weight and value of the evidence and therefore erroneous. In the case of Keena v. United Railroads, 197 Cal. 148, 239 P. 1061, 1063, it was said: "It is sufficient to say that the weight to be given to negative testimony often arises in railroad and other accident cases where it is claimed that signals were not given, and that in such cases, the question is purely for the jury, and it has frequently been held that negative evidence of this character is sufficient to sustain a verdict (Jones on Evidence [Horwitz], § 893, p. 400), even though it conflict with other evidence to the effect that a warning was actually given. Thompson v. Los Angeles Ry. Co., 165 Cal. 748, 134 P. 709." The case of Badostain v. Pacific Electric Ry. Co., 83 Cal. App. 290, 256 P. 576, is to the same effect.

[9, 10] The instruction told the jury in effect that, if they believed the testimony of the witnesses who did not hear the warning whistle blown or the bell rung on the work train, they might conclude that no such warnings had been given. The jury was elsewhere correctly instructed on the burden of proof; credibility of witnesses; that jurors were the sole judges of the value and effect of the evidence and are not bound to decide in conformity with the declarations of any number of witnesses which do not produce conviction in their minds; and that the testimony of one witness entitled to full credit is sufficient for the proof of any fact if it satisfied their minds, as against the testimony of other witnesses which did not so satisfy them. Taken in connection with the other instructions, we think the effect of the instruction in question was to inform the jurors that, if the negative testimony of the witnesses who did not hear warnings given by the work train produced conviction of its truth in their minds, it would be sufficient to support the finding that such warnings had not been given. Appellants further complain of this instruction because of the use of the phrase therein, in referring to a warning whistle, of "immediately prior to the accident." They contend that this phrase is indefinite as to time and might be construed to refer to a whistle which the trainmen testified was sounded when the work train was about eight hundred feet northeasterly from the place of the accident. The word "immediately" is one of common use, the meaning of which is well understood. In Webster's International Dictionary it is defined as "without interval of time; without delay; straightway; instantly; at once." In Funk & Wagnalls Standard Dictionary it is defined as "without lapse of time; instantly; at once; without the intervention of anything." In the case of Newkirk v. Gross, 203 Ill. App. 79, when this word was used in an instruction, it was held to mean "instantly, directly, without delay, forthwith," and that its use could not have misled the jury. Where a word of common import is used in an instruction, the jury must be held to have understood it and applied to it its usual and ordinary meaning. We do not believe the use of this phrase could have misled the jury. While the verbiage of the instruction might have been improved upon, we conclude that, when it is considered with the other instructions, no prejudicial error followed from its being given to the jury.

[11] Appellants also complain of an instruction given at the request of respondents as follows: "If the jury finds from the evidence that the signal bell maintained at the crossing at the intersection of Hellman avenue with the tracks of the Pacific Electric Railway Company was out of order so that it rang continuously and had been ringing continuously for several days prior to the collision, whether a train was near the crossing or not, and that deceased used said crossing frequently while said bell was thus out of repair and that he knew of the bell's unreliability, then you are instructed that the ringing of said signal bell, or wig-wag bell, at and immediately prior to the attempt of the deceased to cross the track of the defendant Pacific Electric Railway Company, was no notice to him of the approach of the work-train which later collided with his truck."

They contend that this instruction was on the facts and invaded the province of the jury. The court told the jury in this instruction that, if the bell was out of order so that it rang continuously for several days without regard to approaching trains, and this fact was known to deceased, it gave him no warning of the approach of a train. This instruction gave no rule of law to the jury. That the ringing of the defective bell gave no warning to deceased was a deduction or conclusion drawn from the facts given in the balance of the instruction. Whether or not these facts were established by the evidence was correctly left to the jury. The conclusion to be drawn from them also should have been left to the jury. However, we fail to see how any other conclusion could have been drawn from these facts by one of average intelligence. The instruction merely stated a logical and obvious conclusion—"a mere commonplace within the general knowledge of jurors; and we do not think that either the giving or the refusing of such an instruction would warrant a reversal." Kauffman v. Maier, 94 Cal. 269, 29 P. 481, 18 L. R. A. 124; Hirshfeld v. Dana, 193 Cal. 142, 223 P. 451, 457.

[12-14] Appellants complain of the ruling of the court in permitting Elbert Lindsey, son, and Lillian E. Lindsey, widow, of deceased, over their objection, to testify to the habit of deceased when about to cross a railroad track. When Elbert Lindsey was on the witness stand the following occurred:

"(Q.) By Mr. Wiseman: Are you familiar with the habits of your father as to stopping and looking and listening at railroad crossings?

"Mr. Morris: I object to that as not in rebuttal, incompetent, irrelevant and immaterial.

"The Court: The objection is overruled.

"(A.) Yes sir.

"(Q.) What were his habits in that regard?

"Mr. Morris: Objected to as irrelevant and immaterial and incompetent. There is evidence here of what was done on this occasion.

"The Court: The objection is overruled.

"(A.) He would always stop and look and listen."

During the testimony of Mrs. Lindsey the following occurred:

"(Q.) Are you familiar with his habits, regarding his habits at railroad crossings? (A.) I am.

"Mr. Morris: I object to that as incompetent, irrelevant and immaterial, because the evidence shows that there were eye-witnesses to the accident.

"The Court: Objection overruled.

"(A.) He was very strict; he stopped, looked and listened."

It must be conceded that these rulings were erroneous.

The evidence is open to objection on two grounds: First, because it is too general, and, second, because there were two eye-witnesses to the accident. When admissible, evidence of the habit of deceased should have been limited to habit at the place of the accident. Evidence at another place and under different circumstances has been held too remote. Blackford v. Beckworth, 90 Cal. App. 37, 265 P. 514. Evidence of habit is not admissible where there are eye-witnesses to an accident. The dicta in the case of Wallis v. Southern Pacific Co., 184 Cal. 662, 195 P. 408, 15 A. L. R. 117, upon which the trial court seemed to have based its ruling in admitting this evidence, has not been followed in later cases. The admission of this class of evidence is now limited to cases where there are no eye-witnesses to the accident. Starr v. Los Angeles Ry. Corp., 187 Cal. 270, 201 P. 599; Chappell v. San Diego, etc., Co., 201 Cal. 560, 258 P. 73; People v. Crossan, 87 Cal. App. 5, 261 P. 531; Blackford v. Beckworth, supra; Gorman v. County of Sacramento, 92 Cal. App. 656, 268 P. 1083.

We have quoted all of the evidence in the record concerning the habit of deceased in stopping before crossing a railroad. As we have observed, two witnesses testified that he did not stop, and no witness contradicted this evidence. After reading the record we have concluded that deceased did not stop. The jurors are presumed to be reasonable human beings subject to reasonable mental reactions. We cannot see how a reasonable person would give the slight evidence of habit appearing in the record any serious consideration in view of the positive testimony of two witnesses that deceased did not stop before going on the tracks before the collision. We therefore conclude that under the facts and circumstances of the instant case, the admission of this evidence was not prejudicial error. While the evidence is sharply conflicting, there is sufficient material evidence in the record to support the conclusion that the proper warning signals were not given by the work train on its approach to the crossing. This established negligence on the part of appellants, which the jury found was the proximate cause of the injury to deceased. Under the peculiar circumstances of this case we hold that the question of the contributory negligence of deceased was properly left to the jury. The verdict resolved this question against appellants. While there were technical errors of law committed in the giving of an instruction and in rulings on the admission of evidence, we do not consider them sufficiently prejudicial to warrant a reversal of the judgment.

Judgment affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

211 Cal. 348

PEOPLE ex rel. STEVENOT, State Director of Natural Resources v. ASSOCIATED OIL CO. et al.

L. A. 12311.

Supreme Court of California.

Jan. 9, 1931.

Appeal and error ⚷891.

Application for leave to take additional evidence was granted, where such evidence concerned facts occurring subsequent to entry of order appealed from (Code Civ. Proc. § 956a; Supreme Court Rule 38).

In Bank.

Action by the People, on the relation of Fred G. Stevenot, State Director of Natural Resources, against the Associated Oil Company, the Twin Bell Oil Syndicate, and others. From an order granting a preliminary injunction, the Twin Bell Oil Syndicate and others appeal. On application of plaintiffs for the taking of additional evidence.

Application granted.

See, also, 294 P. 717.

Neil S. McCarthy, of Los Angeles, for appellants.

James S. Bennett, of Los Angeles, for respondents.

PER CURIAM.

Application having been duly made to this court by the respondents herein, filed on December 9, 1930, pursuant to section 956a of the Code of Civil Procedure and rule XXXVIII of this court, for an order that evidence concerning facts occurring subsequent to the entry of the order granting the preliminary injunction appealed from herein be taken on the issue that said order and preliminary injunction operated as an unlawful discrimination against the appellant Star Petroleum Company, and good cause appearing therefor, it is ordered that the testimony of Wayne Jackman, R. E. Gray, and H. C. Stroebel be taken on said issue of unlawful discrimination and be produced before the Honorable Leon R. Yankwich, a judge of the superior court in and for the county of Los Angeles, who is hereby designated a referee of this court for that purpose; that said testimony be taken before said referee at his courtroom in the city hall of Los Angeles, in said county; that said referee issue a subpœna or subpœnas requiring said witnesses to bring with them or produce the records of production and disposition of gas and oil from said wells of said Star Petroleum Company for the period beginning March 22, 1930; that said testimony may be taken and received in the form of affidavits of said witnesses and filed with said referee; that any other witnesses designated by the respondents whose testimony may be pertinent to said issue and concerning facts occurring subsequent to the entry of the order appealed from may be subpœnaed to produce facts by affidavit or otherwise; that the time of the hearing at which such testimony shall be produced shall be upon ten days' written notice from the respondents to said appellant to appear and produce such testimony before the referee; that at said hearing, or at such later time as the referee may fix, said appellant may produce testimony on said issue by affidavit or otherwise, as it may desire, concerning facts occurring subsequent to the entry of said preliminary injunction and pertinent to said issue; that the respondents produce before said referee a certified copy of the order of said superior court, signed by the Honorable William Hazlett, judge of said court, on May 2, 1930, modifying, confirming, and approving the preliminary injunction appealed from; that, when said testimony has been taken and said certified copy of said order has been produced, said referee shall transmit the originals of said affidavits and a transcript of said oral evidence, if any, duly certified by him to be correct, and the certified copy of said order of modification to the clerk of this court, and the evidence so received shall be deemed a part of the record of said cause on appeal.

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211 Cal. 568

BURR v. WESTERN STATES LIFE INS. CO.

Sac. 4473.

Supreme Court of California.

Feb. 24, 1931.

1. **Contracts** ⚷208.

Where no place of performance is expressly stipulated, contract should be held performable in place where circumstances indicate parties intended performance to take place.

2. **Contracts** ⚷152.

Terms of contract are understood in their ordinary sense, and provisions should be construed together.

3. **Contracts** ⚷209.

Where intention with reference to place of payment does not appear from contract, general rule is that debtor must seek creditor to make payment.

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

4. Contracts 🔑208.

Contract may be held entirely performable at place where made and partly performable.

5. Insurance 🔑146(3).

Court must avoid putting unnatural construction on insurance policy.

6. Insurance 🔑618.

Action against domestic insurance corporation to recover disability benefits *held* not maintainable in county of insured's residence, where contract was made and disability occurred elsewhere, and home office of company located elsewhere was designated as place of payment in case of insured's death (Const. art. 12, § 16).

> Const. art. 12, § 16, provides that a corporation may be sued in the county "where the contract is made or is to be performed, or where the obligation or liability arises or the breach occurs; or in the county where the principal place of business of such corporation is situated." The insurance company's breach of contract to pay the disability benefits occurred at the place where payment was agreed to be made. However the rider of the policy providing for permanent disability failed to state the place of payment of the benefits, and the only place of payment designated in the contract was the designation of the home office for payment in case of death.
>
> SHENK and CURTIS, JJ., dissenting.

In Bank.

Appeal from Superior Court, Mendocino County; H. L. Preston, Judge.

Action by Leslie Lee Burr against the Western States Life Insurance Company. From an order denying defendant's motion for a change of the place of trial, defendant appeals.

Reversed.

For opinion of District Court of Appeal herewith adopted, see 288 P. 444.

M. H. Iverson, of Ukiah, and Thomas G. Crothers, of San Francisco, for appellant.

Hale McCowen, Jr., of Ukiah, for respondent.

PER CURIAM.

A hearing was granted in this court after decision (288 P. 444) by the District Court of Appeal, Third Appellate District, per Mr. Presiding Justice Finch, in order to examine more fully the single question presented by the record. Upon such examination we are satisfied with the majority opinion of the District Court of Appeal, and hereby adopt it as the opinion of this court. It reads as follows:

This is an appeal from an order denying defendant's motion for a change of the place of trial from Mendocino county to the city and county of San Francisco.

In June, 1919, the plaintiff "at the town of Wailuku, in the island of Maui, territory of Hawaii, and while he was then a resident of said island of Maui, made and executed his two certain applications in writing, * * * each applying to defendant for a policy of life insurance upon the life of plaintiff in the sum of $5,000, and said applications were duly forwarded to defendant at its home office in the city and county of San Francisco, State of California. * * * Thereupon and in compliance with and in pursuance of said applications, defendant, in said city and county of San Francisco, made and executed the policies of life insurance forming the subject matter of the above entitled action. * * * Thereupon said policies were forwarded to said plaintiff at Wailuku, in said territory of Hawaii." The policies and the riders attached thereto and made a part thereof are identical in language except as to the policy numbers thereof, and each of said policies, in so far as material on this appeal, reads as follows:

"Western States Life Insurance Company, hereinafter known as the company, agrees to pay $5,000 * * * at the home office of the company, in San Francisco, California, as follows:

"To Olive B. Burr, wife of the insured, * * * immediately upon receipt of due proof of the death, during the continuance of this policy, of Leslie Lee Burr of Wailuku, Island of Maui, Territory of Hawaii. * * *

"In witness whereof, Western States Life Insurance Company has caused this policy to be signed by its president and secretary, or assistant secretary, at the home office of the company at San Francisco, California, this thirtieth day of June, 1919."

There was attached to each policy, at the time it was executed, and made a part thereof, a rider containing the following:

"Upon receipt of due proof * * * that the insured * * * has become wholly disabled by bodily injury or disease so that he is and will be presumably, thereby permanently and continuously prevented from engaging in any occupation, or performing any work, whatsoever for remuneration or profit, * * * then * * * one year after the anniversary of the policy next succeeding the receipt of such proof, the company will pay the insured the sum of $500, and a like sum on each anniversary thereafter during the lifetime and continued disability of the insured. * * *

"Upon receipt of due proof * * * that the death of the insured occurred before the policy anniversary nearest his sixtieth birthday as the result, directly and independently of all other causes, of bodily injury effected solely through external, violent and accidental means, and that such death occurred within sixty days after sustaining such injury, the company will pay instead of the face amount of this policy, double that amount, making $10,000, provided no disability benefit has been allowed under the policy. * * *

"Upon due proof * * * during the life of the insured, that the death of the beneficiary occurred before attaining age sixty * * * as the result directly and independently of all other causes, of bodily injury effected solely through external, violent and accidental means while traveling as a passenger on a street car, railway train, steamship, licensed for regular transportation of passengers, or other public conveyance, operated by a common carrier, * * * the company will pay the insured the sum of $2,500."

After the execution of the policies, "on or about the 14th day of October, 1922, and while plaintiff was a resident of the county of San Diego, State of California, and being at that time in said county of San Diego, said plaintiff forwarded and furnished to defendant at its home office in the city and county of San Francisco, proofs that he was then totally and permanently disabled, in accordance with the total and permanent disability provisions of said policies. Thereupon, defendant approved and allowed the claim of said plaintiff for disability benefits, * * * and thereafter and on the 26th day of December, 1922, the defendant, at its home office in said city and county of San Francisco, attached to each of said policies a total and permanent disability endorsement allowing and approving said disability benefits," reading as follows:

"Total and Permanent Disability Endorsement

"Attached to and made a part of Policy No. 30334.

"The insured under this policy, No. 30334, having become totally and permanently disabled in accordance with the total and permanent disability provision of said Policy, and proof of such total and permanent disability having been approved October 14th, 1922, by Western States Life Insurance Company, the said Company agrees, subject to all the terms and conditions contained in the Policy, to waive payment of the premiums which may become due thereunder on and after June 30th, 1923, and to pay an annual income of $500 during the lifetime of the insured, without reduction in the amount of insurance, first payment to be made on June 30th, 1924.

"Western States Life Insurance Company
"Barrett A. Coates,
"Assistant Secretary & Actuary.

"San Francisco, Calif., December 26th, 1922."

The defendant made all the payments provided for by said allowance up to and including that of June 30, 1928, but refused to make any further payments. This action was brought to recover the payment falling due on June 30, 1929.

The defendant is a corporation organized under the laws of the state of California and at all times material to the issues of this case its residence and principal place of business has been in the city and county of San Francisco, and it has had no place of business in Mendocino county. The plaintiff was, at the time the action was commenced, and for more than two years prior thereto had been continuously, a resident of Mendocino county. Article 12, § 16, of the Constitution reads as follows: "A corporation or association may be sued in the county where the contract is made or is to be performed, or where the obligation or liability arises or the breach occurs; or in the county where the principal place of business of such corporation is situated, subject to the power of the court to change the place of trial as in other cases."

It is apparent that the only theory upon which the order can be affirmed, if at all, is that the contract of insurance was to be performed in Mendocino county.

[1] "In a suit upon the contract of a corporation, where no place of performance is expressly stipulated, it ought to be held performable in the place where the circumstances, viewed in the light of pertinent code provisions, indicate that the parties expected or intended it to be performed." Bank of Yolo v. Sperry Flour Co., 141 Cal. 314, 316, 74 P. 855, 65 L. R. A. 90.

"A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful." Civ. Code, § 1636. "When a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone, if possible; subject, however, to the other provisions of this title." Civ. Code, § 1639. In this case there is nothing whatever except the writing from which to ascertain the intention of the parties. "The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other." Civ. Code, § 1641. "The words of a contract are to be understood in their ordinary and popular sense, rather than according to their strict legal meaning." Civ. Code, § 1644. "Stipulations which are necessary to make a contract reasonable, or conformable to usage, are implied, in respect to matters concerning which the contract manifests no contrary intention." Civ. Code, § 1655.

[2] No authorities need be cited to show that the riders attached to the contracts are parts thereof and are to be construed to the same effect as if they were set forth in the bodies of the contracts as clauses thereof. Each contract has for its object one general purpose, the payment of benefits, which are divided into four classes: (1) $5,000 upon the death of the insured when not caused by violence; (2) $500 a year upon his becoming totally disabled; (3) $10,000 upon his death by violence; (4) $2,500 upon the death by violence of the insured's wife.

The contract expressly provides that payments of the first class shall be made "at the home office of the company, in San Francisco, California." The contract is silent as to the place at which the other payments are to be made. It was probably deemed unnecessary to state expressly where the other payments, if any should become due, are to be made, the natural inference being that they are to be made at the same place as the first, in the absence of any contrary intention appearing from the terms of the contract. It would be a strained construction of the contract to hold that, after expressly making the first of these benefits payable in San Francisco, the parties intended to make the other benefits payable elsewhere, there being nothing whatever in the contract to indicate such intention. For instance, the parties having expressly made the single death benefit payable in San Francisco, it does not seem possible that they could have understood that payment of the double death benefit is to be made at some other place. The terms of the contract are to be understood in their ordinary and popular sense and as a man of average intelligence and experience would understand them. "Each clause is to be considered with reference to every other clause upon which it has any bearing, and all the clauses and provisions are to be construed together as the unified medium whereby the intent of the parties to the instrument is to be reached." Jones v. Van Nuys, 161 Cal. 158, 165, 118 P. 541, 544. "Each clause of the contract is to be looked to for light in interpreting the others." Estate of Winslow, 121 Cal. 92, 94, 53 P. 362.

[3-5] "The intention of the parties to a contract as to the place where payments are to be made usually appears by express provision, or by necessary inference in the contract itself. In cases where the intention does not thus appear, the general rule is that the debtor must seek his creditor to make payment of his indebtedness. * * * While it is a rule of general acceptation that a debtor must seek his creditor to pay his indebtedness, it is always open to the parties to show by the express terms of the contract, or by fair inference therefrom, that it was the intention of the parties to pay at a particular place or within a particular state or country." 6 R. C. L. 902; 21 R. C. L. 15. "It is a fair deduction that a contract is to be entirely performed at the place where it was made and where it expressly provides that part of the performance (payments, for instance), shall be made." 5 Cal. Jur. 454; Hammond v. Ocean Shore Dev. Co., 22 Cal. App. 167, 170, 133 P. 978; Fitzhugh v. University Realty Co., 46 Cal. App. 198, 201, 188 P. 1023. While uncertainties and ambiguities in insurance policies are to be resolved against the insurer, courts must avoid putting a strained and unnatural construction on the terms of a policy and thereby creating an uncertainty or ambiguity. No term of a contract is either uncertain or ambiguous if its meaning can be ascertained by fair inference from other terms thereof. There is no difficulty in so ascertaining the intention of the parties to this action as to the place of payment, and the court must give effect to that intention.

As said by Chief Justice Waste in Ogburn v. Travelers' Ins. Co. (Cal. Sup.) 276 P. 1004, 1005: "In the interpretation of a written instrument the primary object is to ascertain and carry out the intention of the parties thereto. * * * As to the hardships, advantages, or disadvantages which may result from such a construction, the courts have nothing to do. * * * The intention of the parties is, of course, to be ascertained from a consideration of the language employed by them and the subject-matter of the agreement. * * * A contract should be construed, however, as an entirety, the intention being gathered from the whole instrument, taking it by its four corners. * * * We have not lost sight of the familiar rule requiring all uncertainties and ambiguities in a policy of insurance to be resolved against the insurer, who is presumed to have selected and incorporated into the policy the language employed therein. That rule can only have application when the policy actually presents some uncertainty or ambiguity. In the absence thereof, the courts have no alternative but to give effect to the contract of insurance as executed by the parties."

[6] The defendant's breach of contract, if any, occurred at the place where payment was agreed to be made. It may be conceded that, under the constitutional provision quoted, the action could have been maintained in the county of San Diego, that being the county in which the disability of the plaintiff occurred, but the fact that the "obligation or liability" arose in San Diego county does not give the plaintiff the right to prosecute the action in Mendocino county. "Where the action is brought in a county other than one of those mentioned in section 16 of article 12 of the Constitution, the corporation defendant is entitled to have the cause tried in the county of its principal place of business * * *

and the change of venue granted because the action has not been brought in the proper county." 7 Cal. Jur. 132.

The order is reversed.

I concur: R. L. THOMPSON, J.

SHENK, J.

I dissent. The main policy, which was an ordinary life policy, provided for the payment of $5,000 to the beneficiary at the company's office in San Francisco, upon due proof of death. Attached to this policy was a rider providing for an annual payment of $500 "to the insured" upon due proof of total permanent disability. In my opinion this was a separate and distinct contract of indemnity and no place of payment thereof was provided for therein. At least the question is left in doubt. The general rule is stated in 48 Corpus Juris, at pages 592, 593, with an abundance of supporting authorities, as follows: "As a general rule, in the absence of any agreement or stipulation to the contrary, a debt is payable at the place where the creditor resides * * * or wherever else he may be found; and it is ordinarily the duty of the debtor to seek the creditor for the purpose of making payment, provided the creditor is within the state of his residence when the payment is due, unless otherwise provided by statute." It is not otherwise provided by statute in this state. Moreover, section 1489 of the Civil Code specifically provides that in the absence of an express provision to the contrary an offer of performance may be made at the option of the debtor "1. At any place appointed by the creditor; or, 2. Wherever the person to whom the offer ought to be made can be found." In this case the creditor elected to have the payment at his place of residence, known to the debtor, in Mendocino county. He could be found there and that was the appropriate place for tender of payment in order to discharge the obligation of the debtor. 24 Cal. Jur. p. 521. Having failed to make tender of payment at the creditor's place of residence, a breach of the debtor's promise to pay occurred at that place, and under section 16 of article 12 of the Constitution the defendant could be sued at that place, no other place of payment being stipulated. See Bank of Yolo v. Sperry Flour Co., 141 Cal. 314, 74 P. 855, 65 L. R. A. 90. In order to conclude that the defendant must be sued in the city and county of San Francisco, the main opinion indulges in inferences as to what was intended by the parties. When inferences must be resorted to, the provision for payment is necessarily not express and uncertainty is present. The rider was on the printed form prepared by the defendant, and it is a cardinal rule that, when uncertainty exists, the contract is to be construed most strongly against the party who caused the uncertainty to exist. Section 1654, Civ. Code. Furthermore, if the terms of the contract are uncertain they must be interpreted in the sense in which the promisor believed, at the time of making it, that the promisee understood it. Section 1649, Civ. Code. It is inconceivable that the defendant, the promisor in this case, believed that the plaintiff, in case of his permanent total disability, understood that he was to proceed or was to dispatch an agent to San Francisco to demand payment or, in the event of the refusal of payment, that he would be compelled to go to San Francisco to bring suit or suffer his testimony to be taken by deposition.

Much more compelling is the universal rule with reference to insurance policies that when uncertainty exists they will be construed most strongly in favor of the insured. From any and every approach to the problem I think the trial court drew the proper inferences and conclusions and that its order should be affirmed.

I concur: CURTIS, J.

PRESTON, J. does not participate.

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211 Cal. 563

CONSOLIDATED PIPE CO. v. WOLSKI et al.

Sac. 4337.

Supreme Court of California.

Feb. 20, 1931.

1. Appeal and error ⚷1012(1).

In action to enforce materialman's lien, weight and sufficiency of evidence were for trial court.

2. Mechanics' liens ⚷281(1).

Evidence *held* to support finding of lien for materials used in sinking well, and of personal liability of owner.

It appeared from evidence that materialman's goods were actually used in construction of improvement on owner's land occupied by tenant, and that, at time owner claimed he first knew of construction of well, materialman might have regained goods, but, on assurance of owner that it would get its money, materialman refrained from protecting itself.

3. Mechanics' liens ⚷157(1).

Mechanics' or materialmen's liens will not be held invalid unless tending to defraud or failing to impart notice (Code Civ. Proc. § 1203).

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

4. Pleading ⚷398.

No variance between allegations in pleading and proof is deemed "material" unless it has misled adverse party (Code Civ. Proc. § 469).

[Ed. Note.—For other definitions of "Material Variance," see Words and Phrases.]

In Bank.

Appeal from Superior Court, Tulare County; William D. Dehy, Judge.

Action by the Consolidated Pipe Company against Charles Wolski and another. From a judgment in favor of plaintiff, defendants appeal.

Affirmed.

Matot & Stafford, Wesley T. Stafford, and Kenneth E. Matot, all of Los Angeles, for appellants.

Siemon & Garber, of Bakersfield, for respondent.

WASTE, C. J.

The plaintiff brought this action to foreclose a lien for materials alleged to have been sold to the defendants and used by them in the sinking of a well. Defendant Dionne did not appear. Defendant Wolski, owner of the land, interposed an answer in which he denied the allegations of the complaint and set up certain special defenses. At the outset of the trial, it was stipulated that all the allegations of the complaint were true, except the allegations charging the defendant Wolski with personal liability for the amount of the claim. The trial court found all the allegations of the complaint to be true, and, in addition, that after the material was furnished by plaintiff the defendant Wolski "ratified and affirmed" the purchase.

[1] Appellant contends that there is a fatal variance between the statements in the claim of lien, as to the ownership of the land and as to whom the materials were sold, and the allegations in the complaint and the facts found by the court; also that neither the allegations nor the findings find support in the evidence. Wolski owned the ranch. Dionne was his tenant farming it, and Wolski had an interest in the crops to the extent of "getting his money" out of Dionne. In order that Dionne might finance the place, Wolski and his wife executed a crop mortgage to one Sachem for $1,500, and the evidence indicates that the well was to be paid for out of this fund. The evidence in the case is very unsatisfactory, but its weight and sufficiency were the problem of the trial court. It can hardly be doubted that Wolski knew of the need of the well. Plaintiff sold the materials to Dionne on the latter's representation that he was farming the land for Wolski, and that Wolski sent him money to pay the local bills. After ascertaining the financial rating of Wolski, plaintiff sold the goods, first charging the account to Dionne and subsequently charging it to Wolski.

[2] Though the evidence is unsatisfactory, inferences may be drawn therefrom in support of the findings and judgment. The outstanding fact is that plaintiff's goods have been actually used in the construction of an improvement on the land of Wolski, from which he no doubt benefited. At the time appellant claims he first knew of the construction of the well, plaintiff might have regained its goods, but, on the assurance of appellant that it would get its money, the plaintiff refrained from thus protecting itself.

[3, 4] Liens of mechanics or materialmen will not be held invalid unless they tend to defraud or fail to impart notice. Code Civ. Proc., § 1203. No variance between allegations in a pleading and the proof is to be deemed material unless it has misled the adverse party. Code Civ. Proc., § 469. The opinion of this court in Ogden v. United Bank, etc., Co., 206 Cal. 571, 275 P. 430, lends abundant support to the conclusion of the trial court.

The judgment is affirmed.

We concur: SEAWELL, J.; RICHARDS, J.; CURTIS, J.; PRESTON, J.; SHENK, J.; LANGDON, J.

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211 Cal. 565

STOWELL v. EVANS et al.

Sac. 4222.

Supreme Court of California.

Feb. 24, 1931.

Rehearing Denied March 26, 1931.

1. Assault and battery ⚷10, 13.

In action for assault and battery on trespasser in game preserve, defense must be self-defense, or using only necessary force to arrest trespasser, or to eject him.

2. Trial ⚷295(1).

Instructions, although erroneous when taken separately, are not erroneous if charge as whole is correct.

In Bank.

Appeal from Superior Court, Glenn County; Claude F. Purkitt, Judge.

Action by Frank Stowell against C. D. Evans and another. Judgment for plaintiff, and defendants appeal.

Affirmed.

W. T. Belieu, of Willows, for appellants.

A. A. King, of Colusa, and H. W. McGowan, of Willows, for respondent.

PRESTON, J.

Action for damages for assault and battery.

On December 10, 1926, plaintiff and a companion were trespassers upon the inclosed and duly posted game preserve of defendant Spalding Company, a corporation, then and there in charge of the defendant Evans, who was also a duly commissioned deputy sheriff of the county of Glenn.

Plaintiff was in quest of wild geese, and both he and his companion had shotguns. Defendant Evans was in company with two other men, named Pain and Boyd. He discovered the trespassers upon the premises and called to them to come to where he was. It seems that he was stationed at a point between the hunters and the place where their machine was parked. The two hunters approached; the companion being slightly in front of plaintiff. Evans displayed his badge of authority, told the companion who he was, asked him to consider himself under arrest, and ordered him to unload his gun and deliver it to him, which was done. Plaintiff, seeing what was going on, yelled to his companion and directed him not to surrender the gun. Later plaintiff came into the presence of defendant Evans and was told by him to deliver up his gun and consider himself under arrest. Plaintiff declined to surrender his gun.

At this point the evidence is in conflict. Plaintiff contends that he merely asked Evans to show his authority to take and receive from him the gun. Evans and the other witnesses testified that plaintiff made a demonstration as if to use the gun upon Evans. At any rate, Evans, whether justified or not, then struck plaintiff on the head with the empty gun barrel and fractured his skull. The arrest was thereupon completed, and the two trespassers were taken before a magistrate and there booked for trial. Plaintiff has practically recovered from his injury.

[1] He sued defendants, one as servant and the other as the responsible master, claiming that the assault and battery were unprovoked and unlawful. Defendants interposed in the main a plea of self-defense, although it might be said that the defense that Evans was using only the force necessary to overcome the resistance of plaintiff and effectuate his arrest was also made. Under the circumstances, the defense of defendants could only have been either one of the three following propositions: (1) Action necessary for self-defense; (2) use of only so much force as was necessary to subdue plaintiff and effect his arrest (People v. Hardwick, 204 Cal. 582, 586, 269 P. 427, 59 A. L. R. 1480); or (3) the use of so much force only as was necessary to eject plaintiff from the premises. Livesey v. Stock, 208 Cal. 315, 317, 281 P. 70; Walker v. Chanslor, 153 Cal. 118, 126, 94 P. 606, 17 L. R. A. (N. S.) 455, 126 Am. St. Rep. 61.

It will be noted, however, that as to all these defenses, the essence of the question involved is: Did the defendant Evans use an excessive amount of force upon plaintiff under the circumstances? The jury answered this question in the affirmative and assessed damages against defendants jointly at $3,800. The court on motion for new trial directed that it be granted unless the plaintiff would waive all of said verdict in excess of $1,500. Presumably the plaintiff did this, as the defendants are now prosecuting this appeal.

[2] It is conceded that there is such conflict in the evidence that the verdict may not be disturbed upon the ground that no evidence exists to support it. The sole reliance for reversal is upon a series of instructions given by the court at the request of plaintiff, which defendants characterized as so-called formula instructions, directing a verdict for plaintiff, without specifying all the ingredients necessary for such a declaration. We have examined the several instructions and have carefully read and considered the charge as a whole. We are of the view that, construing the instructions as a whole, it cannot be said that the ones complained of were intended to be so-called formula instructions nor that they had a prejudicial effect upon defendants.

For example, a portion of instruction No. 1 reads: "* * * Therefore if you find from all of the evidence in this case that C. D. Evans as an employee and agent of the defendant Spalding Company and also acting individually committed an assault and battery by using unlawful force and violence upon the person of the plaintiff, Frank Stowell, your verdict should be in favor of the plaintiff." It is true that, standing alone, there is error in this instruction, for it omits to mention self-defense as well as the other defenses above mentioned, but the insertion of the words "by using unlawful force and violence" left the instruction open so as to be read in connection with any other instructions relating to the issues involved, and we find that instructions Nos. 3, 5, 12, and 13, given at the request of plaintiff, and instruction No. 14, given at the request of defendant, when read together, cover all the elements contained in plaintiff's complaint and cover the three above-mentioned defenses that were urged or could have been urged by the defendants.

We think the situation is controlled by such cases as Douglas v. S. P. Co., 203 Cal. 390, 264 P. 237, and Saltzen v. Associated Oil Co., 198 Cal. 157, 161, 244 P. 338.

This being true, it follows that the judgment must be, and it is, hereby affirmed.

We concur: WASTE, C. J.; CURTIS, J.; SEAWELL, J.; SHENK, J.; RICHARDS, J.; LANGDON, J.

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211 Cal. 579

MILLS v. STATE BAR OF CALIFORNIA.

L. A. 12403.

Supreme Court of California.

Feb. 25, 1931.

Rehearing Denied March 26, 1931.

Attorney and client ⚷58.

Evidence respecting attorney's breach of trust in connection with handling of funds *held* to require suspension for one year.

In Bank.

Proceeding by Homer C. Mills to review an order of the Board of Governors of the State Bar of California recommending that petitioner be disbarred from practice of law within the state.

Petitioner suspended for one year.

Homer C. Mills, of Long Beach, and Henry P. Leavitt, of Los Angeles, for petitioner.

Mott, Vallee & Grant and Paul Vallee, all of Los Angeles, for respondent.

PER CURIAM.

This proceeding was instituted to review an order of the Board of Governors of the State Bar of California, recommending to this court that petitioner, Homer C. Mills, be disbarred from the practice of the law in this state, which recommendation was based upon findings made by local administrative committee No. 3 of the county of Los Angeles, after its hearing, upon legal notice and in due form, of the charges preferred against him.

Petitioner's several contentions may be summarized in the statement that he claims that the findings were not justified under the evidence, which was without substantial conflict and was insufficient to sustain any of the charges made against him, and that the committee erred in refusing to reopen the proceedings for further testimony and to consider the effect of certain additional evidence submitted in the petition in affidavit form.

On March 14, 1926, complainant, E. E. Easton and petitioner entered into the following written contract: "La Jolla 658 Schaeder 1297 Coast Blvd., Mar. 14/26 I hereby agree to take over the matter of the further prosecution of the suit of E. E. Easton versus Susan T. Brant et al. Now pending in the Federal Courts of California, as chief counsel, and to defend a divorce action now pending at Los Angeles No. D38874 between Elise H. Easton and said E. E. Easton; to bring any and all other actions necessary to fully protect the rights and interests of said E. E. Easton in above actions, or in or to other property interests growing out of certain leasing commissions, or any of the matters connected with said causes for twenty-five (25%) of any and all sums recovered, provided that said E. E. Easton shall pay any and all necessary court costs or other expenses. (signed) Homer C. Mills. I hereby accept the above proposition. (signed) E. E. Easton."

All of complainant's assets were at the time tied up in litigation, and he was without any immediate funds whatsoever. Because of complainant's financial situation, petitioner promised that he would secure the money necessary to pay the costs of the pending litigation, plus $1,000 to be advanced to complainant for payment of certain personal obligations and costs in connection with said divorce action; the total amount required being estimated at $6,000. Thereafter and on April 10, 1926, petitioner produced one E. R. Dampier, who agreed to advance said sum of $6,000, and to whom complainant gave his note for that amount, executed jointly by himself and one Dyer B. Holmes.

It is petitioner's alleged breach of trust in connection with the handling of portions of this fund on behalf of complainant which forms the basis of this proceeding. It is sufficient to set forth a few of the serious and vital discrepancies in the accounting between them, which point unerringly to a failure by petitioner to account for a part of the fund which came into his hands.

In the first place, petitioner failed to furnish any proper bills or vouchers to cover a number of the expenditures alleged to have been made by him on behalf of complainant from the trust fund of $5,000 supposed to have remained in his hands after payment to complainant of the $1,000 for his personal use. Said Dampier, the lender of said sum, was a law clerk, not admitted to practice in California, but employed by petitioner during the time said services were to be rendered at a salary of $200 per month. The evidence fails to show whether the $6,000 was ever actually loaned by said Dampier to complainant, and it fairly supports the finding that said Dampier advanced to petitioner, on account of said loan, only an undetermined part of the total sum, which part was paid in installments over a period of time. Petitioner, however, did not at any time, inform complainant that said $6,000 was received by him in installments, but permitted him to repay the whole sum of $6.000, together with interest on the whole amount thereof for the whole period of time as expressed in the note.

Petitioner submitted an alleged receipt of Dampier for $1,000 paid him from said fund for "Service for checking record, briefing, etc. * * *" Convincing evidence is lacking that petitioner ever paid this sum to Dampier out of said trust fund, but, even if he had, it would have been an improper payment, as said services were such as petitioner himself was bound to perform under said contract. Furthermore, the evidence supports the opinion of the committee that said Dampier, having loaned petitioner only an undetermined portion of said $6,000, gave his receipt for $1,000 to petitioner to be used by petitioner in padding his account.

Petitioner likewise charged complainant with an item of "Extra help in typing record, making copies of exhibits, rechecking records, typing briefs, etc., $1096.95," $711.95 of which was an improper charge. With the exception of $385 paid for copies of exhibits, the item covered services originally contemplated and covered as the natural overhead of a law office and services of a general clerical nature, part of which at least were performed in connection with petitioner's general office work, apart from work on litigation in which complainant was interested.

Petitioner likewise wrongfully charged an item of advice and assistance in procuring delay in payment of alimony judgment, $200 which was covered by his original contract of employment. He also improperly charged an item of advice and assistance in securing a two years' extension of Holmes' indebtedness, $500; no services of this nature being requested by complainant or rendered by him. In connection with the taking of certain depositions, petitioner also charged complainant with the sum of $177.40, $67.40 of which still remained unpaid and for collection of which he had referred the deposition notary to complainant.

In short, from the evidence it appears that, over and above the amounts legitimately paid out by petitioner, he failed to properly account for the items above mentioned, to wit, $1,000 alleged to have been paid said Dampier, $711.95 for stenographic help, etc., and $67.40 on depositions.

The additional evidence submitted by petitioner has been carefully examined. It throws no further light upon the case, but merely sets forth certain letters sent to him by complainant's attorney in an effort to secure an accounting, and, in view of the findings of the committee, a later effort to secure from said Dampier a return of such portion of said $6,000 as was never loaned by Dampier to him for use in complainant's behalf.

Notwithstanding the serious misconduct of petitioner as outlined above, we hesitate to inflict upon him permanent disbarment. Under the contract he was not required to secure any money for the expenses of litigation nor for the personal use of the client. The contract between them was thus departed from at least to that extent. Moreover, petitioner, with apparent skill and ability conducted a vast amount of litigation for complainant, taking one case even to the Supreme Court of the United States. For these services under the contract he could receive no compensation. In view of the other departures from said contract and in view of all the surrounding circumstances, petitioner may have believed that he would be justified morally in padding his account to supply the absence of compensation. He is well advanced in life and, so far as shown, has heretofore been a lawyer of integrity and ability, and may even yet, if given the opportunity, redeem himself from the odium of this present offense. Accordingly, we have concluded to impose upon him a suspension from practice.

It is therefore ordered that petitioner herein, Homer C. Mills, be, and he is hereby, suspended from the practice of law in this state for the period of one year from and after the date of filing of this order.

211 Cal. 200

SVENSON et al. v. ENGELKE et al.

Sac. 4385.

Supreme Court of California.

Feb. 13, 1931.

As Modified on Denial of Rehearing March 12, 1931.

1. Fish 🔑**8.**

Game 🔑**3½.**

State has right to regulate and control taking, possession, and sale, or other transportation of fish and game.

2. Fish 🔑**13(1).**

Possession or transportation of salmon lawfully taken on high seas across fish and game districts to place where salmon might be lawfully possessed and sold, was not illegal

Pen. Code. § 634. subd. 3, as amended by St. 1927. p. 958).

3. **Injunction** 🔑136(2).

Issuance of preliminary injunction preventing interference with transportation or possession of salmon caught on high seas *held* not erroneous (Pen. Code, § 634, subd. 3, as amended by St. 1927, p. 958).

In Bank.

Appeal from Superior Court, Humboldt County; Henry W. Falk, Judge.

Action by G. A. Svenson and others against Walter Engelke and others. Judgment granting a preliminary injunction, and defendants appeal.

Affirmed.

Eugene D. Bennett and Ralph W. Scott, both of San Francisco, for appellants.

Eugene S. Selvage and H. L. Ford, both of Eureka, for respondents.

Marshall B. Woodworth, of San Francisco, amicus curiæ.

RICHARDS, J.

The plaintiffs commenced this action on behalf of themselves and of the Eureka Fishermen's Union, a voluntary association of commercial fishermen, against the defendants, who are members and officers of the California Fish and Game Commission, to restrain the latter from interfering with or prosecuting criminal or other actions against the plaintiffs and their fellow members of the association on account of the transportation or possession by the plaintiffs and their associates, of fresh salmon caught on the high seas and in the course of being transported over and across certain fish and game districts, wherein the taking or possession of fresh salmon was at the time prohibited by state law. Upon the filing of a verified complaint seeking the foregoing relief, the superior court of Humboldt county issued a temporary restraining order, and also an order to show cause why a preliminary injunction should not issue. Upon the return day of the latter order and after a hearing thereon, the trial court issued a preliminary injunction granting the relief sought pendente lite. It is from such order that the defendants have taken and are prosecuting this appeal.

It is the appellants' first contention that the plaintiffs were not in any event entitled to an injunction for the reason that under the provisions of section 526 of the Code of Civil Procedure "an injunction cannot be granted * * * to prevent the execution of a public statute by officers of the law for the public benefit." The difficulty with this contention is that it assumes the existence of a fact which is the very fact in controversy in the present proceeding, and which is as to whether or not there is an existing public statute covering the situation presented by the plaintiffs' complaint and which the defendants, as officers of the law, were attempting or were threatening to enforce at the time the preliminary injunction was sought and obtained by the plaintiffs. The authorities cited by the appellants in support of their foregoing contention have relation to statutory offenses which the officers of the law referred to therein are engaged in enforcing, and which the persons against whom such enforcement is sought are seeking to evade prosecution upon the showing either that they are not guilty of such statutory offense or that the law defining the same does not apply to such a person or class of persons. In the present case, however, it is the respondents' contention that there is no statute which renders unlawful the acts of the plaintiffs in seeking to transport the salmon which they have lawfully taken upon the high seas, and which at the time of their attempted or threatened prosecution they were engaged in transporting to a place wherein they were lawfully entitled to possess and sell fish thus lawfully taken. It is to this question, therefore, that we must direct our attention in considering this case upon the merits.

[1] We do not deem it necessary to restate the law which has been heretofore consistently decided by this court touching the right of the state in the exercise of its police power to regulate and control the taking, possession and sale or other transportation of fish and game. It will suffice for the purposes of this cause to cite but a few of the leading cases declaring this uniform rule: Paladini v. Superior Court, 178 Cal. 369, 173 P. 588; People v. Stafford Packing Co., 193 Cal. 719, 227 P. 485; People v. Monterey Fish Products Co., 195 Cal. 548, 234 P. 398, 38 A. L. R. 1186, and cases cited. That the principle thus asserted is applicable to sea products caught upon the high seas beyond the three-mile limit of state jurisdiction and sought to be brought into or transported over portions of the state which have been subjected to statutory regulation affecting the taking, possession, and sale of fish, and other marine products, see Van Camp Sea Food Co. v. Department of Natural Resources (D. C.) 30 F.(2d) 111; Union Fishermen's, etc., Co. v. Shoemaker, 98 Or. 659, 193 P. 476, 194 P. 854; State v. Schuman, 36 Or. 16, 58 P. 661, 47 L. R. A. 153, 78 Am. St. Rep. 754; Ex parte Maier, 103 Cal. 476, 37 P. 402, 42 Am. St. Rep. 129.

We thus arrive at the particular facts of this case with which the trial court undertook to deal in the issuance of its preliminary injunction. The plaintiff and their fellow members of the Eureka Fishermen's Union have been engaged for some time in conducting fishing operations out of the city and harbor of Eureka in Humboldt county, in the course of which they were wont to fish for salmon in the waters of the Pacific Ocean at points exceeding three miles west of the coast line of the state of California and which points are also to the westward of certain fish and game districts which have been created by the legislature of the state of California and which lie along the coast line of said state and within the boundaries of the several coast counties thereof which extend from Humboldt to Santa Cruz. The several fish and game districts immediately concerned in this litigation are numbered districts 6, 7, 8, 9, 10, and also district 1½, which latter district embraces or includes the city of Eureka.

The particular statute defining these several districts was adopted in 1917 (St. 1917, p. 1058) and was from time to time amended down to the year 1927, when it took on the form and content existing at the time of the commencement of the present action (St. 1927, p. 1128). In the meantime those several sections of the Penal Code relating to violations of the laws for the preservation of fish and game were being amended and enacted until they also took on the form in which they stood when this action was begun. An examination of these statutes and of the said provisions of the Penal Code disclose that the times within which salmon may be taken, possessed, and sold within these several districts varies, so that at certain times it is lawful to take, possess, or offer for sale salmon in one of said districts when at the same time it is unlawful so to do in another one or more thereof. It is out of this state of the law that the present controversy has arisen, since, as asserted in the plaintiffs' complaint, the plaintiffs having lawfully engaged in fishing for salmon upon the high seas at points exceeding three miles west of the coast line of the state of California, were undertaking to bring their catch, thus lawfully taken, into the state of California and over and across fish and game districts 6, 7, 8, 9, and 10 thereof, for the purpose of possession and sale thereof in the city of Eureka, which lies within district No. 1½ thereof, and in which at said time the possession and sale of salmon was not unlawful. It was asserted by plaintiffs in their complaint and found to be the fact by the trial court as the basis for the making of its said order that the defendants herein, as members and officers of said fish and game commission, were attempting and threatening to prevent the plaintiffs from so transporting the salmon, thus by them lawfully taken, across such of said fish and game districts in which the possession and sale of salmon caught or taken therein was at the time unlawful, in order to reach their destination at the city of Eureka, wherein they might lawfully possess, offer for sale, and sell their said fish.

The vital question involved in this situation is that presented by the interpretation to be placed upon the provisions of subdivision 3 of section 634 of the Penal Code, as said section read at the time of the commencement of this action (St. 1927, p. 958). This section of the Penal Code has special reference to the taking, catching, killing, possession, and sale of salmon. By the terms thereof, as it then read, it was provided substantially that: Every person who takes, catches or kills in any manner, or possesses, any salmon other than as provided for in this act is guilty of a misdemeanor. Subdivision 3 thereof, however, contains the proviso that every person who in fish and game district 1½ between the 1st day of June and the 31st day of July of the same year, both dates inclusive, or between the 17th day of September and the 14th day of November of the same year, both dates inclusive, "takes, catches, kills, or has in his possession more than two fresh salmon during any one calendar day, or who buys, sells, offers or exposes for sale any fresh salmon, is guilty of a misdemeanor; provided that nothing in this act shall prohibit the possession or sale at any time of any salmon from Oregon or Washington, or the possession or sale of any salmon lawfully taken in any fish or game district." A fair interpretation of the foregoing provision of the Penal Code would seem to be that it was not therein intended to declare unlawful the possession or sale in any district, and especially in the districts specifically mentioned in subdivision 3 of said section of the Penal Code, at any time of salmon brought into the state of California from Oregon or Washington, or the possession or sale at any time, in said or any fish and game district, of salmon lawfully taken therein or in any other fish and game district. If the foregoing proviso contained in subdivision 3 of section 634 of the Penal Code, as the same read at the time of the commencement of this action, is thus truly interpreted, it would seem to follow that the possession and sale of salmon in any fish and game district, which had been lawfully taken or caught in any of the other fish and game districts, was not prohibited under any provision of the law relating to the possession or sale of salmon. If this be true, it would seem to further follow that the provisions of the fish and game laws which purport to render unlawful the possession or sale of salmon in any particular district during the closed season therein must be held to have relation only to such salmon as had been unlawfully taken or caught therein or in some other of the fish and game districts of the state. It is significant in this connection to note that at the very time when this action was commenced the Legislature had undertaken to clarify the language of subdivision 3 of section 634 of the Penal Code by an amendment thereof which provided that "the sale of salmon legally taken in all other districts or shipped into the state is not prohibited." It is true that the above amendment of this section of the Penal Code, although enacted at said time by the Legislature, had not yet become effective. But, nevertheless, it serves some purpose as indicating the legislative intent with respect to the lawfulness of the possession and sale of salmon lawfully taken in any district or lawfully brought into the state from elsewhere. The appellants herein concede in their final brief herein that the spirit and intent of this latest expression of the legislative will should govern the disposition of the present action. Before leaving the provisions of subdivision 3 of section 634 of the Penal Code, as the same read when the present action was begun, it may be proper to state that while said provision does not specifically refer to salmon lawfully taken or caught upon the high seas, it would be quite unreasonable to infer that it was not within the legislative intent to render lawful the possession and sale of salmon within the state of California wherever lawfully taken or caught. The section in its present form clearly evinces such intent. We look vainly through the many and complex regulations of the fish and game laws for any provision therein which could or should be so construed to render it unlawful to possess or sell anywhere or at any time this edible and perhaps most universally desired and used of all marine products when it appeared that the same had been caught or taken upon the high seas and beyond the three-mile limit of our state boundaries and jurisdiction.

[2] By the foregoing course of reasoning we are brought to consider the final and precise contention of the appellants, which is that notwithstanding the provisions of subdivision 3 of section 634 of the Penal Code, the transportation of salmon from a place where it has been lawfully taken across a particular district during the closed season therein, and at a time when the possession of salmon therein was unlawful, is an offense against the fish and game laws which the fish and game commission, its members and officers, were entitled to prosecute and for the prosecution of which as against these plaintiffs they could not be lawfully enjoined. We look again vainly for any provision of the fish and games laws which expressly renders it unlawful to transport salmon from the place where it has been lawfully taken or caught to another place within the state wherein it may at said time be lawfully possessed and sold. On the contrary, we find that wherever in the fish and game laws the subject of transportation is mentioned it has reference to a transportation which is at the place of inception thereof unlawful, and that nowhere within the provisions of the fish and game laws can any provision be found which renders it unlawful to transport fish or game from the place where lawfully caught and lawfully offered for transportation to the place wherein its possession is also lawful. Sections 627a, 627b, and 632a of said Penal Code have special reference to the transportation of fish and game when the same is undertaken by railroad companies, express companies, transportation companies, or other common carrier, and it is nowhere stated therein or elsewhere that the transportation of these forms of food products from the place where they have been lawfully taken, caught or killed, to another portion of the state wherein they may be lawfully possessed or used is rendered unlawful by the fact that in the course of such transportation such food products may be carried through a fish and game district during the closed season therein.

[3] We therefore conclude that at the time of the commencement of the present action there was no existing statute which prohibited or rendered unlawful the possession or transportation of salmon lawfully taken or caught upon the high seas across any of the fish and game districts referred to in said action in order that the same might be carried to the city of Eureka, wherein such salmon might at said time be lawfully possessed and sold. It follows that the trial court was not in error in the issuance of the preliminary injunction herein. This conclusion renders unnecessary a discussion of the question as to whether the plaintiffs herein have brought themselves within the category of those engaged in interstate commerce.

The judgment is affirmed.

We concur: WASTE, C. J.; SEAWELL, J.; SHENK, J.; CURTIS, J.; LANGDON, J.; PRESTON, J.

211 Cal. 512

ADKINS v. POTTER et al.

Sac. 4286.

Supreme Court of California.

Feb. 13, 1931.

Rehearing Denied March 12, 1931.

1. Fraud 🔑58(1).

In action for deceit inducing exchange of realty, evidence *held* insufficient to support finding that defendant vendor and brother conspired in fraudulent representations made to plaintiff by third defendant.

2. Fraud 🔑50.

If evidence equally reasonably supports inferences of participation and nonparticipation in fraud, court or jury must draw inference favorable to fair dealing.

3. Fraud 🔑58(1).

In action for deceit inducing exchange of realty, evidence *held* insufficient to show relation of principal and agent between defendant vendor and brother and defendant making fraudulent representations.

4. Exchange of property 🔑3(1).
Fraud 🔑12.

False representation land was easily irrigable, stated as existing fact within declarer's knowledge, inducing realty exchange, is basis of action in damages or for rescission.

5. Fraud 🔑23.

Misrepresentation regarding irrigability of land is actionable, though purchaser saw property.

6. Fraud 🔑22(1).

As regards cause of action for misrepresentation regarding irrigability of land, purchaser is not required to make independent investigation.

7. Fraud 🔑64(5).

Question what reliance purchaser placed upon misrepresentation regarding irrigability of land *held* for jury.

In Bank.

Appeal from Superior Court, San Joaquin County; D. M. Young, Judge.

Action by Hugh L. Adkins against G. L. Potter, F. K. Potter, J. B. Wilbur, Edward F. Harris, and the Commercial & Savings Bank of Stockton. Judgment in favor of plaintiff against first three defendants, and first two defendants appeal.

Affirmed as to defendant F. K. Potter, and reversed as to defendant G. L. Potter.

Case & Forslund, Carlton C. Case, Warren H. Atherton, Barry McDermott, Louttit & Marceau, and Louttit & Stewart, all of Stockton, for appellants.

George A. Work, of San Francisco, and A. H. Carpenter, of Stockton, for respondent.

PER CURIAM.

This is an appeal by two of the defendants from a judgment in the plaintiff's favor in an action for damages for fraud and deceit alleged to have been practiced upon the plaintiff by all of the defendants acting in concert, by reason whereof the plaintiff was induced to exchange his real property for real property of one of the defendants. It was also alleged that the defendant vendor made certain false and fraudulent representations which also were the proximate cause of the loss sustained by the plaintiff. The jury returned a verdict in favor of two of the defendants, Edward F. Harris and Commercial & Savings Bank of Stockton, and in favor of the plaintiff in the sum of $4,750 against the remaining defendants, G. L. Potter, F. K. Potter, also designated herein as Kyle Potter, and J. B. Wilbur. From the judgment entered upon this latter verdict, the defendants G. L. Potter and F. K. Potter only appeal. The judgment has become final as to the defendant J. B. Wilbur.

The plaintiff, prior to December 12, 1924, was the owner of a lot improved by a residence and situated in Stockton. Prior to that time the defendant Kyle Potter owned a 42-acre farm situated outside of Stockton. On that date the parties effected an exchange of their properties upon terms which will hereinafter appear. About March, 1926, the farm, upon which in the meantime the plaintiff had moved, was sold under the terms of the deed of trust given by the plaintiff as a part of the purchase price. Thereafter the plaintiff brought this action, with the result above noted.

The main contention of the appellants is that the jury's determination must necessarily be based upon a finding that the three defendants, Wilbur and the two Potters, acted in concert, and that the record is devoid of any evidence of a conspiracy among them. It is also contended that the false representations shown to have been made by Wilbur do not constitute actionable fraud.

The evidence favorable to the plaintiff on the theory of conspiracy and which in the main is the plaintiff's own testimony, is, in substance, as follows:

The defendant G. L. Potter had for a number of years been employed by the defendant Commercial & Savings Bank of Stockton as note teller. The plaintiff banked with the Commercial & Savings Bank of Stockton and had had other business dealings with it. In August, 1924, the plaintiff went to G. L. Potter's window at the bank and stated to Potter that he would like to exchange his equity in his Stockton property for a small piece of farming land the value of which would equal the equity in his Stockton property. G. L. Potter informed him that the bank sometimes had property to exchange, and during the same afternoon they drove out near Escalon to look at a piece containing 40 acres, with which the plaintiff was not satisfied because of its size and because it was not suitable to his purposes. On their return to Stockton, Potter informed the plaintiff that his brother, Kyle Potter, owned a place near Manteca, and that he would arrange for the two to meet and go over the place, to which the plaintiff consented. A few days later G. L. Potter called the plaintiff by telephone and stated that he had arranged for his brother to be in the bank on a certain day and for the plaintiff to come in also. At the appointed time G. L. Potter introduced the plaintiff and Kyle Potter. The latter two then proceeded in G. L. Potter's automobile to Kyle Potter's 42-acre farm, the same piece of property which was eventually exchanged for the plaintiff's city property, and looked it over. They also looked at another place. On the drive back to the city of Stockton they stopped at a nearby farm owned by a Mrs. Howe to inquire concerning her place. While the plaintiff waited in the automobile Kyle Potter talked to Mrs. Howe and reported back that the owner wanted $650 an acre for her property. When the question of price for the Potter place came up, Kyle Potter told the plaintiff that he would leave the price to his brother at the bank. A day or so later the plaintiff drove by the Kyle Potter place, but did not stop to look at it. Two or three days subsequently the plaintiff informed G. L. Potter that he was not interested in his brother's place. Thereupon G. L. Potter gave to the plaintiff a list of three or four places which the plaintiff visited by himself, but he was unable to testify that the bank had any connection with them. After a lapse of five or six weeks during which the subject of the Kyle Potter place was dropped, the plaintiff while at the bank incidentally informed G. L. Potter that he was about to close a deal for the exchange of his property for a 20-acre place on the French Camp road.

A day or two later the defendant Wilbur called upon the plaintiff at his residence. According to the plaintiff's testimony he had not met Wilbur before. Wilbur stated that he was in the bank, meaning the defendant Commercial & Savings Bank of Stockton, and that Ed Harris, who was the president of the bank, had sent him out. The plaintiff had known the defendant Ed Harris for some forty years. Wilbur stated to the plaintiff that he knew of conversations which the plaintiff had had about exchanging his place for some lands owned by the bank, that the bank was foreclosing on a 60-acre place near Lathrop belonging to a man named Duden which he thought could be handled in an exchange for his place. They drove to the place, which Wilbur said was worth $60,000 and could be had for $30,000, but the plaintiff objected that he did not have that amount of money and his place was not worth it. Thereupon Wilbur told the plaintiff that it did not make any difference that he did not have the money; that Ed Harris knew him and thought a lot of him, and that the plaintiff could have any piece of land the bank owned by asking for it; that Harris had stated that the bank would finance him for any piece of property he took over; and suggested that the plaintiff put in his city property at a price of $10,000; that Ed Harris would get behind him for any amount of money that was needed to fix up the place until it was resold; that he (Wilbur) was working for the bank and had been working for it for two years; and that, when the property was resold he would divide equally with the plaintiff his 50 per cent. share of the commission on the resale of which the bank retained the other 50 per cent. There was a $3,000 incumbrance on the plaintiff's place, and Wilbur pointed out that the value of the $7,000 equity would be received by the plaintiff on a resale of the Duden place. The plaintiff at that time "signed up to take the (Duden) place," but he never saw the contract again nor heard anything more concerning it.

The next day Wilbur showed to the plaintiff a 100-acre tract and thereafter six or seven other pieces of property represented by him to be owned by the bank, but each time they went to see one of these places the plaintiff testified that Wilbur drove the plaintiff past Kyle Potter's farm and extolled to him good qualities which he represented that it possessed. During this period, on several occasions when the plaintiff and Wilbur were in the bank together, Wilbur went into G. L. Potter's cage and came out with slips of paper on which the plaintiff had seen G. L. Potter write and then hand to Wilbur. Finally, while returning at one time from Manteca, Wilbur drove by the Potter place again, and this time he suggested to the plaintiff that they go in and look at it, to which the plaintiff rejoined that he had already seen it. Wilbur asked the plaintiff to look at it again, whereupon they drove into the place and looked it over. On the way back Wilbur told the plaintiff that the place was for exchange; that Kyle Potter owed the bank $16,000; that the bank was after G. L. Potter about it, and something had to be done immediately, and asked the plaintiff if he would consider an exchange on the same basis as the Duden place, and that he would get both places to fix up and resell; that the bank had 176 of these places coming in within a year, and that "th " wanted the plaintiff "to fix these places up"; that he would get 25 per cent. of the commission for his services; and that the bank would finance all the places for that purpose. The plaintiff testified that Wilbur's conduct satisfied him that he was working for the bank, and that he believed all of his statements. Wilbur thereupon proposed that the plaintiff exchange his residence property at the $10,000 figure subject to the $3,000 incumbrance, and take the Potter place, which was worth $22,000 at $20,000, and execute a deed of trust for $13,000, the difference being the value of the plaintiff's equity in his Stockton property, at the same time stating that it did not matter whether the Potter place was worth $20,000 or $40,000, or whether the plaintiff ever got a crop from it, since it would be resold within five months at the outside, when the plaintiff would have his $7,000 equity and 25 per cent. of the commission on the resale, and that the bank would lend him $3,000, when the papers were signed to fix up the place for resale.

During this period, which was early in December, Wilbur saw the plaintiff every day. One evening, several days after the first trip to the Potter place, the plaintiff and Wilbur called at the Kyle Potter farm and discussed the possibility of making the exchange. Kyle Potter at that time said he would do something about it in a day or two. Subsequently Kyle Potter called at the plaintiff's residence and both indicated that they were ready to close the deal on the terms proposed. G. L. Potter accompanied Kyle Potter to the plaintiff's residence, where Wilbur also was present, and inquired of plaintiff how he proposed to handle the deal and whether he was satisfied to have it go through on those terms. There is testimony that the plaintiff stated that a brother of his in the East would back him, and the plaintiff admitted that he wrote to his brother, who replied that he would be unable to advance any funds.

Instruments to effect the exchange and create the incumbrance on the Potter place by deed of trust from the plaintiff to Kyle Potter for $13,000 were executed on December 12, 1924. The plaintiff continued to reside on his place in Stockton until January 8, 1925, when he moved on the Potter farm. Subsequent to December 12, the plaintiff went to G. L. Potter's window at the bank and informed him that the deal had been made and that he had come to get the $3,000 to go ahead on the place, as Wilbur had told him. The plaintiff testified that G. L. Potter told him to "lay off the Wilbur stuff"; that he knew nothing about it and wanted nothing to do with it; that the plaintiff thereupon informed Potter that if he could not have the money he would have to call off the deal; and that Potter stated that he would have to get the money somewhere else, that the deal so far as they were concerned was closed, and that they would sue him to compel him to go through with it. Sometime later negotiations were completed whereby the plaintiff gave a crop mortgage and a lien on some stock to secure advances from the bank, aggregating $2,500.

There is further testimony that during the negotiations Kyle Potter represented to the plaintiff that the land was irrigable and that he had "irrigated it all over" himself, that the plaintiff had had some previous limited grain farming experience, but that he made no independent inquiries or investigation concerning the value of the Potter farm or its susceptibility to irrigation. The market value of the residence property of the plaintiff at that time is admitted by the defendants to be $8,500. The figures in evidence as to the market value of the Potter place in December, 1924, range from $10,000 to $18,000.

The plaintiff testified that he did not mention the subject of the conversations had between himself and Wilbur with respect to his prospective employment as an agent of the bank to fix up the bank's property for resale with the bank's financial backing, etc., to any of the other defendants, nor to any one else, and that that subject was not discussed in his presence by any one else, and that he did not make any inquiry of any one at any time before the deal was closed as to Wilbur's authority to make any promises on behalf of the bank, although there is testimony that the plaintiff knew several of the officers and directors of the bank and that he was not prevented from making inquiry.

Other facts are presented by the record, but they are not material to the present discussion. The plaintiff defaulted in the payment of the principal of the note secured by the $13,000 deed of trust, and the farm was purchased at the trustee's sale by Kyle Potter for that sum.

[1, 2] We have carefully considered the contention of the plaintiff that the evidence herein narrated supports the jury's verdict, based on a finding that the two Potters were guilty of conspiring in the fraudulent representations made to the plaintiff by the defendant Wilbur, and we are compelled to the conclusion that the contention is without merit. Without entering into any prolonged analysis of the chain of events disclosed by the record, it must be said that any attempt to discover therein any evidence which creates more than the merest suspicion of concerted action would be futile. The most that can be said is that the evidence sustains the inference that G. L. Potter was instrumental in bringing the plaintiff and Wilbur together as well as the plaintiff and Kyle Potter, but the inference that the Potters were parties to any such fraudulent representations testified to have been made by Wilbur is too remote even for conjecture. Even assuming without deciding that an inference of participation by either of the Potters in the fraudulent conduct of Wilbur could be drawn from the evidence, the inference of nonparticipation on their part is at least equally reasonable and equally susceptible. If either conclusion is equally reasonably inferable, "the one favoring fair dealing and the other favoring corrupt practice, it is the express duty of court or jury to draw the inference favorable to fair dealing." Ryder v. Bamberger, 172 Cal. 791, 799, 800, 158 P. 753, 756. Therefore any responsibility on the part of the Potters for Wilbur's representations must depend on the existence of the relation between them of principal and agent.

[3] It may be assumed that Wilbur was acting as the plaintiff's agent in the transaction. But the record again is devoid of any evidence that the relationship of principal and agent was created between the vendor, Potter, or G. L. Potter and the defendant Wilbur. No commission was paid by the Potters to Wilbur, although Wilbur received a $500 commission from the plaintiff. In fact, the record bears only the inference that Kyle Potter had constituted G. L. Potter as his agent, and the latter appeared to be acting for him throughout.

The foregoing conclusions render it unnecessary to determine whether the representations made by Wilbur constitute actionable deceit.

[4-6] It does become necessary to consider, however, whether the representations made by Kyle Potter that all of his land was easily irrigable because he had irrigated it all over himself may support the judgment as against him. The evidence is uncontradicted that but a small proportion of the land proved to be susceptible of irrigation. That such a material inducement to the contract, when, as here, it is stated as a representation of an existing fact within the knowledge of the declarer, and not merely as a matter of opinion, and which later proves to be false, becomes properly the basis of an action in damages or for rescission cannot be questioned. French v. Freeman, 191 Cal. 579, 586, 217 P. 515; Herdan v. Hanson, 182 Cal. 538, 546, 189 P. 440; Barron Estate Co. v. Woodruff Co., 163 Cal. 561, 573, 126 P. 351, 42 L. R. A. (N. S.) 125; Crandall v. Parks, 152 Cal. 772, 776, 93 P. 1018; Palladine v. Imperial Valley F. L. Ass'n, 65 Cal. App. 727, 737, 225 P. 291; Edge v. Bryan, 47 Cal. App. 312, 315, 190 P. 476. And this is so even though the vendee has seen the property; and the vendee is not required to make independent investigation. French v. Freeman, supra; Teague v. Hall, 171 Cal. 668, 154 P. 851; Palladine v. Imperial Valley F. L. Ass'n, supra.

[7] The appellants contend that nevertheless the plaintiff did not rely on the representations as to irrigability made by Kyle Potter, but relied solely upon the representations made by the defendant Wilbur. But we are unable to perceive any merit in the contention. On the contrary, it may be said that the irrigability of the land would be considered by the vendee as one of the main and controlling elements, even under the fanciful scheme which the plaintiff testified was proposed by Wilbur, as the value of the land on resale would depend largely on its susceptibility to irrigation. The question then as to what reliance was placed by the plaintiff upon Kyle Potter's representations was one for the jury to determine.

Minor points raised by the appeal are without merit or have become unnecessary to consider in view of the foregoing discussion.

The judgment as to the appellant F. K. Potter is affirmed, and as to the appellant G. L. Potter it is reversed.

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211 Cal. 601

TAYLOR et al. v. BUNNELL.

Sac. 4362.

Supreme Court of California.

Feb. 25, 1931.

Rehearing Denied March 26, 1931.

1. Appeal and error ⚿1214.

In action to establish constructive trust, decision of appellate court holding admission of certain evidence prejudicial error *held* not determination of facts upon conflicting evidence precluding trial court from exercising on retrial judicial discretion on evidence properly admissible.

> It could not be assumed that District Court of Appeal deemed it within its proper province to weigh evidence which was substantial on each side and sharply conflicting. Facts in opinion were quite generally discussed, obviously as background for determining that errors of law complained of and found to exist were prejudicial.

2. Appeal and error ⚿1195(3).

Appellate court's holding evidence was sufficient to show certain facts as plaintiff contended was not holding evidence was insufficient to support findings actually made for defendant, as regards law of case.

> While court stated that evidence was sufficient to show defendant was owner of

only life estate in land, such statement was made merely as bearing on question whether errors in admission of evidence were prejudicial to plaintiff, and was not intended to be taken as holding that evidence was insufficient to support findings court below actually made in favor of defendant.

3. Appeal and error ⚿1195(1).

Doctrine of law of case will not be extended beyond exigencies demanding application.

4. Appeal and error ⚿1195(3).

It could not be assumed that appellate court undertook to decide fact questions within exclusive province of trial court.

5. Appeal and error ⚿1011(1).

Determination of facts requiring weighing of conflicting evidence is within exclusive province of trial court subject to power granted to reviewing courts pursuant to Constitution (Code Civ. Proc. § 956a; Const. art. 6, § 4¾, adopted in 1926).

6. Appeal and error ⚿1216.

Erroneous conception of trial court of appellate court's decision as deciding conflicting fact questions required reversal.

Trial court, by misconstruing effect of decision of District Court of Appeal, deprived itself of power and duty to weigh evidence, and hence judgment required reversal.

7. Appeal and error ⚿1195(3).

Discussion on former appeal, assuming as fact disputed parol promise to hold land in trust, *held* obiter and not binding as law of case.

8. Trusts ⚿107.

In action to establish constructive trust, burden remained on plaintiff, after showing confidential relationship, to prove deed, while conveying fee on face, constituted grantee constructive trustee as to remainder.

9. Trusts ⚿44(3).

To prove trust by parol under absolute conveyance, evidence must be clear and convincing.

10. Appeal and error ⚿1012(1).

Whether parol evidence to prove trust under conveyance absolute on face is of required degree is for trial court.

In Bank.

Appeal from Superior Court, Glenn County; J. O. Moncur, Judge.

Action by Alma Taylor and husband against Edwin Bunnell. From a judgment in favor of plaintiffs, defendant appeals.

Reversed.

George R. Freeman, of Willows, Stephen W. Downey, of Sacramento, and Robert L. McWilliams, of San Francisco, for appellant.

Casper A. Ornbaun, of San Francisco, and R. M. Rankin, of Willows, for respondents.

SHENK, J.

This is the second appeal in this case, the first having been decided by the District Court of Appeal, Third Appellate District. Taylor v. Bunnell, 77 Cal. App. 535, 247 P. 240. The facts recited in the opinion on that appeal, supplemented by what is stated herein, are sufficient for the purposes of this appeal.

The action was brought to establish a constructive trust in certain real property deeded to the defendant, Dr. Edwin Bunnell, by his wife, Margaret A. Bunnell, a short time before her death, and which was her separate property. The trust was sought to be established in favor of the plaintiff, Alma Taylor, who is one of several nieces of the decedent. The plaintiffs alleged that the deed to the defendant was delivered by the decedent upon the parol promise of the defendant made at the time to the grantor that he would convey the property to the plaintiff effective upon his death; that the transaction created, not an estate in fee simple in the grantee which the deed purported to convey, but a life estate in the grantee and a remainder in fee to the plaintiff; that the defendant was therefore a constructive trustee of the interest conveyed to him for said purposes, and that shortly after the death of the grantor the defendant repudiated and denied the existence of the alleged trust.

On the first trial of the action the court found in favor of the defendant. On the appeal from the judgment the District Court of Appeal held that the trial court had erred in admitting in evidence certain statements and declarations of the decedent made subsequent to the time of the delivery of the deed to the defendant. The holding was based on the ground that, having parted with her entire interest in the property, the declarations referred to by the District Court of Appeal were not admissible under any exceptions to the rule forbidding the admission in evidence of hearsay declarations. The District Court of Appeal in its opinion expressly referred to and included within its determination all such declarations whether favorable to the plaintiff or to the defendant. That court concluded that the admission of declarations favorable to the defendant was prejudicial to the plaintiff on the record presented and reversed the judgment.

⚿For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

On the second trial the parties stipulated that the record of the testimony taken at the former trial might be offered and received in evidence subject to such objections, withdrawals and motions to strike as the parties might desire to make, each party to have the right to supplement the record by additional testimony. The record now before us is substantially the same as that presented to the trial court on the former trial, with the exception of the matters found by the District Court of Appeal to have been objectionable, which were excluded. On this record the trial court made findings of fact and conclusions of law in favor of the plaintiff and rendered the judgment from which the present appeal is taken. In so acting the court proceeded on the assumption that the judgment of the District Court of Appeal so established the law of the case as to leave the trial court no alternative but to find in favor of the plaintiff and order judgment accordingly. This fact is not and cannot be disputed in view of the record before us. Whether this assumption was erroneous is the crux of this appeal. It is necessary therefore now to determine whether the judgment of the District Court of Appeal established the law of the case not only as to the points of law therein determined, but also as to the facts. On the retrial of the action all parties proceeded on the theory that the law of the case controlled the question of the inadmissibility of the evidence which the reviewing court found to be objectionable and to have been admitted to the prejudice of the appellant.

[1-5] It is the position of the plaintiff that the judgment on the former appeal applied also to the facts. The defendant contends that no such interpretation should be placed on the decision of the District Court of Appeal and that the trial court should have considered itself free to exercise a judicial discretion on the evidence properly admissible.

We think the position of the defendant is well taken. When the transcript of the testimony taken on the former trial, and which is now before us on this appeal, is properly considered, it cannot be assumed that the District Court of Appeal deemed it within its proper province to weigh the evidence, which was substantial on each side and was sharply conflicting. It may be assumed that it would support findings and judgment either way. This must have been readily apparent to the District Court of Appeal, and the fact that that court did not hold the evidence insufficient to support the findings in favor of the defendant is significant. The fact that the court held the evidence "sufficient to show that the defendant is the owner of only a life estate in the land" is not a holding that the evidence was insufficient to support the findings actually made in favor of the defendant. The facts are quite generally discussed in that opinion, obviously as a background for determining that the errors of law complained of and found to exist were prejudicial. As we read the opinion, that court did not decide, as obviously it could not, that the facts were so far undisputed as to constitute the findings unsupported as a matter of law. It did decide, in response to the argument of the defendant, that the errors of law complained of were of material consequence, that such errors were substantial and resulted in prejudice to the plaintiff. Such was the construction of the opinion entertained by this court when the petition for hearing was denied. While the doctrine of the law of the case is a salutary rule of law, its application will not be extended beyond the exigencies which demand its application. Klauber v. San Diego St. Car Co., 98 Cal. 105, 32 P. 876; 5 Cal. Jur. 555. It may be conceded that the decision of the District Court of Appeal is subject to the construction placed upon it by the plaintiff. But it must likewise be conceded, and we think with better reason, that it is subject to the construction placed upon it by the defendant. This is especially true because of the fact that the evidence, apart from that erroneously admitted on behalf of the defendant, was admittedly conflicting and because thereof, and of its substantial character, no question of law was presented thereon for the consideration of the District Court of Appeal, except the question of the prejudicial character of the errors in the light of the whole evidence in the case. It cannot be assumed that the court on the former appeal under these circumstances undertook to decide questions of fact which at that time were within the exclusive province of the trial court to decide. Such is now the law except for the limited extension of power granted to reviewing courts by section 4¾ of article 6 of the Constitution added in November, 1926, and section 956a of the Code of Civil Procedure adopted in 1927 (see Tupman v. Haberkern, 208 Cal. 256, 280 P. 970), and which is not applicable herein.

[6] In view of the misconception of the trial court as to the effect of the decision of the District Court of Appeal, thereby depriving itself of its power and duty to weigh the evidence and pass upon the same on the merits, the judgment must be reversed.

[7-10] One other point requires discussion as a guide to the trial court on the retrial. It must not be assumed that on the former appeal it was decided that, upon the mere showing of a confidential relationship between the grantor and grantee, a prima facie constructive trust was created and imposed on the grantee. The discussion on that point assumed the existence of the parol promise to hold the land in trust. It thus assumed the fact in issue in this case. It is therefore obiter and is not binding as the law of the case. After the showing of the confidential

relationship the burden was still upon the plaintiff to prove that the deed was not what it purported on its face to be; in other words, to prove that the transaction did not create a fee-simple interest in the defendant, but that the execution and delivery of the deed to him under all the facts and circumstances surrounding or pertinent to the transaction constituted the defendant a constructive trustee entitled to a life estate with the remainder in fee held for the benefit of the plaintiff. O'Brien v. O'Brien, 21 Cal. App. 620, 623, 624, 132 P. 612. The rule is also well established that to prove a trust by parol under a conveyance absolute in its terms the evidence must be clear, satisfactory, and convincing. Bollinger v. Bollinger, 154 Cal. 695, 703, 99 P. 196; Harris v. Harris, 136 Cal. 379, 69 P. 23. And whether the evidence in any case is of this character must be determined by the trial court. Sherman v. Sandell, 106 Cal. 373, 39 P. 797. No other points require discussion.

The judgment is reversed.

We concur: WASTE, C. J.; CURTIS, J.; RICHARDS, J.; LANGDON, J.; SEAWELL, J.

PRESTON, J., does not participate in the foregoing decision.

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211 Cal. 461

PETERSON et al. v. BALL et al.

L. A. 10957.

Supreme Court of California.

Jan. 30, 1931.

1. Corporations 🔑346.

Amendment of statute, eliminating liability of directors for excessive debts, did not abate pending proceedings (Civ. Code, §§ 309, 404; St. 1929, p. 1266; Civ. Code, § 309, subd. 2, as amended by St. 1917, p. 657, and section 283, as amended by St. 1929, p. 1261).

> Civ. Code, § 309, prior to amendment in 1929, made directors jointly and severally liable for debts created in excess of subscribed capital stock. St. 1929, p. 1266, amended such section by eliminating this liability and also eliminating saving clause, contained in subdivision 2, as amended by St. 1917, p. 657. Civ. Code, § 404, provides that amendment or repeal of that part of the Civil Code or any section, etc., thereof, shall not take away or impair remedy against any such corporation, its stockholders or officers, for any liability previously incurred. Section 283, as amended by St. 1929, p. 1261, provides that that title applies to every private corporation, unless there be special provision inconsistent therewith.

2. Corporations 🔑337.

Liability imposed on directors for debts in excess of capital stock is punitive so far as directors are concerned (Civ. Code, § 309, prior to amendment by St. 1929, p. 1266).

3. Assignments for benefit of creditors 🔑180.

Voluntary assignment for creditors of all property of every kind and nature, specifically mentioning choses in action, covered causes of action.

4. Assignments 🔑24(1).

Corporation's right of action against directors for creating debts in excess of capital stock is not assignable.

5. Assignments for benefit of creditors 🔑176 (1).

Voluntary assignment for creditors, even though having same effect as statutory assignment, covered only property which assignor could legally convey or assign (Civ. Code, §§ 3449–3473).

6. Assignments for benefit of creditors 🔑180.

Assignee, under corporation's voluntary assignment for creditors, does not represent creditors so as to enforce director's statutory liability (Civ. Code, § 309).

7. Corporations 🔑39, 41.

Statute *held* to reserve plenary power to Legislature to amend or repeal any laws relative to corporations (Civ. Code, § 404).

> Civ. Code, § 404, provides in part that the Legislature may at any time amend or repeal this part, or any title, chapter, article, or section thereof, and dissolve all corporations created hereunder.

8. Corporations 🔑39, 41.

Statute *held* to provide general saving clause preserving remedy against corporation, stockholders, or officers, for liability which had been previously incurred, and which, in absence of such statute, would have been taken away by amendment or repeal of statute creating liability (Civ. Code, § 404).

> Civ. Code, § 404, provides in part that the amendment or repeal of any part of the Civil Code or any sections thereof shall not take away or impair remedy against corporation, its stockholders, or officers, for any liability previously incurred.

9. Corporations 🔑337.

Statute creating general saving clause *held* applicable to rights and liabilities against directors of corporation for creating debts in excess of capital stock (Civ. Code, §§ 309, 404).

10. Statutes 🔑241(2).

"Punitive statute" is one which creates forfeiture or imposes penalty.

[Ed. Note.—For other definitions of "Punitive," see Words and Phrases.]

11. Corporations 🔑450.

Debts created by directors in excess of capital stock of corporation in violation of statute *held* not binding on corporation (Civ. Code, § 309).

In Bank.

Appeal from Superior Court, Los Angeles County; W. D. McConnell, Judge.

Action by Fred E. Peterson and others, trustees by assignment for benefit of creditors of the Bartlett Music Company, against W. F. Ball and others. From a judgment for defendants, plaintiffs appeal.

Affirmed.

Adopting 289 P. 834.

Hugh M. Foster, of Los Angeles, for appellants.

Brobeck, Phleger & Harrison, Winfield Dorn, and Arthur L. Shannon, all of San Francisco, amici curiæ.

Overton, Lyman & Plumb and Irving H. Prince, all of Los Angeles, for respondent E. J. Salyer.

Lawler & Degnan and Barry Brannen, all of Los Angeles, for respondent W. F. Ball.

Anderson & Anderson & Sheahan and Call & Murphey, all of Los Angeles, amici curiæ for respondents.

George W. Fenimore, Chandler, Wright & Ward, and Chandler P. Ward, all of Los Angeles, amici curiæ in support of motion to dismiss.

PER CURIAM.

Both appellants and respondents being desirous that a rehearing be granted in this case, appellants questioning the correctness of the decision in holding that the cause of action was brought to recover a penalty, and hence was not assignable, and respondents questioning the correctness of the conclusion that the action was saved from abatement by the general provision of section 404 of the Civil Code, and amici curiæ joining with respondents in a petition to grant a rehearing, a rehearing was granted in order that further consideration might be given to the respective contentions of the parties. After a thorough re-examination of the questions presented, assisted by the additional authorities supplied by both appellants, respondents, and amici curiæ, we are convinced that the conclusions reached in our former opinion are correct, and therefore adopt it as the opinion in this case.

This action was brought by plaintiffs as trustees by assignment for the benefit of creditors of the Bartlett Music Company, against the defendants as directors of said company, based upon the provisions of section 309 of the Civil Code making directors jointly and severally liable for the full amount of debts created in excess of the subscribed capital stock of the corporation during their administration. The complaint consisted of ten counts, each count of which alleged that the defendants were directors of the Bartlett Music Company, a corporation, and as such directors created an indebtedness in a certain amount which was in excess of the subscribed capital stock. At the trial the defendants moved for judgment on the pleadings, which motion was granted by the court, and judgment was entered for the defendants. From this judgment plaintiffs have appealed.

[1] After the rendition of judgment and the filing of notice of appeal by plaintiffs, section 309 of the Civil Code was amended (Stats. 1929, p. 1266). By said amendment the liability on the part of the directors of a corporation for the creation of debts in excess of subscribed capital stock was completely eliminated therefrom. Defendants, thereupon, filed their motion to dismiss the appeal upon the ground that as the liability of directors under this section was penal and statutory in character, the amendment operated to abate all proceedings pending thereunder. This motion was argued and submitted with the understanding that it would be considered and passed upon at the time of the determination of the case upon its merits. We will first direct our attention to the motion to dismiss.

The case of Moss v. Smith, 171 Cal. 777, 155 P. 90, involves a very similar question. In that case the court held, Justice Henshaw writing the opinion, that the Public Utilities Act (Stats. Ex. Sess. 1911, p. 18) repealed section 309 of the Civil Code in so far as it had application to directors of public utility corporations, and that as the Public Utilities Act contained no clause saving pending litigation or imperfect or inchoate rights the effect of the repeal was to destroy the right of a creditor to further prosecute a pending action to enforce the liability of the directors under section 309 of the Civil Code for such excess indebtedness. This case is quoted with approval in Freeman v. Glenn County Telephone

Co., 184 Cal. 508, 194 P. 705, which involved the question of whether or not the amendment of 1917 to section 309 of the Civil Code operated to cut off the right to enforce the liability of directors under that section for the distribution of the capital stock of the corporation in contravention of the provisions of section 309 prior to 1917. The court in that case, relying upon the authority of Moss v. Smith, supra, held that the amendment operated as a repeal of the statutory liability formerly existing with the result that the repeal operated to destroy the right of action if it occurred at any time prior to final judgment.

An order dismissing the appeal based upon the authority of these two cases, therefore, might well be made, were it not for the fact that there appears to be a general saving clause of actions involving corporations incorporated in the part of the Civil Code dealing with corporations. This is section 404 of the Civil Code, which provides that, "The legislature may at any time amend or repeal this part, or any title, chapter, article, or section thereof, and dissolve all corporations created thereunder; but such amendment or repeal does not, nor does the dissolution of any such corporation, take away or impair any remedy given against any such corporation, its stockholders or officers, for any liability which has been previously incurred."

This section has been in the Code since 1905 and was, therefore, in the Code at the time of the decision of Moss v. Smith, in 1916, and Freeman v. Glenn County Telephone Co., in 1920. Respondents argue that inasmuch as that section did not control in those two cases, it should not control here. The records show, however, that this section was not drawn to the attention of the court in either of these actions. However, had the section been drawn to the attention of the court, it is quite probable that the same result would have been reached in the two cases for the reason that in each case there were present other and controlling factors not present in the instant case. For instance, in Moss v. Smith, it was held by the court that the Public Utilities Act absolutely governed and controlled, as the corporation therein involved was a public utility corporation. Inasmuch as the Public Utilities Act, which, as the court held, contained no clause saving pending litigation, was the sole controlling statute, it follows that section 404 would have no application. In the case of Freeman v. Glenn County Telephone Co., the peculiar phrasing of the saving clause of section 309, as amended in 1917, which expressly excluded from the effects of the saving clause the particular liability of directors upon which that action was based, excluded section 404 from application to that action. Subdivision 2 of section 309, as amended in 1917 (St. 1917, p. 657), reads as follows: "No right, cause of action, or liability now existing or any action or proceeding now pending, shall be affected by this act and such right, cause of action or liability may be enforced and such action or proceeding may be prosecuted in the same manner and with the same effect as if this act had not been passed; excepting only the liability of a director of a corporation heretofore incurred shall not exist in any case where, all of the debts and liabilities of the corporation to creditors having been paid, the capital stock divided, withdrawn, or paid out constituted all of the capital stock of the corporation and the same was paid out, withdrawn, or divided with the consent of all of the stockholders to or among themselves." It is obvious that this is a special provision governing "liabilities heretofore incurred" under special conditions such as existed in that case, and that therefore the general provisions of section 404 were not applicable.

We find no merit in defendants' contention that section 404 is a general provision and that inasmuch as the 1929 Legislature expressly deleted from section 309, as it existed in 1917, the clause saving pending litigation, it affirmatively expressed its intention that pending litigation should be abated. The Legislature in 1929 made drastic and far-reaching changes in title 1 of part 4 of division 1 of the Civil Code, which deals with corporations in general. Some thirty-six sections were amended, twenty-one sections repealed, and five new sections added to this particular division of the Code. In our opinion, it appears reasonable that in the reframing of the Code applicable to corporations, the superfluity of the saving clause in section 309 was noted and the Legislature deeming it no longer necessary, entirely eliminated it. No other explanation appears to us plausible in view of the provisions of section 283 of the Civil Code, as amended in 1929 (St. 1929, p. 1261), which provides that, "The provisions of this title are applicable to every private corporation, unless there be a special provision in relation thereto inconsistent with some provisions of this title, in which case the special provision prevails."

The motion for a dismissal is therefore denied.

The trial court based its order granting judgment on the pleadings in favor of the defendants upon two propositions of law: First, the liability of directors created by section 309 of the Civil Code for creating debts beyond the subscribed capital stock of the corporation is penal in character, and, second, a right of action to enforce this liability is not assignable. If these two propositions are well founded in law, then plaintiffs' complaint failed to state facts sufficient to constitute a cause of action against the defendants, and the motion for judgment on the pleadings in favor of the defendants was properly granted.

[2] Section 309 of the Civi Code was before this court in the case of Moss v. Smith, 171 Cal. 777, 155 P. 90. In that case, after an exhaustive review of the authorities not only in this state but in other jurisdictions, this court concludes (page 786 of 171 Cal., 155 P. 90, 94): "In all of these jurisdictions it is held that a creditors' bill is the proper method to establish rights under like statutes, and in all of them the statutes themselves are declared to be penal in their nature. Indeed, the whole matter may be summed up in the statement that, even if section 309 be remedial so far as the creditor is concerned, it is highly punitive so far as the directors are concerned." The case of Moss v. Smith followed Irvine v. McKeon, 23 Cal. 472, and Moore v. Lent, 81 Cal. 502, 22 P. 875, and in turn has been followed by this court in Talcott Land Co. v. Hershiser, 184 Cal. 748, 761, 195 P. 653. In the state of Montana, where section 309 of the Civil Code of this state has been adopted without change by the Legislature as section 3837 of the Revised Codes of 1907, it was held in the case of Continental Oil Co. v. Montana Concrete Co., 63 Mont. 223, 207 P. 116, 118, "that the liability imposed by section 3837 is purely statutory and is in the nature of a penalty for failure to obey the mandate of the law, and this is in harmony with the decided weight of authority," citing Moss v. Smith, supra, and many other authorities. While the case from the Supreme Court of Montana states that the above rule is in harmony with the weight of authority, we have not been cited to a single authority supporting a contrary rule. We conclude, therefore, that the liability imposed by section 309 against directors who have suffered debts to be created in excess of the subscribed capital stock of the corporation, and which is the basis of the cause of action set out in plaintiffs' complaint, is "highly punitive so far as the directors are concerned."

[3] The next question with which we are concerned is whether a claim, or cause of action arising out of said section 309 in favor of the corporation or in favor of the creditors against the directors, is assignable. The only authority under which the plaintiffs claim the right to institute this action against the defendants is under the assignment made to them by the corporation, the Bartlett Music Company. This assignment is not a statutory assignment for the benefit of creditors for which the Civil Code provides (section 3449), but is one which was executed by the Bartlett Music Company, as party of the first part, to five persons designated as trustees and as parties of the second part, and a number of the creditors of said corporation referred to therein as parties of the third part, and who assented in writing to said assignment. By this assignment, the corporation assigned to said trustees, "All of its property of every kind and nature, wherever situated, both real and personal, including all that stock of merchandise, store furniture and fixtures, book accounts, books, bills receivable, cash in hand, choses in action, insurance policies, and all other personal property of every kind and nature situated in or pertaining to, the stores now owned and conducted by said party of the first part in the City of Los Angeles, California, including any leases and leasehold interest."

The trustees named in said assignment are the plaintiffs herein with the exception of C. W. Jacks and W. C. Lannin, who were selected to take the places of C. H. Mayer and W. H. Munson, named in said assignment as two of said trustees, but who subsequently and before the commencement of this action resigned. It will thus be seen that the plaintiffs take whatever rights they have in the property of the Bartlett Music Company by a voluntary assignment executed in their favor by the corporation and assented to by certain of the creditors. That such an assignment is binding upon the corporation and the creditors assenting thereto is not questioned. Jarvis v. Webber, 196 Cal. 86, 236 P. 138. By this assignment, and as to the corporation and the creditors whose consent was given thereto, the plaintiffs took and thereafter held under the terms of said written assignment, all property of the corporation, which the latter could transfer or assign. We cannot agree with the contention of the defendants that the assignment is not broad enough to cover causes of action. By reference to the language of the assignment, it will be noted that it purports to assign "all property of every kind and nature" belonging to the corporation, including "choses in action." This latter term is sufficiently comprehensive to cover causes of action.

[4] This brings us to the question as to whether the right of action against the directors for creating debts in excess of the subscribed capital stock of the corporation is assignable. If it is, then the plaintiffs acquired such right and may maintain this action for the purpose of enforcing it against the directors. If it is not assignable, then as already indicated this action must fail.

In a recent case before this court we held that the right given by the Usury Act to recover treble interest paid on a usurious note or obligation was not assignable. Primo Degli Esposti v. Rivers Bros. Inc., et al. (Cal. Sup.) 279 P. 423, 424. In that case we said: "The second answer is that the right which the original maker of a usurious note and mortgage is given under section 3 of the Usury Act to recover such interest and to treble the same is in the nature of a statutory penalty, and, under the authorities from other jurisdictions, which we hereby approve, is not assignable. In the case of Pardoe v. Iowa State Bank, 106 Iowa, 345, 76 N. W. 800, a statute containing the same language as that of the usury law of this state was so construed with a quite abundant reference to authorities. A similar ruling was made by the Supreme Court of Kansas upon the terms of a similar statute in the case of Lloyd v. First Nat. Bank, 5 Kan. App. 512, 47 P. 575. See, also, Robinson v. St. Marie's Lumber Co., 34 Idaho, 707, 204 P. 671, 21 R. C. L., p. 2117, § 6; Wilson v. Shrader, 73 W. Va. 105, 79 S. E. 1083, Ann. Cas. 1916D, 886, 893 and notes; Allen v. Petty, 58 S. C. 240, 36 S. E. 586; First State Bank, etc., v. Bank of Jefferson, 112 Okl. 177, 240 P. 311."

In Wilson v. Shrader, 73 W. Va. 105, 79 S. E. 1083, 1084, Ann. Cas. 1916D, 886, the court phrased the question presented on appeal as follows: "If the rights of action for the penalty are not assignable, the declarations are wholly and essentially bad. They set forth no causes of action, the benefit of which the assignee can take. A vital inquiry therefore, is whether penalties under the statute here involved are assignable." The action of Wilson v. Shrader, supra, was instituted for the recovery of a penalty given by section 7 of chapter 79 of the Code of West Virginia against a coterminous landowner for mining coal within five feet of the land of the adjacent owner without his consent in writing. The statute provided for a forfeiture or penalty of $500 in favor of the adjacent owner for each violation of said statute. The declarations set forth three separate and distinct violations of the statute and judgment was asked for $1,500 based upon the facts so alleged. At the time of the alleged violations, one Samuel V. Woods was the owner of the adjacent estate. Before the commencement of the action, he sold the same to the plaintiff, and in his deed to the plaintiff he endeavored to assign his right to recover the amount of the three penalties given under said statute. The opinion of the Supreme Court of West Virginia contains a most thorough citation of authorities upon the question of the assignability of rights of action based upon statutory penalties, and concludes that rights so given by statutes cannot be assigned. The court in that case points out (73 W. Va. 105, 79 S. E. 1086) that: "The reasons that preclude the assignability of mere personal rights, such as actions for slander, assault, and battery, and other pure torts, obviously apply here. Assignability of such claims encourages litigation and strife. The same principle of public policy forbids the conversion of penalties into commodities or assets."

[5] The only answer the plaintiffs make to the contention of the defendants, which appears to be well supported by the authorities just cited, is that the assignment made to them by the corporation and assented to by certain of the creditors, is as valid and binding as if made in compliance with the provisions of sections 3449 to 3473 of the Civil Code, and that such an assignment is valid against the assignor and all creditors assenting to it and serves to vest the assignor's title to all the property absolutely in the assignee, which title can be voided only by a creditor not having assented to the assignment or by a purchaser or encumbrancer in good faith and for value. We may concede that the assignment made by the Bartlett Music Company to the five persons therein named as trustees is as valid and has the same legal effect as an assignment for the benefit of creditors made under the provisions of sections 3449 to 3473 of the Civil Code. In either case, the assignee takes only such property of the assignor as the latter may legally convey or assign. We have pointed out that the right of the corporation to sue the directors for creating debts in excess of the subscribed capital stock is not assignable. Therefore, under the assignment the plaintiffs have no standing in the action.

[6] Appellants make the further contention, however, that the appellants as trustees under such assignment for the benefit of creditors occupy a dual position. They not only succeed to all of the property of the corporation by virtue of the assignment, but they represent and stand in the shoes of the creditors as well, and in this latter capacity they are authorized to maintain this action on behalf of the creditors to recover from the directors upon their liability under section 309 of the Civil Code. It will be noted under the provisions of this Code section as they were previous to the amendment of said section in 1929, that the directors assenting to an excessive indebtedness are made "jointly and severally liable to the corporation, and to the creditors thereof," etc. There is undoubtedly a dual liability created by this section of the Code against the directors, one in behalf of the corporation, and the other in behalf of the creditors. If we understand appellants' position, it is that if they are not able to maintain this action to recover on behalf of the corporation by virtue of said assignment, they are, at least, entitled to institute and prosecute the same to judgment as representatives of the creditors under the terms of said section of the Code making the directors liable to the creditors as well as to the corporation. Unfortunately for the appellants, this court has on two occasions held that the assignee even under a statutory assignment for the benefit of creditors "is merely the representative of his assignor, and does not represent the creditors." Francisco v. Aguirre, 94 Cal. 180, 182, 29 P. 495, 496, First National Bank v. Menke, 128 Cal. 103, 106, 60 P. 675. These cases further hold that an assignee for the benefit of creditors under a statutory assign-

ment from his assignor is not a person upon whom the estate of the assignor devolves by operation of law, but that he takes title to whatever estate he possesses by the voluntary act of the previous owner. In other words, the assignee holds solely under the assignment made by the assignor for the benefit of his creditors. We do not think it can be successfully contended that the appellants, who are made trustees under a nonstatutory assignment, are possessed of any greater powers, or stand in any more favorable position regarding the property of the assignor, than an assignee under a statutory assignment. The latter has some semblance of reason for contending that he holds his position and exercises the powers of his office under a procedure provided by law, while the former has not. His rights depend entirely upon the voluntary acts of the persons who are parties to the assignment.

The appellants appear to lay great stress upon the case of Hornor v. Henning, 93 U. S. 228, 23 L. Ed. 879. In this case the court had under consideration the Act of Congress of May 5, 1870 (16 Stats. at L. 98), one of the provisions of which made the trustees or directors of any corporation organized under the act liable to the creditors for corporate debts created in excess of the capital stock. The court in that case held that an action at law by an individual creditor to recover the amount due him would not lie against the directors, but that the liability of the directors represented a trust fund for the benefit of all the creditors of the corporation so far as it might be necessary to pay their debts. It is pointed out in that case that while the action as brought could not be maintained, the proper proceeding would be one brought in equity by all of the creditors, or by one or more in behalf of all, for the purpose of subjecting this trust fund to the payment of all of the creditors in proportion to the amount of their debts. The same ruling was made in Moss v. Smith, supra. We confess we are unable to discern how this ruling in any way helps the case of appellants. It may, however, indicate a procedure under which the creditors of a corporation may avail themselves in establishing their rights under the provisions of section 309 of the Civil Code prior to its amendment in 1929. But it cannot have any determining effect upon the action now before us.

Our conclusion in this matter is that the plaintiffs have no right to maintain this action and that the trial court acted properly and legally in granting the motion of defendants for judgment on the pleadings.

In the original briefs filed in support of their motion to dismiss the appeal, it was apparently conceded by respondents that section 404, Civil Code, was a general saving clause, the respondents relying upon the argument that the Legislature in the 1929 amendment, by deleting the specific saving clause from section 309, Civil Code, had by affirmative action shown that it did not intend for the general saving clause of section 404, Civil Code, to apply to an action brought to enforce the liability of directors for the debts of the corporation created in excess of its subscribed capital stock theretofore imposed by section 309 of the Civil Code, but eliminated by the 1929 amendment. The court did not agree with this contention, being of the opinion that the clause saving pending causes of action was deleted from section 309, Civil Code, not for the purpose of retroactively cutting off pre-existing rights, but because, in view of the presence of section 404 in the Code, its superfluity was recognized.

After the filing of our former opinion, amici curiæ joined with respondents in petitioning the court for a rehearing upon this phase of the case urging for the first time that section 404, Civil Code, was not a general saving clause. It is argued, in this behalf, that the latter clause of section 404 is governed and controlled by the first clause which must be read in the conjunctive that "the legislature may at any time amend or repeal this part, or any title, chapter, article, or section thereof, and dissolve all corporations created thereunder" and that therefore only in the event of the dissolution of a corporation by legislative act does the latter provision of section 404, Civil Code, operate to preserve existing rights and liabilities. As amici curiæ read and understand section 404, Civil Code, its sole purpose and intent is to authorize the Legislature to dissolve any California corporation by repealing or amending any part of the law relative to corporations and incidental to such dissolution to provide that an amendment or repeal which operates to dissolve a corporation will not operate to impair any remedy against the corporation or its officers for liabilities theretofore existing. In an attempt to prove that this is the correct interpretation, amici curiæ have traced the legislative history of the enactment of section 404, Civil Code. It appears that section 404, Civil Code, is identical in language with section 384, Civil Code, which latter section was repealed in 1907 (St. 1907, p. 578) for the reason that section 384, Civil Code, was not in the proper place in the Code and section 404 was. The repealing act contained a proviso that the rights acquired under section 384 should not be lost but continue in force under the provisions of section 404. It also appears that section 384, Civil Code, is based upon section 31, article 4 of the California State Constitution of 1849 (which section is preserved in somewhat different language in section 1 of article 12 of the California Constitution of 1879), which reads as follows: "Corporations may be formed under general laws, but shall not be created by special act except for municipal purposes. All general laws and special acts passed pursuant to this section may be altered from time to time, or repealed." The code commissioners in a note to section 384, Civil Code, after quoting that provision of the Constitution, say: "Under that provision of the tenth section of the first article of the Constitution of the United States which prohibits a state from enacting any law 'impairing the obligation of contracts' it has been settled that the charter of a private corporation is an executed contract between the government and the corporators, and that the legislature cannot repeal, impair, or alter it against the consent or without the default of the corporation judicially ascertained and determined. (* * * Dartmouth College v. Woodward, 4 Wheat. 518 [4 L. Ed. 629]. * * *) In consequence of this construction, it has become usual for legislatures in acts of incorporation, either to make the duration of the charter conditional, or to reserve the power to alter, modify, or repeal the charter at pleasure; 'and as the power of modification and repeal is thus made a qualifying part of the grant of franchises, the exercise of that power cannot of course impair the obligation of the grant.' * * * Section 384 was inserted in this code out of an abundance of caution, and not because it was deemed necessary, for there can be but little doubt that the constitutional provision quoted at the head of this note enters into and becomes a part of the contract, thereby reserving to the legislature the right to repeal, impair, or alter any law relative to the formation of corporations, even though the result reached would be the dissolution of every corporation organized within the state." Civ. Code of Calif., Ann. (1st Ed.) vol. 1, p. 121. It is apparent from the foregoing discussion that the original purpose of section 384, Civil Code, and hence of section 404, Civil Code, which is identical in language, was to neutralize the effect of the Dartmouth College doctrine and to preserve in the Legislature of the state the power to control all corporations by reserving to the Legislature the power to alter, amend, or repeal any law relative to corporations, "even though the result reached would be the dissolution of every corporation organized within the state."

[7, 8] Conceding this to be the purpose of the enactment of section 404, Civil Code, nevertheless we do not believe that section 404 is susceptible of the construction claimed for it by amici curiæ. Amici curiæ claim that rights and liabilities are preserved by the latter clause of section 404 only in the event of the dissolution of a corporation. If the first clause of section 404 is read in the conjunctive, it would follow that the power reserved to the Legislature was to dissolve all corporations by amending or repealing any section of the Code relative to corporations. It is obvious, we think, that the power reserved to the Legislature need not go to the extent of dissolving a corporation, but that any exercise of its power which falls short of that result is equally permissible. The power only to dissolve a corporation without the power to alter or modify its rights or liabilities, or to change the rules and regulations applicable thereto, would be a meager power, and fall far short of the complete control over corporations which concededly section 404, Civil Code, was enacted to preserve to the state Legislature.

If the first clause of section 404, Civil Code, be read, as we think it must, to reserve to the Legislature, not only the power to dissolve any and all corporations in the state but to amend any part, title, chapter, article, or section of the Code relative to corporations regardless of whether such action does or does not result in dissolution, it follows logically that the latter part of section 404 is a general saving clause providing for the preservation of any remedy given against any corporation, its stockholders, or officers, for any liability which had been previously incurred, and which, in the absence of such provision, would be taken away or impaired by such amendment or repeal. In short, the latter clause of section 404, Civil Code, is as broad in its scope as the first clause of section 404, and, inasmuch as the first clause reserves plenary power to the Legislature to amend or repeal any laws relative to corporations, the latter clause preserves all rights and liabilities affected by such amendment or repeal.

[9] Under the decision of People v. McNulty, 93 Cal. 427, 26 P. 597, 29 P. 61, it was held that a general saving clause in the general body of the law is as effective as a special saving clause in the particular section. It is plain from the language of section 404, Civil Code, that it is intended to apply to the amendment or repeal of any part of the Civil Code relative to corporations, and hence to the rights and liabilities arising under section 309 of the Civil Code.

The argument is reiterated upon rehearing that in the 1929 amendment the saving clause of section 309 was expressly omitted with the legislative intent of terminating all rights previously acquired but not carried to final judgment. As before noted, this court was of the opinion that the saving clause of section 309 was omitted because its superfluity was apparent. Confirmation of our opinion is to be found in the comment of Henry Winthrop Ballantine in his book entitled, "California Corporation Amendments (1929)" upon section 309 of the Civil Code. Mr. Ballantine who served in the capacity of draftsman of the committee of the state bar of California on revision of the corporation law, and who was instrumental in preparing the drafts of the amendments enacted by the Legislature in

1929, commenting upon the 1929 amendment to section 309, says:

> "The saving clause as to causes of action or liability now existing or actions now pending against directors was omitted. Under the decision of Moss v. Smith, 171 Cal. 777 [155 P. 90], and Freeman v. Glenn County Telephone Co., 184 Cal. 508 [194 P. 705], it might seem that the amendment would operate to terminate the liability of directors for unlawful dividends even though they were declared and paid long prior to the amendment as well as liability for other violations of section 309, except in the cases covered by the amendment.
>
> "The cases just cited, however, seem erroneous in that they overlook the general saving clause contained in section 404 which provides that an amendment or repeal of any section of the code does not take away or impair any remedy given against any corporation, its stockholders or officers for any liability which has been previously incurred. Under the decision of People v. McNulty, 93 Cal. 427 [26 P. 597, 29 P. 61], it is held that a general saving clause like section 329 of the Political Code, in the general body of the law, is as effective as a special saving clause in the particular section. It would seem accordingly that the Supreme Court in the future, if its attention be called to this section, would follow the code rather than the prior decisions which overlooked the code section."

As pointed out in our former opinion, special circumstances were present in both the case of Moss v. Smith, supra, and Freeman v. Glenn County Telephone Co., supra, which rendered section 404, Civil Code, inapplicable to these actions. No such factors are present in the instant case.

We are, therefore of the opinion that the motion to dismiss the appeal upon the ground that the amendment of 1929, which eliminated the liability on the part of directors for the creation of debts in excess of subscribed capital stock, operated to abate all proceedings thereunder, was in the first instance properly denied.

The additional authorities furnished us by appellants, questioning the correctness of the conclusion that section 309 imposes a liability penal in its nature and hence unassignable, are of little value. The case of Illinois State Bank v. Queen City Quarry Co., 203 Ill. App. 176, which is merely an abstract of a decision, and which holds that the liability of directors under an Illinois law similar to section 309 is that of a surety, and the case of Swan v. Burnham, 70 N. H. 580, 49 A. 93, which holds that "the effect of these enactments is to impose the liability of sureties for the corporation upon the directors, to the amount of such excess, as a penalty for a violation of these provisions," (italics ours) are cited as proof that the liability imposed by section 309 is a contractual liability. These cases are from other jurisdictions and are not controlling, particularly in view of the fact that it is now settled beyond controversy by the case of Moss v. Smith, supra, and the later case of Talcott Land Co. v. Hershiser, 184 Cal. 748, 761, 763, 195 P. 653, that in California the liability imposed by section 309, Civil Code, is penal in its nature. Moreover, it is to be noted that the case of Swan v. Burnham, supra, expressly states that the liability of a surety is imposed as a penalty. Thompson on Corporations, vol. 2 (3d Ed.) § 1439, page 994, is also cited. An examination of this section and the preceding ones discloses the fact that the section quoted by appellants has reference to the minority view. The introduction to the section that "some courts have held and some able law writers have insisted * * *" clearly indicates this.

Appellants cite no cases in this jurisdiction directly holding said liability to be contractual—indeed, in view of Moss v. Smith, supra, and Talcott Land Co. v. Hershiser, supra, none could be cited. But appellants cite cases which hold the liability of directors under other statutes to be contractual, and argue that the liabilities involved in these cited cases are similar to the liability imposed by section 309 of the Civil Code, and thereby reach the conclusion that the liability imposed by section 309 Civil Code, is contractual, not penal. Winchester v. Howard, 136 Cal. 432, 64 P. 692, 69 P. 77, 89 Am. St. Rep. 153; Brown v. Major (C. C. A.) 164 F. 673; In re Post (D. C. N. Y.) 12 F.(2d) 941. The two former cases deal with the liability of directors under section 3, article 12, of the Constitution, for moneys embezzled or misappropriated by the officers of a corporation or joint-stock association. The New York case deals with a similar liability under the New York law for wrongful misapplication of funds by a director of a corporation. It is true that the state court in Winchester v. Howard, supra, and the federal court in Brown v. Major, supra, following the decision of Winchester v. Howard, held the liability imposed under that section and article of the Constitution to be contractual. However, evidently this same argument was advanced in Moss v. Smith, supra, and there disposed of, for the court there, after definitely holding the liability under section 309, Civil Code, to be penal, for the reason that under section 309 there was no element of compensation for loss, said: "Nothing in Winchester v. Howard [136 Cal. 441, 89 Am. St. Rep. 153, 64 P. 692, 69 P. 77], supra, is in conflict with this; in the first place, because the directors, under section 3, art. 12, of the Constitution, which section was the foundation of the action, are liable solely for loss sustained by embezzlement and misappropriation—a liability involving loss, and thus entirely different in character from that which appellants contend is imposed by section 309."

In re La Jolla Lumber & Mill Co., 243 F. 1004, decided by the District Court, Southern District of California, holding that the liability of a director under 309 could only be enforced by a bill in equity, is cited, apparently to present the point that the remedy being in equity was not a penalty for the reason that an equity court will not enforce forfeitures and penalties. This argument was likewise advanced and answered in the leading case of Moss v. Smith, the court there saying: "The fact that the action may be treated in the nature of a creditors' bill brought on behalf of plaintiff creditor and all others, and that it thus addresses itself to the equitable side of the court, has not the slightest weight in determining the nature of the statute. and no more weight has the invocation of the familiar maxim that equity abhors penalties and forfeitures. The question might have been of consequence in the older administration of jurisprudence where the courts of law and equity were wholly separated, but it ceases to be of consequence under our system, and even under the English system since its Reformed Judicature Act has come into effect. All redress and relief is administered in one forum and by one judicial officer. If as chancellor he revolts at enforcing a legal penalty, he will doff his chancellor's robes and lay aside his great seal, and donning the judicial ermine will enforce the penalty * * *, resuming the regalia of his chancellorship for the purpose of making equitable disposition of the fund." The case of In re La Jolla Lumber & Mill Co., supra, is similar in its holding to Hornor v. Henning, discussed in our first opinion. So likewise is the case of United States Farm L. Co. v. Bennett, 55 Cal. App. 299, 203 P. 794, in which the Supreme Court in denying the petition for a hearing held that the decision of the District Court of Appeal could not be construed to mean that a single creditor could sue a director in a simple action for a money judgment, intimating that a bill in equity for the benefit of all the creditors was the proper remedy.

At first glance, some slight support is apparently afforded to appellants by the holding in Southern Cal. Home Builders v. Young, 45 Cal. App. 679, 188 P. 586. This case involved the unlawful payment of dividends as prohibited under section 309 of the Civil Code. However, it appears upon examination that the holding was to the effect that, even if section 309 be conceded to be remedial and damages must therefore be shown actual damages in the amount that the capital stock was depleted by unlawful dividends had been shown. The proposition that section 309 was remedial being, therefore, only a tentative assumption for the purpose of argument in that case, the decision therein is not actual authority to that effect.

Appellants point out that in the case of United States Farm Land Co. v. Bennett, supra, plaintiff secured judgment against defendant on account of goods alleged to have been delivered "by plaintiff and its assignors," and that in Colcord et al. v. Granzow et al., 137 Okl. 194, 278 P. 654, it was held that the right to sue under section 5336 (similar to section 309) passed to the assignees of notes held by certain creditors of a corporation prior to its dissolution as an incident to the debts. Appellants argue that, if the assignees of creditors may sue, the assignees of the corporation should be entitled to sue. Nothing contained in our former opinion is at variance with the conclusion of these two cases that the assignment of a debt carries with it the right to enforce the statutory liability of a director imposed as a penalty. That question was not then and is not now before us, and we expressly refrain from expressing any opinion thereon. In the instant case, the alleged assignment to the trustees was not an assignment of a debt owing to the corporation which might, perhaps, carry with it as an incident thereof the right to enforce the statutory liability of the directors, but was an attempt to assign the right to sue the directors upon the statutory liability. Nothing contained in either of the cited cases has caused us to change our former opinion that the naked right to sue upon the statutory penalty is not assignable by the corporation.

[10, 11] An amicus curiæ makes the further contention that a distinction has been made both by statute and decisions of courts between the liability imposed upon directors creating excessive corporate debts and those incurred by the directors in the commission of other acts enumerated in section 309 of the Civil Code resulting in the impairment of the capital stock of the corporation, such as declaring of dividends from sources other than surplus profits, and that, while the action of the directors declaring dividends contrary to the provisions of this section of the Code is expressly made a crime by a separate section of the Penal Code (section 560), and would, therefore, be void as to the corporation, no such drastic legislation is to be found against the action of directors creating excessive debts, but, on the other hand, such debts, though created in violation of the statute, are binding upon the corporation. Underhill v. Santa Barbara, etc., Co., 93 Cal. 300, 28 P. 1049. It is true that the legislation in one instance is more extreme in its effect than it is in the other. That the Legislature was of the opinion that the danger which might accrue to corporate property by reason of directors creating excessive debts was less real or serious than that which might arise from their acts in impairing the capital stock of a corporation is apparent from the amendment to section 309 of the Civil Code in the year 1929, which in effect wholly abolishes the liability of directors for their future acts in creating excessive debts while the provisions of said section in other respects were practically left unchanged. As the Code section now reads, as already stated, no action like the present one will lie either at the instance of the corporation, or of the creditors or stockholders. But the distinction which amicus curiæ points out is not the distinction which marks the dividing line between a punitive statute and one that is not. A punitive statute is one which creates a forfeiture or imposes a penalty. "What is meant by a statutory penalty was defined in Los Angeles County v. Ballerino, 99 Cal. 593, 32 P. 581, 34 P. 329, to be: 'One which an individual is allowed to recover against a wrongdoer, as a satisfaction for the wrong or injury suffered, and without reference to the actual damage sustained.'" Moss v. Smith, supra, page 783 of 171 Cal., 155 P. 90, 92. This court in that same case held that the liability against directors for the violation of section 309 in creating excessive debts came within the above definition and could be enforced against the directors without reference to the loss sustained by the corporation as a result of the action of the directors in illegally creating debts in excess of the capital stock. This, therefore, must be held to be the deciding characteristic of a statutory penalty, and the feature which distinguishes it from a mere contractual liability. We are, therefore, unable to agree with amicus curiæ in the above contention.

Judgment is affirmed.

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211 Cal. 779

Fred E. PETERSON, A. Getty, W. C. Lannin, H. Jackson, C. W. Jack, Trustees by Assignment for the Benefit of the Creditors of the Bartlett Music Company (a Corporation), Plaintiffs and Appellants, v. W. F. BALL, E. E. Searles, J. F. Faulkner and E. J. Salyer, Defendants and Respondents.

L. A. 10958.

Supreme Court of California.

Jan. 30, 1931.

In Bank.

Appeal by plaintiffs from a judgment of the Superior Court of Los Angeles County, W. D. McConnell, Judge, in an action against corporation directors for debts created in excess of subscribed capital stock. Affirmed.

Hugh M. Foster, of Los Angeles, for appellants.

Overton, Lyman & Plumb and Irving H. Prince, all of Los Angeles, for respondent E. J. Salyer.

Lawler & Degnan and Barry Brennen, all of Los Angeles, for respondent W. F. Ball.

Pacht, Pelton & Warne and A. B. Nathanson, all of Los Angeles, for respondent E. E. Searles.

Chandler, Wright & Ward and George W. Fenimore, all of Los Angeles, amici curiæ in support of motion to dismiss.

PER CURIAM.

In this action the same questions are presented as were before the court in the case of Fred E. Peterson et al. v. W. F. Ball et al., L. R. No. 10957, 296 P. 291, this day decided. The parties are practically the same in each action and the only difference in the two relates to the amount of the indebtedness claimed to have been illegally incurred. The same procedure was had in this action as was taken in the prior action, L. A. No. 10957, and resulted in a judgment on the pleadings in favor of the defendants herein.

On the authority of the prior action, the judgment herein is affirmed.

HESS et ux. v. COUNTRY CLUB PARK et al.

Civ. 7720.★

District Court of Appeal, First District, Division 2, California.

Feb. 20, 1931.

Rehearing Denied March 21, 1931. Hearing Granted by Supreme Court April 20, 1931.

1. Action 🔑6.

Action lies to annul, as well as enforce, building restrictions in deeds (Code Civ. Proc. §§ 1060–1062).

2. Action 🔑6.

Action to annul building restrictions in deeds *held* authorized as against claim that there was no actual controversy, in view of record and contentions of defendant's counsel on appeal (Code Civ. Proc. §§ 1060–1062).

3. Action 🔑6.

Evidence in action to annul building restrictions in deeds *held* to justify finding that it would be unjust, oppressive, and inequitable to give effect thereto.

There was testimony that plaintiff's lot was worth about $40,000 without restrictions against erection of any buildings except residences; that it was on business

★Superseded by opinion of Supreme Court 2 P.(2d) 782.

street and could be used practically for business purposes only; that business building thereon would increase value of every lot in tract, and would not damage residences therein; that taxes on such lot were between $300 and $400 per year; and that street lighting assessments were $160 per year. The parties stipulated that the lot had been placed by city zoning ordinance in district wherein only business buildings could be erected, and exhibits showed that there were business places in both directions therefrom on same street.

4. Covenants ⚷72

Equity courts may annul building restrictions in deeds when changes in use of property in neighborhood render them unjust, oppressive, and inequitable.

Appeal from Superior Court, Los Angeles County; Charles C. Montgomery, Judge.

Action by Arthur C. Hess and wife against the Country Club Park, a corporation, in which Leona Molony and others filed a complaint in intervention and were made parties defendant. Judgment for plaintiffs, and intervening defendants appeal.

Affirmed.

Fred N. Arnoldy, of Los Angeles, for appellants.

William Ellis Lady, of Los Angeles, for respondents.

BURROUGHS, Justice pro tem.

[1, 2] The first cause of action stated in the complaint is in the ordinary form to quiet plaintiffs' title to lot 31 of tract No. 1600, in the city of Los Angeles. The second cause of action has for its object the annulment of certain building restrictions contained in the deeds, through which plaintiffs deraign their title to said parcel of land. The action was originally brought against the defendant Country Club Park, a corporation. Thereafter a complaint in intervention was filed by the remaining defendants. The pleadings were then amended and said interveners were made parties defendant. The trial court granted the relief prayed for by the plaintiffs. So far as the defendant Country Club Park, a corporation, is concerned, the judgment has become final. All the other defendants have appealed. Appellants contend that the relief asked in this case is not available to the plaintiffs, but applies only to cases where it is sought to enforce restrictions against the use of property. This contention is disposed of in Strong v. Hancock, 201 Cal. 530, 258 P. 60, where it is held that, since the enactment in 1921 of sections 1060, 1061, and 1062, of the Code of Civil Procedure, relating to declaratory relief, actions such as this one may be maintained. Appellants further claim that even under the foregoing sections there is no "actual controversy" before the court. We think this claim is refuted by the record in the case as well as by the earnestness with which counsel for appellants is endeavoring to maintain the position that the restrictions against the land are binding and enforceable.

[3, 4] On January 23, 1912, the defendant Country Club Park, a corporation, was the owner of all the lands embraced in the tract No. 1600, hereinabove referred to. On said date, the corporation, having previously subdivided said tract of land, filed a subdivision map thereof, as provided by law. On May 31, 1916, said corporation conveyed to one Edwin B. Sword lot No. 31 of said tract, and through mesne conveyances respondents are now the owners of said lot. Each one of the appellants owns a lot in said tract No. 1600. In the several deeds, by which both the appellants and respondents obtained their respective titles, there is inserted certain restrictions as to the purposes for which said lots may be used. So far as necessary to a decision of the questions involved on this appeal, it is sufficient to say that the use is limited to residences only, to cost not less than $6,000, and to be located within certain lines. There are provisos attached to said conditions and restrictions by which, if there be any violation thereof by the grantee or his successors in interest, the premises revert to the grantor, its successors or assigns; "and as to the owner of and the successors in interest of any owner of any other lot or lots in said tract, all and singular said conditions are and shall be covenants running with the land for the benefit of the grantor herein and for the benefit of each and all of the lots in said tract, and of the owners of such lots in said tract and their respective successors in interest, and the breach of any of said covenants and conditions or the continuance of any such breach may be enjoined, abated or remedied by appropriate proceedings by any or either of such owners, their heirs, assigns, or successors in interest." It is also provided that the restrictions are of no effect after January 1, 1935; that the restrictions and conditions subsequent and the date of termination thereof "apply to and bind only the property hereinabove described and hereby conveyed and the owners thereof, and the grantor expressly reserves the right to make and/or apply the same or varying or different restrictions and conditions subsequent or to omit the same entirely, respecting other lots in said tract, and/or property owned by the grantor." The court found, among other matters, that since the execution and delivery of the said deeds and conveyances, the conditions in the neighborhood where said tract is situated have changed, and that the value of said lots have greatly increased; that said property, and

particularly said lot 31, is in a section devoted exclusively to and essentially useful for business purposes; that the plaintiffs are ready, able, and willing to improve said lot for business purposes, and that the improvement thereof will not injure or damage the property of the defendants or any thereof, but on the contrary such improvements will make the property in that vicinity more valuable; that the conditions and restrictions are no longer beneficial for the purposes for which they were placed on said property, and that they have now become oppressive and inequitable, and to enforce them would be inequitable and unjust. The exhibits in the case show that said lot 31 is situated on the northeast corner of the intersection of Pico street and Wilton place; that the appealing defendants own lots on Wilshire place north of said lot 31, but not facing on Pico street. Charles B. Felts testified that he has been sales manager for the defendant Country Club Park for about thirteen years last past; that the last residence on said tract to be erected on Pico street was about eight years prior to October, 1927, the time of the trial; that lot 31 sold in 1912 for $4,000, and at the time of the trial, without the restrictions, had a value of about $40,000, and that other property there has a similar value; that Wilton place has many valuable homes. It was stipulated by the parties that Pico street is a business street from this tract on east. W. C. Skaggs testified that Pico street is a business street, and that the only practical purpose for which lot 31 could be used was for business purposes; a business house on this lot would increase the value of every lot in the tract; it would not harm the tract. F. S. Kadletz testified that his occupation was a real estate appraiser; that he had a large experience in that line of work for the city and county and also for individuals; that he was familiar with the Country Club Park tract of land and with said lot 31; that said lot was only suitable for business purposes; that no other property in the tract would be damaged if it were used for business purposes; that it would not damage the residences in this tract to erect a store building on said lot, because the character of the property as business property was already fixed. The plaintiff Arthur C. Hess testified that the taxes on said property were between $300 and $400 per year; that the assessments for the street lighting system was $360 per year; that the property was not desirable as residence property. It was stipulated that in 1912, when the tract was subdivided, the immediate neighborhood in which lot 31 and the adjoining property was situated was strictly residential district; that at that time Pico street had a width of 50 feet and since then has been widened to 80 feet; that since 1921 said lot and the lot immediately adjoining it to the north and for two lots deep on each side of Pico street from east of Western avenue westerly to the city limits has by an ordinance adopted by the city council of the city of Los Angeles been placed in a zoning district; that by virtue of said ordinance the only class of buildings that may be erected in said district, which includes said lot 31, are certain defined places of business. The exhibits attached to the transcript show that to the east of said lot on Pico street are many business places, to the west of said lot on said Pico street there are a number of business houses, such as a drug store, market, barber shop, oil stations, etc. It is true that none of these buildings is within said tract No. 1600, and that there have been no violations of the building restrictions in said tract. It further appears from the evidence that the said tract contains a total of 165 lots; that the defendant Country Club Park, a corporation, still owns 14 lots; that three lots have been sold by the last-named defendant without any restrictions contained in the deeds; that said tract contains 75 lots, the restrictions upon which expired January 1, 1925; leaving a total of 73 lots upon which, under the covenants contained in the deeds, the restrictions expire on January 1, 1935.

It also appears that there has never been filed in the office of the county recorder of the county of Los Angeles any statement of a common plan of restriction for said tract. We are of the opinion that under the evidence above set forth the trial court was right in declaring that, as to said lot No. 31, it would be unjust, oppressive, and inequitable to give effect to the said restrictions. That courts of equity may under such conditions declare the same null and void is unquestioned. Werner v. Graham, 181 Cal. 174, 183 P. 945; Downs v. Kroeger, 200 Cal. 743, 254 P. 1101; Strong v. Hancock, 201 Cal. 530, 258 P. 60. In Downs v. Kroeger, supra, the portion of the decision of the court applicable to this class of cases is summed up in the syllabus as follows: "Where a tract of land was subdivided and laid out for residential purposes and restrictive covenants running with the land were inserted in all deeds by which parts of said tract were conveyed, prohibiting until a certain time the construction of any structure but residences in the restricted area, a change in the uses to which the property in the neighborhood is being put of such nature that it is no longer residence property renders it unjust, oppressive, and inequitable to give effect to the restrictions, if such change has resulted from causes other than their breach."

In the case last cited it is said: "The findings of the court below under the evidence are binding upon us and we have simply adhered to the well-known rule of law governing us in such a situation."

Many additional cases are cited by both parties to this appeal. However, the cases above cited express the law of this state concerning this character of action, and we deem it unnecessary to further extend this opinion except to add that, the court having found upon substantial evidence that the uses to which the property in the neighborhood where the tract of land is situated have been put has changed this lot from a residence to a business property, it would be "unjust, oppressive and inequitable" to deny to the respondent the right to use said lot No. 31 for business or other lawful purposes.

The judgment is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

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112 Cal. App. 106

ROBINSON v. SOUTHLAND PRODUCE CO. et al.

Civ. 6504.

District Court of Appeal, Second District, Division 2, California.

Feb. 20, 1931.

Rehearing Denied March 21, 1931.

1. Dismissal and nonsuit ⚷81(2).

Where trial court enters order of dismissal after regular submission of motion, court's power is exhausted (Code Civ. Proc. § 581, subds. 4, 5).

2. Dismissal and nonsuit ⚷81(2).

Where court denied permission to amend complaint by inserting word "partnership" in place of "corporation" and dismissed action, court could not vacate order of dismissal although erroneous (Code Civ. Proc. § 581, subds. 4, 5).

Appeal from Superior Court, Los Angeles County; Charles C. Montgomery, Judge.

Action by Mrs. Pearl E. Robinson against the Southland Produce Company and another. From an order vacating a previous order dismissing the action and also from an order granting plaintiff permission to file an amended complaint, defendants appeal.

Order reversed.

Kidd, Schell & Delamer, of Los Angeles, for appellants.

John C. Miles, of Los Angeles, for respondent.

ARCHBALD, Justice pro tem.

This is an appeal by defendants Estrin and Garbus from an order made by the lower court vacating its previous order dismissing the action and also from the order granting plaintiff permission to file an amended complaint. The appeal on the ground last mentioned has been dismissed. 98 Cal. App. 365, 276 P. 1036.

Plaintiff filed her complaint in the court below claiming damages for alleged personal injuries against the Southland Produce Company and the Liberty Produce Company, corporations. An answer was filed by Liberty Produce Company, "a partnership," and "Nick Estrin and Phillip Garbus, doing business under the firm name and style of Liberty Produce Company," in which, among other denials, was one denying the alleged corporate existence of the Liberty Produce Company. At the trial plaintiff dismissed as to the Southland Produce Company, and, calling the court's attention to the answer of defendants, asked leave to amend by striking out the word "corporation" and inserting instead the word "partnership." This was objected to by counsel for the answering defendants, and, after some argument and introduction of evidence on the question of ownership of the truck alleged to have collided with plaintiff, the following occurred:

"The Court: You are not prepared to prove that this is a corporation?

"Mr. Graves: We take their denial that this is a copartnership and rest on their statement that it is a partnership and ask to amend, without going into the details. We took their statement and asked to amend by inserting the word 'partnership' in the place of 'corporation,' and we hold that that is not an amendment which does the defendants any injustice, and therefore it is within the allowance of our code.

"The Court: I will have to deny the motion.

"Mr. Claassen: Your Honor, I move for a dismissal.

"The Court: I will have to grant the motion."

A minute order was then made pursuant thereto dismissing the action. About twelve days thereafter plaintiff's attorney filed a notice of motion to set aside said order of dismissal on the grounds of "inadvertence and by reason of an oversight on the part of said court," and that the granting of the motion "was in excess of the jurisdiction of the court," as well as other grounds not material here, and at the same time filed a notice of motion for permission to file an amended complaint. The motions came on for hearing December 26, 1928, and both were granted, whereupon defendants appealed.

Appellants contend that the court acted beyond its jurisdiction in vacating the order of dismissal. Respondent urges that the court may of its own motion modify or set aside an erroneous order, and apparently also urges that the action of the court in dismissing the action was mistakenly and inadvertently taken; that the court lacked jurisdiction and also abused its discretion. As authority for her first contention, respondent cites the cases of Ex parte Hartman, 44 Cal. 32, Loomis v. Andrews, 49 Cal. 239, and Domenigoni v. Imperial Live Stock, etc., Co., 189 Cal. 467, 209 P. 36. The first case arose under the Criminal Practice Act, prior to the adoption of the Codes, when a court of general jurisdiction had complete control over a final judgment during the term (Wiggin v. Superior Court, 68 Cal. 398, 401, 9 P. 646), and so the action of the court there during the term was within its general jurisdiction as well as in accordance with the provisions of the act. The other two cases cited are also not pertinent.

[1, 2] The rule in California since the adoption of the Codes is well stated in the case of Holtum v. Greif, 144 Cal. 521, 524, 78 P. 11, 12, where the court says: "The decisions of this court are numerous and uniform to the effect that a judgment or order once regularly entered can be reviewed and set aside only in the modes prescribed by statute. If they have been entered prematurely or by inadvertence, they may be set aside on a proper showing, * * * and, if the order as entered is not the order as made, the minutes may be corrected so as to make them speak the truth, * * * but, subject to these exceptions, the order is reviewable only on appeal, and, the decision of the trial court having been once made after regular submission of the motion, its power is exhausted. It is functus officio." An examination of the record in the instant case shows that there was no mistake or inadvertence on the part of the court in the legal sense, and that the order of dismissal was the order intended to be made; and, while the court may have erred in the use of its discretion, there was no abuse of it. The plaintiff asked leave to amend, and the court denied the motion. The plaintiff then could not prove the allegation in her complaint that the defendant Liberty Produce Company was a corporation, and so she could proceed no further with the trial under the circumstances. The court had jurisdiction under subdivisions 4 and 5 of section 581 of the Code of Civil Procedure to dismiss the action even though it erred in so doing, and its action is conclusive except on appeal or other direct attack authorized by the code. Cozad v. Raisch Imp. Co., 208 Cal. 496, 281 P. 1017. The action of the court in our opinion being merely erroneous and not void, the motion to set aside the order of dismissal would seem to afford no basis for the order made. A motion for new trial would have done so, but it was not made; and, while we are heartily in accord with the principle of determining each case on the merits if possible, we see no way to accomplish that here, as in our opinion the court had no jurisdiction to vacate the order of dismissal under the circumstances shown by the record.

Order reversed.

We concur: WORKS, P. J., CRAIG, J.

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112 Cal. App. 48

PATTERSON v. HENDERSON TIRE & RUBBER CO.

Civ. 6141.

District Court of Appeal, Second District, Division 1, California.

Feb. 18, 1931.

Set-off and counterclaim 🔑41.

In action for personal services, amount due plaintiff *held* subject to set-off for merchandise furnished by defendant previous to plaintiff's employment (Code Civ. Proc. § 440, and § 690, subd. 10).

Appeal from Superior Court, Los Angeles County; Walter S. Gates, Judge.

Action by F. L. Patterson against the Henderson Tire & Rubber Company. Judgment for defendant, and plaintiff appeals.

Affirmed.

Leo L. Schaumer and DeGroot & Schaumer, all of Los Angeles, for appellant.

O'Melveny, Tuller & Myers and J. R. Girling, all of Los Angeles, for respondent.

YORK, J.

The plaintiff is prosecuting an appeal from a judgment of the Superior Court of Los Angeles county, reversing a judgment of the municipal court of Los Angeles city, and ordering a new trial therein and directing that appellant recover costs of appeal. This was based upon the Superior Court's conclusion that the plaintiff was entitled to the sum of $31.79 only, which was the difference between the sum of $415.15, the amount owing to plaintiff by defendant for personal services, and the sum of $383.36, the amount owing to defendant by plaintiff on account of merchandise purchased prior to the rendition of the personal services.

The whole dispute between the parties was whether or not the sum of $321, the amount due, owing and unpaid from defendant to plaintiff for the latter's personal services, rendered within thirty days preceding the date of termination of plaintiff's employment, was subject to exemption from the set-off or counterclaim urged by defendant for merchandise furnished previous to the plaintiff's employment; the plaintiff having alleged that said sum of $321 was and is necessary for the use of his family residing in this state, supported in whole by his labor. Plaintiff's contention was sustained by the municipal court, but the Superior Court reached a different conclusion thereon, and ordered a reversal of the judgment of the said municipal court, basing its conclusion on section 440 of the Code of Civil Procedure, to the effect that the respective debts or claims of the plaintiff and defendant must be deemed compensated, so far as they equal each other; that is, that the defendant's claim against plaintiff has set off, equalized, and balanced plaintiff's demand against the defendant to the extent of $383.36, the amount which was admittedly due the defendant.

Appellant states that he is not relying upon section 690, subdivision 10, of the Code of Civil Procedure, but he is contending that, to warrant a set-off or counterclaim, the debts must be mutual, and that the principle of mutuality requires that the debts "must not only be due to and from the same person, but in the same capacity."

An examination of this record shows that the set-off or counterclaim allowed by the Superior Court complies with this requirement.

The judgment of the Superior Court is affirmed.

We concur: CONREY, P. J.; HOUSER, J.

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112 Cal. App. 114

CHEATHAM v. MUNICIPAL COURT IN AND FOR CITY OF LOS ANGELES et al.

Civ. No. 7681.

District Court of Appeal, Second District, Division 2, California.

Feb. 20, 1931.

1. Abatement and revival 🔑8(6).

Purchaser at sale under trust deed could maintain unlawful detainer action against grantor retaining possession, notwithstanding action pending between parties involving same property.

Defendant in unlawful detainer action had filed complaint in another court against plaintiff and others in unlawful detainer action, alleging she had intrusted certain property to defendants in such action as security, and that defendants had failed to account to her for it, but had sold property and embezzled proceeds, and prayed for return of property or for a reasonable compensation for detaining, converting, and embezzling property.

2. Abatement and revival 🔑8(6).

There may be two suits pending between same parties for possession of same land, if second is brought on title acquired after commencement of first.

3. Courts 🔑168.

Municipal court had jurisdiction of unlawful detainer action where plaintiff claimed $35 monthly rental, totaling $50 (St. 1925, p. 658, § 29, subd. 2, as amended by St. 1929, p. 838, § 2).

Petition by Fannie G. Cheatham against the Municipal Court in and for the city of Los Angeles, Los Angeles County, Hon. T. L. Ambrose, Judge Presiding, for a writ of mandate.

Writ denied.

A. E. Putnam, of Los Angeles, for petitioner.

IRA F. THOMPSON, Judge.

This is an application for the writ of mandate by which it is sought to compel the respondent court to dismiss an action in unlawful detainer. The alternative writ was not issued, the petitioner preferring to bring the matter on for hearing upon notice to the respondent. From the petition it appears that D. W. Henderson filed a complaint in the municipal court (the petition fails to state the date), alleging a sale of certain property pursuant to the terms of a trust deed executed by the defendant, the petitioner herein; that the plaintiff became the purchaser thereat; that the plaintiff had served the defendant with a notice to vacate, which she had refused to do; that he had been damaged in the sum of $50, the rental value of the property to the time of the filing of the complaint; and that the rental value of the property was $35 per month. The defendant in that action, the petitioner here, interposed a demurrer to the complaint on the grounds, so far as we are able to judge from the very ambiguous pleading, that there was an action pending between the same parties in the superior court involving the ownership and possession of the property, and that the value of the real property was more than $3,000, and hence the court had no jurisdiction of the action. A pleading denominated an answer was also filed setting up verbatim the same matter contained in that which was called a demurrer, and no more. The demurrer was overruled, and, after trial held on November 10, 1930, judgment was rendered in favor of the plaintiff for the possession of the property and $35. On August 12, 1930, the petitioner filed a complaint in the superior court against Henderson and others, alleging that she had intrusted certain real and personal property to defendants as security, and that the defendants had failed to account to plaintiff for it, but had sold the property and embezzled the proceeds, and praying for a return of the property or for a reasonable compensation in the sum of $17,000, together with a like sum for "intentionally and maliciously taking, detaining, converting, embezzling said property and conspiring to wrongfully deprive plaintiff thereof." Henderson interposed a general demurrer, which was sustained by the court on August 27, 1930, with ten days to the plaintiff there, the petitioner here, to amend. Plaintiff filed no amended complaint, and for her default in that particular the motion of the defendant Henderson for judgment was granted, and the cause dismissed on September 22, 1930. On November 25, 1930, plaintiff gave notice that she appealed from the judgment in Cheatham v. John Doe Jackson (Henderson) et al., filed October 2, 1930, although as we have seen, the judgment was apparently rendered September 22, 1930. This further discrepancy may be noted—the notice of appeal refers to action numbered in the superior court 106316, whereas the action to which we have heretofore referred is 107316.

[1, 2] Was the respondent court bound to determine that the pendency of the action in the superior court was good ground for the abatement of the action in the municipal court? It is difficult to designate the superior court action. It was not an action to recover the real property. In fact, so far as appears in the petition before us, the description of the property was not set forth in the complaint. The statement is made in the complaint that the property was intrusted to the defendants as security, but as security for what we are not told. We are told that the defendants sold the property and refused to account. But whether they sold it pursuant to the terms of the agreement or contrary thereto is not disclosed other than as we are able to imagine from a statement, which as an allegation of fact is utterly without merit, that "defendants have conspired among themselves and others unknown to plaintiff to deprive her of said property and legal rights, without due process of law and in violation thereof." It is obvious, however, that the complaint totally fails to state a cause of action, and it is also patent that the title claimed by the plaintiff in the municipal court as the foundation for his action was acquired by a trustee's deed on September 6, 1930, or a month lacking six days after petitioner's action in the superior court was filed. In Leonard v. Flynn, 89 Cal. 535–541, 26 P. 1097, 1098, 23 Am. St. Rep. 500, it is said: "A plaintiff may have two suits against the same defendant for the recovery of the possession of the same land, pending at the same time, if the second is brought on a title acquired after the commencement of the first. Vance v. Olinger, 27 Cal. 358; Mann v. Rogers, 35 Cal. 318; Larco v. Clements, 36 Cal. 132; Murray v. Green, 64 Cal. 368, 28 P. 118." This concludes the petitioner in this particular, although it should be added that no judgment could have been rendered under the pleading presented which would have been a bar to the action commenced in the respondent court.

[3] All that is necessary to demonstrate that the municipal courts have jurisdiction of unlawful detainer actions where the damages sought are no greater than here involved is to quote subdivision 2 of section 29 of the Municipal Court Act (St. 1925, p. 658) as amended in 1929 (Stats. 1929, p. 838, § 2), which provides that they shall have jurisdiction of "All actions of forcible entry or forcible or unlawful detainer, where the rental value is two hundred dollars or less per month, and where the whole amount of damages claimed is two thousand dollars or less."

Writ denied.

We concur: WORKS, P. J., CRAIG, J.

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111 Cal. App. 731

NICELEY v. MADERA COUNTY.

Civ. 4088.

District Court of Appeal, Third District, California.

Feb. 13, 1931.

Rehearing Denied March 14, 1931. Hearing Denied by Supreme Court April 13, 1931.

1. Sheriffs and constables 🔑68.

Expenses of sheriff necessarily incurred in detection of crime and in prosecution of criminals *held* proper charge against county, although not provided for in county budget (Pol. Code, § 4307, subd. 2, as amended by St. 1927, p. 1667).

2. Statutes 🔑161(1).

That one statute may repeal another by implication, both must deal with same subject-matter.

3. Statutes 🔑158.

Repeal of statute by implication is not favored.

4. Statutes 🔑225.

Latest valid expression of legislative will on given subject is controlling.

5. Statutes 🔑159.

One statute will not be held repealed by subsequent statute making no mention of prior one unless there is irreconcilable conflict.

6. Sheriffs and constables 🔑29.

Statute providing system for budgeting all ordinary, but not extraordinary or unanticipated, county expenses *held* not to have repealed by implication prior statute relating to payment of expenses necessarily incurred by sheriff in detection of crimes (Pol. Code, § 3714, subd. 5, as amended by St. 1927, p. 725, and § 4307, subd. 2, as amended by St. 1927, p. 1667).

> Pol. Code, § 3714, subd. 5, as amended by St. 1927, p. 725, provides that expenditures made in excess of budget appropriations should not be a liability of the county, but the officer making or incurring such expenditure should be liable therefor personally, and on his official bond, while section 4307, subd. 2, as amended by St. 1927, p. 1667, provided in part that the traveling and other personal expenses of the sheriff incurred in criminal cases arising in county and all other expenses necessarily incurred in the detection of crime and in the prosecution of criminal cases should constitute a proper charge against the county.

Appeal from Superior Court, Madera County; Charles R. Barnard, Judge.

Action by T. J. Niceley against the County of Madera. Judgment for plaintiff, and defendant appeals.

Affirmed.

Barcroft & Barcroft and Mason A. Bailey, all of Madera, for appellant.

David E. Peckinpah, of Fresno, for respondent.

Mr. Justice PLUMMER delivered the opinion of the court.

This cause is based upon certain obligations incurred by Welton C. Rhodes, as sheriff of the county of Madera, for detective hire, etc. The items upon which this action is based appear to be in excess of the amount allowed to the office of sheriff by the county budget for the fiscal year beginning June 1, 1928, and ending June 30, 1929. By the budget the sheriff was allowed the sum of $1,000, this sum having been expended on or before October 31, 1928, and further allowances made by the board of supervisors of the sum of $327.43. Thereafter the sheriff incurred expenditures in the sum of $982.46. This expenditure was incurred in running down and ferreting out of certain bands of cattle thieves, and also in connection with a certain crime committed in the county of Madera known as the "Sylva murder case." The board of supervisors disallowed the claims on two grounds: First, that the expenditures were unnecessary; and, second, on the further ground that the fund allowed the sheriff for detective hire, etc., had been exhausted. Upon this appeal no question is made as to the necessity or propriety of the expenditures made by the sheriff, or of the expenses incurred by him, the only contention being that section 3714 of the Political Code, being the Budget Act, is controlling, and that under its provisions the sheriff only is liable for the payment of the expenses furnishing the basis of this action. On the part of the sheriff it is contended that section 4307 of the Political Code governs this action. The claims were all assigned to the plaintiff, and the action is prosecuted by the plaintiff for the collection of the several items of expenditure. The trial court found the allegations of the complaint true, which included the necessity and propriety of making the expenditures, and also held that the expenses constituted a legal charge against the county of Madera, and awarded judgment, as prayed for. The county appeals from this judgment.

The cause of action herein arose prior to the amendments of sections 3714 and 4307 of the Political Code, made in 1929 (St. 1929, pp. 1129, 1969). Hence it is not necessary to consider the argument of counsel relative to any changes made by the Legislature in 1929.

After providing at length, and with a great deal of detail, how county budgets shall be made up and approved, subdivision 5 of section 3714 of the Political Code (St. 1927, p. 725) reads as follows, so far as pertinent here: "Expenditures made, liabilities incurred, or warrants issued in excess of any of the budget appropriations as originally determined, or as thereafter revised by transfer, as herein provided, shall not be a liability of the county, but the official making or incurring such expenditure shall be liable therefor personally, and upon his official bond. The county board of supervisors shall approve no claim, and the county auditor shall issue no warrant for any expenditure in excess of said budget appropriation, as finally adopted or as thereafter increased from the unbudgeted reserve or by a transfer as herein provided by said board of supervisors, or as revised under the provisions herein, except upon an order of a court of competent jurisdiction, or for an emergency, as hereinafter provided." As amended, this act went into effect on the 1st day of January, 1928. In 1927, section 4307 of the Political Code was amended so as to provide for the payment of certain expenditures incurred by the sheriff, the subdivision of that section (section 4307, subd. 2, as amended by St. 1927 p. 1667) reading as follows: "The traveling and other personal expenses of the district attorney and the sheriff incurred in criminal cases arising in the county, and in civil actions and proceedings in which the county is interested, and all other expenses necessarily incurred by either of them in the detection of crime, and in the prosecution of criminal cases," etc., shall constitute a proper charge against the county. As amended, this section took effect within the statutory time thereafter and some months preceding the time of the taking effect of section 3714 of the Political Code. The contention here presented is that section 3714 of the Political Code, taking effect some months after the taking effect of section 4307 of the Political Code, by implication repeals section 4307 of the Political Code, it being argued that the two sections are in irreconcilable conflict.

Before considering the question of whether section 3714 of the Political Code, by implication or otherwise, repeals the provisions of section 4307 of the Political Code, it is important to observe that subdivision 5 of section 3714, supra, does not make final the budget as adopted by the board of supervisors, nor does it make final the sum or allowance made or allotted to any particular official. The question is left open for a determination by the court as to whether any other items of expenditure shall be determined to be a claim against the county, and whether the county shall be held liable therefor. This plainly appears from the words specifying that no payment shall be made, "except upon an order of a court of competent jurisdiction." And this provision follows that portion of the section relating to expenditures outside of, and in excess of, the budget allowance.

[1] In 1927 (Stats. 1927, p. 1667) section 4307 of the Political Code was so amended as to make the provisions thereof applicable to sheriffs as well as to district attorneys, and the section as amended, not only makes the traveling and personal expenses of the sheriff, and district attorney a proper charge against the county, but also all other expenses necessarily incurred in the detection of crime and in the prosecution of criminal cases, etc.

This court has had occasion to consider the provisions of section 4307 of the Political Code in several cases. In the case of Thiel Detective Co. v. Tuolumne County, 37 Cal. App. 423, 173 P. 1120, 1122, it was held that the district attorney is authorized to employ detectives at the expense of the county, when necessary for the detection of persons guilty of crimes, or to obtain evidence of their guilt, and that, when a claim for such expenditures is presented and disallowed by the board of supervisors, an action might be maintained to enforce payment. There the question was raised as to whether the district attorney should consult the board of supervisors, and presumably obtain their consent before making such expenditures, and the court, quoting from the case of County of Yolo v. Joyce, 156 Cal. 429, 105 P. 125, used the following language: "'There is no provision of the law which requires the district attorney to consult any court or obtain any order therefrom as a prerequisite for his incurring any expense which he may deem proper in the discharge of his duties in detecting crime or prosecuting of criminal cases.' It may be said also that there is no provision requiring him to consult the board of supervisors, but the matter is left to his discretion in the first instance." The same is true with regard to the sheriff. The section of the Code we are considering does not require the sheriff to consult the board of supervisors or obtain their consent or the consent or order of the court before incurring the expenditures. However, a claim for such expenses must be presented to the board of supervisors, and, if considered unnecessary, may be rejected. In any case the court is the final arbiter of the necessity for the expenditures and the legality of the charge against the county.

Whatever has been said by the Supreme Court and the District Courts of Appeal relative to the power and authority of a district attorney under section 4307 of the Political Code applies now to the power and authority of a sheriff.

In the case of Cunning v. Carr, 69 Cal. App. 232, 230 P. 987, 990, this court had occasion to analyze the various cases having to do with the power and authority of the district attorney. In holding that the district attorney of Humboldt county had authority to employ detectives to assist in ferreting out crimes and obtaining evidence upon which to base prosecutions, this court said: "This court, in the case of Thiel v. Tuolumne County, 37 Cal. App. 423, 173 P. 1120, has also held that the authority is given the district attorney, under said section of the Political Code, to make employment of an agent to detect crime and that the expenses therefor constituted a proper county charge." Practically the same holding is had in Humiston v. Shaffer, 145 Cal. 195, 78 P. 651; Victors v. Kelsey, 31 Cal. App. 796, 161 P. 1006; County of Yolo v. Joyce, 156 Cal. 429, 105 P. 125; Rocca v. Boyle, 166 Cal. 94, 135 P. 34, Ann. Cas. 1915B, 857. We likewise refer to the case of Langdon v. Koster, 157 Cal. 39, 106 P. 209, where the district attorney of San Francisco was held authorized to employ a special agent in the detection of crime and assist in obtaining evidence to prosecute certain alleged offenders in that county.

In the case of Cunning v. County of Humboldt, 204 Cal. 31, 266 P. 522, the opinion in the case of Cunning v. Carr, supra, is quoted at length and approved, and the court sustained the authority of the district attorney to employ detectives and agents to assist in the detection of crime and the collection of evidence, etc. It is true that these cases all involved facts and circumstances arising prior to the 1st day of January, 1928, the date on

which the amendment to section 3714 of the Political Code, relative to budgeting, took effect.

In the case of Darrah, District Attorney, v. San Joaquin County, 283 P. 962, this court again upheld the authority of the district attorney under section 4307 of the Political Code to incur expenses, as therein provided for, even though no allowance had been made by the board of supervisors to cover the same, and that such expenses constituted a charge against the county, and the district attorney was awarded judgment for repayment by the county of such expenses. In the case of Darrah v. San Joaquin County, supra, however, section 3714 of the Political Code was not considered. So far as the opinion reads it relates exclusively to the authority of the district attorney to the provisions of section 4307 of the Political Code unaffected by any of the provisions or limitations of section 3714 of the same code.

We may also agree with the contention of the appellant that none of the cases which we have cited consider anything further than the authority conferred by section 4307 of the Political Code, as section 3714 of the Political Code, so far as it relates to budgeting of the expenses, was not then in existence. In support of the contention of the appellant that section 3714 of the Political Code is controlling here, our attention is called to the case of Fitzgerald v. Badaracco, 202 Cal. 18, 258 P. 937, where an attempt was made by the board of public works to raise certain salaries and then compel the board of supervisors of the county of San Francisco to adopt such salary raise and provide for the payment thereof by increasing the budget allowance and levying a tax to cover the same. It was there held that the board of supervisors constituted the ultimate authority in that particular, and the petition of the board of public works was denied. That case, however, does not appear to us to be controlling here. The charter of the city of San Francisco, so far as we are advised contains no such provisions as we find in section 4307 of the Political Code.

The authorities which we have cited definitely establish the right and power of either district attorney or sheriff to perform the acts and incur the expenditures which are involved in this action, unless limited by the provisions of section 3714 of the Political Code. If there is no conflict, then there is no limitation other than as determined ultimately by the courts. In other words, the necessity and legality of the expenditures are first determined by the officer involved, second, by the board of supervisors, and finally, by the courts.

[2-6] As to the two sections referred to, it is contended by the appellant that section 3714 of the Political Code cannot be given full effect unless it is construed as a limitation upon the power conferred upon the sheriff and district attorney by section 4307, and therefore, that section 4307, taking effect prior to the taking effect of section 3714 of the Political Code, is repealed by implication. In determining this question attention must first be given to the subject-matter of the two sections. A reading of all of section 3714 of the Political Code shows that the Legislature had in contemplation a system which would provide for budgeting all the ordinary expenses of the county, and that all of the ordinary and usually anticipated expenses of the conduct of each office of the county should be estimated and set forth in the budget. There is nothing in section 3714 of the Political Code relative to extraordinary or unusual or unanticipated expenditures that might necessarily have to be incurred in the prosecution of criminal cases. In fact there is nothing in section 3714 of the Political Code covering the subject of criminal prosecutions, or of the detection and ferreting out of criminals, or the collection of testimony necessary to be brought forth and presented to the court in the enforcement of our criminal laws. The emergency expenditures referred to in subdivision 6 of section 3714 of the Political Code (St. 1927, p. 725) cannot reasonably be interpreted as applying to any of the acts or expenditures involved in this action. There was no public emergency, no fire, flood, explosion, storm, earthquake, epidemic, riot, or insurrection. Only such occurrences as are provided for in section 4307 of the Political Code are presented to us for consideration. A reading of section 4307 of the Political Code shows that it applies to a specific subject, to wit, the detection of crime and the prosecution of criminal cases, so far as the present action is concerned. Thus, it is apparent that the two sections relate to entirely different and distinct subjects. As stated in 23 California Jurisprudence, page 697: "In order that one statute may repeal another by implication, it seems clear that both must deal with the same subject matter. An act is not repealed by a subsequent act relating to another matter, nor is a section repealed by a subsequent section if the subjects of the two sections are distinct and separate and in nowise in conflict with each other."

We think the foregoing analysis shows that the two sections are distinct and deal with different subjects. We do not need to cite authorities to the elementary proposition that repeals by implication are not favored, nor do we need to question the contention of appellant that the latest valid expression of the legislative will on a given subject is controlling. The law relative to the repeal of statutes by implication is clearly set forth in 23 California Jurisprudence, page 691, et seq., and shows clearly that one section of the Code will not be held repealed by a subsequent section making no mention of the prior section, unless there is an irreconcilable conflict. Here, as we have said, one section relates to the subject of budgeting, and as we have shown by an excerpt taken from subdivision 5 of the section relating to the budget, the court is the final arbiter of whether expenses incurred outside of the budget shall be paid by the county.

We think the cases which we have cited and the sections, as we have analyzed them, demonstrate clearly that section 4307 of the Political Code stands unlimited by section 3714 of the Political Code; that both sections as we have interpreted them may be given full effect; and that the expenditures incurred by a sheriff under section 4307 of the Political Code, when approved by the board of supervisors, or upon a judgment of a court of competent jurisdiction, constitute a county charge; and that there is nothing in section 3714 of the Political Code operating as a bar to prevent payment.

Unless compelled thereto by the wording of the sections, the conclusion should not be drawn that the Legislature intended that the detection and prosecution of thieves and murderers should be limited or stayed by a budget system relating to the ordinary business of a county—one section relates to the transaction of civil business; the other has to do with criminal proceedings. This, we think, shows the line of demarkation between the purposes and subject-matter of the two sections. The construction which we have given to the two sections does not award a district attorney or sheriff unlimited license in the expenditure of a county's money. The words "expenses necessarily incurred" appearing in the section make the trial court the final arbiter, and, if so found, the county is liable.

The judgment is affirmed.

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112 Cal. App. 64

WAUCHOPE et al. v. BAUMBACK.

Civ. 4170.

District Court of Appeal, Third District, California.

Feb. 19, 1931.

1. **Automobiles** ⚷245(80).

Contributory negligence of motorist colliding with motorist approaching intersection from right who failed to heed stop sign *held* for jury.

2. **Appeal and error** ⚷996.

Where circumstances are such that reasonable minds may differ whether plaintiff is guilty of contributory negligence, judgment for plaintiff will not be disturbed.

3. **Automobiles** ⚷244(43).

In action for injuries sustained in automobile collision at intersection, evidence supported judgment that plaintiff was not contributorily negligent.

Appeal from Superior Court, San Joaquin County; C. W. Miller, Judge.

Action by August E. Wauchope and another against Fred Baumback. From a judgment for plaintiffs, defendant appeals.

Affirmed.

Levinsky & Jones, of Stockton, and Morgan J. Doyle, of San Francisco, for appellant.

Kilpatrick & Goodman, of Oakland, for respondents.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

This is an appeal from a judgment which was rendered upon a verdict for damages for personal injuries resulting from a collision between automobiles.

The only question involved in the appeal is whether the plaintiff was guilty of contributory negligence.

Kettleman lane and Quimby avenue intersect at right angles one mile south from Lodi. The first-mentioned lane runs east and west. The other one extends north and south. Both roadways are surfaced with asphalt pavement. Each is about eighteen feet in width with a dirt shoulder on either side. There is no grade at the intersection of these highways. A danger sign was stationed near the western border of Quimby avenue 200 feet from its intersection with Kettleman lane. November 13, 1929, at 9 o'clock p. m., the plaintiff, accompanied by his wife, was driving southerly along Quimby avenue in their Dodge automobile. At the same time the defendant was driving easterly along Kettleman lane. It was dark, and the headlights of both cars were turned on. The night was clear. The pavement was dry. The brakes on the plaintiff's car were in good condition. There was a line of trees on the westerly side of Quimby avenue, north of Kettleman lane, obscuring the view to some extent. The plaintiff approached the intersection of these streets at about 25 miles an hour. When he reached a point 30 feet northerly of the intersection his speed was reduced to 16 miles an hour. His view being somewhat obstructed by the trees to his right, the plaintiff did not observe the headlights of the defendant's car until he reached a point about 10 feet from the intersection. The defendant's machine was then 50 or 75 feet westerly from the intersection and was running at a speed of about 45 miles an hour. There were stop signs on Kettleman lane along which the defendant was driving. When the plaintiff first saw the lights of the defendant's car, he shut off the gas, but permitted the car to roll along on its own momentum, thinking the defendant would stop on account of the signs. Almost instantly he realized the defendant was not slackening his speed, and therefore began to put on his brakes. At first they were not applied with full force. The plaintiff did not think the defendant would run past the stop sign without stopping. Realizing very soon that the defendant was not going to stop, the plaintiff applied his brake with full force causing the rear wheels to skid, and instantly turned his machine to the left to avoid the collision which seemed imminent. The machines came in contact near the center of the intersection. Defendant's car ran off the road some 75 feet and landed in a vineyard. The plaintiff's car was overturned. Both the plaintiff and his wife were seriously injured. The jury rendered a verdict in favor of the plaintiff for the sum of $2,000. The amount of this verdict is not challenged.

[1-3] The question of contributory negligence under the circumstances of this case was a problem for the determination of the jury. 19 Cal. Jur. 735, § 141; Swartz v. Acme Exp. & D. Co., 102 Cal. App. 615, 283 P. 358. Where the circumstances are such that reasonable minds may differ regarding the question as to whether a plaintiff is guilty of contributory negligence, a judgment in his favor will not be disturbed on appeal. Reaugh v. Cudahy Packing Co., 189 Cal. 335, 208 P. 125. There is ample evidence to support the judgment and implied findings of the jury to the effect that the plaintiff was not guilty of contributory negligence.

The plaintiff testified:

"At the northerly boundary line of the intersection * * * [my machine was going] not over fifteen miles an hour. * * *

"Q. What did your speedometer register at that time [30 feet before reaching the intersection]? A. About sixteen [miles an hour]. * * *

"Q. Did you see a machine coming? A. Not until I was within about ten feet of the intersection line. * * *

"Q. Where were these lights you saw on Kettleman lane, * * * how far west of that westerly boundary line were the lights, in feet? A. Between fifty and seventy-five feet. * * * I saw the flash of the lights and slapped on my brakes, and I got hit then. * * *

"Q. Did those lights appear to be moving rapidly? * * * A. I should judge about forty-five miles an hour. * * * I had taken my foot off the accelerator, but had not thrown out the clutch. * * *

"Q. Were your brakes in good condition? A. Yes. * * *

"Q. How many feet would it take you to stop the car [running sixteen miles an hour]? A. I should judge twelve or fifteen feet. * * *

"Q. Why is it your car did not stop? * * * A. I expected him to stop at the intersection. * * * I applied the brakes when I saw he did not slack up at the intersection. * * * As I came to the intersection line, I started to push in my brake * * * but did not apply them enough to stop the car at that point, * * * ten feet north of the boundary line. * * * I saw the lights were not stopping, and I turned to the left * * * trying to get out of the way. * * *

"Q. How far west [was the machine then]? A. I suppose twenty-five feet. * * * I don't think they slacked up in speed at all. * * *

"Q. Could you have stopped your car in a distance of twenty feet? * * * A. I could have if I had thought it was necessary. * * *

"Q. Why didn't you bring your automobile to a stop right then? A. Because nobody is supposed to pass a stop sign. A stop sign is there. * * *

"Q. Will you tell us where you were * * * when you first realized that the lights which you saw on the other car would not be able to stop? * * * A. I had crossed the line of intersection. * * * [I made] the turn to the left to prevent him from hitting me. * * *

"Q. How soon after you realized the other car would not stop, did you turn to the left and jam on your brakes? A. As soon as I possibly could. * * *

"Q. Where were you at the time you saw this car at 'A 3'? A. In the intersection. * * *

"Q. At that time you realized that car could not stop? * * * A. I didn't know whether it could or not. * * * I applied my brakes as soon as I thought it was necessary."

Under the circumstances of the present case it seems quite clear the plaintiff was not guilty of contributory negligence. At least it became a question for the jury to determine, and there is sufficient evidence to support the finding in this regard which is favorable to the plaintiff.

The judgment is affirmed.

112 Cal. App. 104

In re CALDWELL'S ESTATE.

BANK OF ITALY NAT. TRUST & SAVINGS ASS'N v. CALDWELL.

Civ. 7776.

District Court of Appeal, Second District, Division 2, California.

Feb. 20, 1931.

1. Wills 🔑260.

Under statute, petition to revoke probate of will must be filed within six months after probate (Code Civ. Proc. § 1327, as amended by St. 1929, p. 860, § 2).

2. Wills 🔑260.

Statute, if allowing one year for contest of will after probate, *held* inconsistent with, and impliedly repealed by, subsequently amended statute allowing only six months (Code Civ. Proc. § 1333, and § 1327, as amended by St. 1929, p. 860, § 2).

Appeal from Superior Court, Los Angeles County; Charles S. Crail, Judge.

Petition by Oscar P. Caldwell to revoke probate of the will of Perry Moore Caldwell, deceased, opposed by the Bank of Italy National Trust & Savings Association. From an order dismissing the petition, the contestant appeals.

Affirmed.

D. A. Knapp, of Los Angeles, for appellant.

Harold E. Thomas, of Los Angeles, for respondent.

WORKS, P. J.

This is an appeal from an order dismissing a petition to revoke the probate of a will.

[1] The dismissal was ordered on the ground that the petition was filed too late. Section 1327 of the Code of Civil Procedure, by an amendment which took effect on August 14, 1929 (St. 1929, p. 860, § 2), allows a contest of a will after probate to be filed within six months after admission to probate. In the present case the decedent departed this life on August 3, 1929, and on August 21 of the same year his will was admitted to probate. The contest here in question was filed on April 7, 1930, more than six months after the will was probated. Under the direct terms of section 1327 it is plain that the filing was too late.

Appellant, however, sets forth several alleged reasons why the limitation prescribed by the statute should not be allowed to apply in the present instance, but we think it so plain that they are not true reasons that we forbear further to discuss them.

[2] Section 1333 of the Code of Civil Procedure provides: "If no person, within one year after the probate of a will, contest the same or the validity thereof, the probate of the will is conclusive; saving to infants and persons of unsound mind, a like period of one year after their respective disabilities are removed." So the section has stood since 1874. A part of the amendment of section 1327, passed in 1929, was in changing the words "one year," theretofore in the section, to "six months." It is contended that section 1333 is a statute of limitation and that it is applicable to the present case. But section 1327 is undoubtedly a statute of limitation, and, if section 1333 is to be regarded as such a statute, in form, it is plainly in conflict with 1327 and to the extent of the conflict was repealed by implication by the amendment of the latter in 1929.

Order affirmed.

We concur: CRAIG, J.; IRA F. THOMPSON, J.

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112 Cal. App. 19

Ex parte BRIDWELL.

Cr. 206.

District Court of Appeal, Fourth District, California.

Feb. 16, 1931.

1. Criminal law 🔑90(4).

Criminal jurisdiction of justice's court in township of 30,000, or more, is confined to offenses committed within township in which court is situated (Pen. Code, § 1425, as amended by St. 1929, p. 861).

2. Criminal law 🔑90(4).

Justice court of Santa Ana township, having population over 30,000, was without jurisdiction of misdemeanor for failure to support minor children, where defendant and children were not residents of township (Pen. Code, § 1425, as amended by St. 1929, p. 861).

Application of D. N. Bridwell for a writ of habeas corpus directed to the Sheriff of Orange County.

Writ granted, and petitioner discharged.

John F. Groene, of Los Angeles, for petitioner.

BARNARD, P. J.

This is an application for a writ of habeas corpus. The petitioner was tried in the justice's court of Santa Ana township, county of Orange, upon a complaint charging him with failure to support his minor children, a misdemeanor; the complaint charging that this offense was committed within the county of Orange, state of California. He was found guilty and sentenced to imprisonment in the county jail for the term of one year. It fully appears that the petitioner and his said minor children were not residents of Santa Ana township, but that they were, and for more than five years had been, residents of the township of La Brea, in the county of Orange. Petitioner attacks the jurisdiction of the justice's court of Santa Ana township over the offense charged. This township has a population in excess of thirty thousand, and the question presented is whether or not a justice's court in such a township has county-wide jurisdiction over such a misdemeanor.

While section 1425 of the Penal Code formerly gave to justices' courts jurisdiction over offenses committed within the respective counties in which such courts are established, this section was amended in 1929 (St. 1929, p. 861), and now reads as follows:

"The justices' courts have jurisdiction as follows:

"1. In cities, cities and counties, towns and judicial townships having a population of thirty thousand or more, said courts shall have jurisdiction in all criminal cases amounting to misdemeanor only, except those of which the juvenile court is given original jurisdiction.

"2. In those having a population of less than thirty thousand said courts shall have jurisdiction in all criminal cases amounting to misdemeanor only, punishable by fine not exceeding one thousand dollars, or imprisonment not exceeding six months, or by both such fine and imprisonment."

We think the question before us has been practically decided in the case of Antilla v. Justice's Court of Big Bear River, etc. (Cal. Sup.) 290 P. 43, 45, in which it was held that the jurisdiction of justices' courts in criminal cases is confined to the township wherein the offense was committed. While that case involved the jurisdiction of a justice court in a township which actually had a population of less than thirty thousand, over an offense committed in another similar township in the same county, the court does not rest its decision upon that fact. In that case the court used the following illustration: "For example, under the construction contended for by respondents, in a county having one township of the larger population and five of the lesser population, the justices' court of the former would, under well-settled holdings of the court, have exclusive jurisdiction of every offense of the higher type committed in any part of the county and concurrent jurisdiction, with the other justices' courts, of all the lesser offenses as well. Green v. Superior Court, 78 Cal. 556, 21 P. 307, 541; Application of Westenberg, 167 Cal. 309, 316, 139 P. 674; In re Luna, 201 Cal. 405, 257 P. 76, supra. This result may not have been intended by the Legislature."

Not only do the inference from this illustration, and the fact that the decision is not expressly limited to the jurisdiction of a justice court in a township of the lesser population, support the contention of petitioner here, but the principles and reasoning set forth in that case would seem to apply as well to the jurisdiction of justice courts in townships of the larger population. The former county-wide jurisdiction of justice courts having been withdrawn, by the amendment of section 1425, such jurisdiction is no more to be presumed for the one class of such courts than for the other.

[1, 2] We conclude that under section 1425 of the Penal Code, as now existing, while a justice's court in a township having a population of thirty thousand or more has an enlarged jurisdiction in certain respects, the territorial limits of its jurisdiction are the same as those of a justice's court in a smaller township, and that its jurisdiction in criminal cases is therefore confined to offenses committed within the township in which it is situated. The justice's court of Santa Ana township, under whose process this petitioner is held, had no jurisdiction over the offense involved, since it is not situated in the township in which the offense was committed. See, also, In re Cohen (Cal. App.) 290 P. 512.

The writ is granted, and the petitioner is discharged from custody.

I concur: JENNINGS, J.

112 Cal. App. 132

KUTNER-GOLDSTEIN CO. v. WORKMAN.

Civ. 307.

District Court of Appeal, Fourth District, California.

Feb. 20, 1931.

Rehearing Denied March 16, 1931. Hearing Denied by Supreme Court April 20, 1931.

1. Sales 🔑**286.**

Reasonable time to put grain binder in satisfactory working condition would be such time as permitted test in actual use and worked no injury to purchaser (Civ. Code, § 1657).

Grain binder proved defective during harvesting season, whereupon seller and purchaser entered into new contract in writing providing for sale of binder and payment of purchase price. At same time, seller signed and delivered to purchaser a letter wherein seller agreed as per contract at its expense to put binder in, and turn same over to purchaser in, satisfactory working condition within a reasonable time. To properly determine whether binder was put in satisfactory working condition involved testing it in actual use.

2. Evidence 🔑52.

Court could not take judicial notice of time for harvesting grain and thereby contradict direct evidence.

3. Sales 🔑441(3).

Evidence *held* insufficient to support finding that seller within reasonable time attempted to put grain binder in satisfactory working condition (Civ. Code, § 1657).

4. Sales 🔑286.

Seller of grain binder, having agreed to put binder in satisfactory working condition, could not require purchaser to give few weeks' notice before harvest season.

At time of agreement by seller to put grain binder in satisfactory working condition within reasonable time, purchaser had harvested his crops for that particular season and had no use for it until the following harvesting season. Subsequently seller wrote letter to purchaser requesting purchaser to give seller few weeks' notice before ready to use binder, and in letter agreed to then proceed to put binder in first-class working condition.

Appeal from Superior Court, Kings County; K. Van Zante, Judge.

Action by the Kutner-Goldstein Company against Esau Workman. Judgment for the plaintiff, and the defendant appeals.

Reversed, and the cause remanded for a new trial.

J. L. C. Irwin, of Hanford, for appellant.

J. W. Ferguson and Clarence H. Wilson, both of Hanford, for respondent.

BARNARD, P. J.

In April, 1926, the plaintiff sold to the defendant a new grain binder and engine, which proved defective during the ensuing harvesting season. A new contract was entered into in writing between the parties on the 24th day of August, 1926, providing for the sale of the binder and engine to the defendant for $515, $104 of which was paid in cash, and the defendant agreed to pay the balance of $411 on June 15, 1927. At the same time the plaintiff signed and delivered to the defendant a letter reading as follows: "Relative to grain binder, as per contract signed today, this is to advise that we will, at our expense, put same in and turn same over to you in satisfactory working condition, within a reasonable time."

At that time the defendant had completed the harvest of all of his crops for the year 1926, and it is admitted that he had no use for the binder until the harvesting season of 1927. On January 13, 1927, the plaintiff wrote to the defendant as follows: "Regarding the binder there is nothing we can do until about the time you are ready to use this, and if you will give us a few weeks notice we will then proceed to get same in first class working condition."

The defendant testified that he did not recall getting this letter, but that he might have gotten it. On or about May 10, 1927, an employee of the plaintiff, with a representative of the company that manufactures the binder, went to the defendant's ranch for the purpose of putting the binder in condition. The record shows that the defendant told these visitors that the big portion of his grain was then too ripe to cut with a binder, that he could not accept the machine, and that he did not want it. The visitors left without fixing the binder, and on June 10, 1927, the defendant served upon the plaintiff a written notice of rescission of the contract. On June 17, 1927, the plaintiff brought this action to recover the balance due, according to the contract. In his answer, the defendant set up the defense that the plaintiff had not complied with its agreement, in that it had not repaired the binder as agreed, and that he had rescinded the contract, and a return of the $104 already paid was prayed for. The action was tried before the court without a jury. The court found that the binder and engine were not in working condition, but that the plaintiff had agreed to put the same into satisfactory working condition; that on or about the 10th day of May, 1927, the plaintiff sent employees to the defendant's ranch to properly repair the binder and engine; that at that time the defendant told these employees that he would refuse to accept the binder and engine, even if the same were put in good condition and properly repaired; that, as a consequence of the refusal of the defendant to accept the binder and engine, the plaintiff did not put the same into working condition; and that the said visit of the plaintiff's employees to the defendant's ranch occurred within a reasonable time after the execution of the written contract of August 24, 1926. This appeal is from the judgment for the plaintiff, which followed.

It is admitted by all parties that the machinery was not in proper working condition. Appellant's first contention is that the finding that he told respondent's employees that he would refuse to accept the binder and engine even if the same were put into good working condition is not supported by the evidence. Without further referring to the record, we have no hesitation in saying that this contention is without merit.

[1-3] Appellant next argues that the finding that the visit of respondent's employees to appellant's ranch on or about May 10, 1927, was within a reasonable time after the execution of the contract, is not supported by the evidence. We feel that this point is well taken, and that the same is determinative of this appeal. While appellant argues that, under the provisions of section 1657 of the Civil Code, these repairs should have been made immediately after August 24, 1926, it will be noted that the agreement relied upon is silent as to the exact time when the repairs shall be made, but that it provides that the machine is to be turned over in satisfactory working condition "within a reasonable time." To determine whether or not it was put in satisfactory working condition involved testing it in actual use, and, since the harvesting season of 1926 was past, it could not be so tested until the next season. Under the circumstances, a reasonable time would be such a time as permitted such test, and also a time which would work no injury to the defendant. We think this must be held to be a time making it available for the harvesting of the next crop, in the year 1927. One element in determining whether the time is reasonable, is whether it is within such time as will work no injury on the other party. Spaeth v. Ocean Park, etc., Inv. Co., 16 Cal. App. 329, 116 P. 980. It seems apparent that, if this machine was not repaired in time to harvest the crop of 1927, it would result in injury to the appellant. Whether the attempt of the respondent to put the machinery into the required condition was made within a reasonable time, as found by the trial court, depends then upon whether this was done in time for the harvesting of the crop of 1927. As to the fact in that regard, the appellant testified that, when the respondent's employees came to his ranch to repair the binder, his grain was too ripe to cut with a binder; that it is necessary to cut grain with a binder before it is near so ripe; that this must be done long before it may properly be harvested with a harvester; that, if you try to cut grain with a binder after it is overripe, the binder does not work well, you cannot do much with it, and the grain shatters out; but that, if you cut it with a binder at the right stage, it can be handled by the machine with little waste and the grain is all of good quality. Appellant's son testified that he was present when respondent's employees visited the ranch, and that at that time, it was too late to harvest this grain with a binder. This evidence is uncontradicted, so far as shown by the record. However, the respondent argues that the court could take judicial notice of the fact that a wheat harvest in Kings county, in an ordinary year, begins some time between June 15 and July 1, and that it practically never commences before June 1. In support thereof it cites Haines v. Snedigar, 110 Cal. 18, 42 P. 462, 464. In that case the opinion states that the court could take judicial notice of the fact that in San Joaquin county, "the time for harvesting of small grain has arrived on the 11th of July." Not only do we find no evidence in this record to show that the grain growing upon appellant's ranch was wheat, rather than some other variety of grain, but there is a wide difference between taking judicial notice that a general harvesting season for small grain has arrived by the 11th of July, and taking judicial notice that on a certain day in May, it is not too late for a particular method of harvesting a certain grain, the variety of which is unknown to the court. In addition to all other considerations, the degree of ripeness of grain on a specific day would vary in different seasons, even though the season be considered ordinary, and there is no evidence here that this was an ordinary season. Under the circumstances here presented, the doctrine of judicial notice may not be invoked to contradict the direct evidence upon the fact. Upon the record before us, it must be held that the finding in question is not supported by the evidence.

[4] Respondent further contends that May 10, 1927, was a reasonable time within which to offer to repair the machinery because of the letter of January 13, 1927, asking for a few weeks' advance notice, and that respondent was entitled to wait, relying upon the appellant to give such notice before he was ready. While it would appear that appellant might well have complied with this request, we know of no rule of law that compelled him to do so, or that permitted respondent to delay in the belief that he would.

A number of other points are raised, which require no consideration. The entire controversy turns on whether respondent's attempt to repair the binder was made within a reasonable time. While no legal obligation rested upon the appellant to notify the respondent, as requested, a few weeks ahead of the time when he should need the machine, the fact that he did not do so, with other circumstances, rather indicates that he desired to avoid the contract. Because of this, and the fact that the evidence which is missing from this record may be available to respondent, we think the case should be retried.

The judgment is reversed, and the cause remanded for a new trial.

We concur: MARKS, J.; JENNINGS, J.

112 Cal App. 50

HENSLEY v. McBRIDE et ux.

Civ. 7747.

District Court of Appeal, First District, Division 2, California.

Feb. 19, 1931.

1. Animals ⚷70.

To render owner liable to person bitten by dog, owner must have had knowledge of dog's vicious propensities to bite people.

2. Animals ⚷74(5).

Evidence *held* insufficient to show defendants had knowledge that dog had previously exhibited vicious propensities toward human beings, precluding recovery.

3. Animals ⚷70.

Liability of owner to person bitten by dog could not be predicated on owner's knowledge of dog's vicious propensities toward other dogs.

Appeal from Superior Court, Los Angeles County; Charles L. Bogue, Judge.

Action by Minnie C. Hensley against George W. McBride and wife. Judgment for plaintiff, and defendants appeal.

Reversed.

Culbert L. Olson, of Los Angeles, for appellants.

Fred Mansur and Lois S. Kershner, both of Los Angeles, for respondent.

SPENCE, J.

Plaintiff sought to recover damages for an injury sustained when bitten by a dog belonging to defendants. The cause was tried by the court sitting without a jury, and, from a judgment in favor of plaintiff, defendants appeal.

Plaintiff alleged in her complaint that the dog was of "vicious disposition and dangerous character, and evilly disposed toward human beings and other dogs, and accustomed to attack them without provocation, all of which matters were well known to defendants." The court found that the dog was of a "mischievous disposition and of a dangerous character, and evilly disposed toward other dogs and accustomed to attack them, all of which matters were well known to defendants." No finding was made relating to any propensity on the part of the dog to bite or attack human beings. Appellants contend that the evidence was insufficient to support the findings and judgment, and in our opinion this contention must be sustained.

It appeared that the dog had been owned by appellants for six years. There was no evidence to show that prior to the day in question the dog had ever bitten or attacked or attempted to bite or attack anyone. Appellants testified that their dog had engaged in a few fights or tussles with other dogs, but it did not appear that he had ever bitten or injured any other dog. Although permitted to run at large and to mingle with adults, children, and animals, it was not shown that the dog had ever done any harm or that any complaint had ever been made concerning his actions. On the occasion in question the dog was barking at respondent's dogs and the injury was received when respondent picked up her two small dogs to carry them away.

[1-3] The well-settled rule relating to the liability of the owner of a dog is stated in 2 California Jurisprudence, page 73, as follows: "In an action to recover damages resulting from the biting by a dog, it is necessary to prove: (1) that the dog bit the plaintiff; (2) that the dog was vicious and accustomed to bite people; (3) that this fact was known to the defendant, and (4) that the dog was harbored or kept by the defendant." Smith v. Royer, 181 Cal. 165, 183 P. 660; Halminska v. Kobler, 100 Cal. App. 598, 280 P. 699. In our opinion the evidence in the present case was insufficient to show knowledge that the dog had previously exhibited any vicious propensities toward either human beings or other animals. As there was no evidence whatever showing any vicious propensities toward human beings, the trial court omitted all reference thereto in its findings. Even assuming that evidence of knowledge of a few fights or tussles over a period of years was sufficient to charge the owner with knowledge that the dog was possessed of vicious propensities toward other dogs, liability for injury to a person may not be predicated on such knowledge. 3 Corp. Jur. 120, and cases cited.

In effect, respondent urges the abandonment of what is termed the "time worn" doctrine, "that every dog is entitled to his first bite before he becomes a biting dog." 2 Cal. Jur. 74. Although this may not be an entirely accurate statement of the existing rule, the law of this state has never imposed liability upon the owner of a dog for injuries inflicted upon other persons in the absence of a showing of knowledge on the part of the owner that the dog possessed such vicious propensities. As a matter of policy it may well be argued that under present-day conditions, an absolute liability without regard to knowledge should be imposed upon the owner of a dog for injuries to others especially in cases where the dog is permitted to run at large. However, this is a matter of legislative concern. The Legislature has heretofore adopted a rule of absolute liability covering cases where dogs inflict injuries upon sheep, angora goats, cashmere goats, and poultry. Civ. Code, § 3341. Equal solicitude might be shown by the Legislature for the welfare and protection of human beings if this situation were called to its attention. Until such time as the Legislature acts, we find no justification for departing from the well-settled law of this state on the subject.

The judgment is reversed.

We concur: NOURSE, P. J.; STURTEVANT, J.

112 Cal. App. 68

PEOPLE v. JONES.

Cr. 41.

District Court of Appeal, Fourth District, California.

Feb. 19, 1931.

1. Rape 🔑51(7).

In prosecution for assault with intent to commit rape, evidence *held* to sufficiently establish that assailant of prosecuting witness was a man.

2. Rape 🔑51(7).

In prosecution for assault with intent to commit rape, evidence *held* sufficient to establish identity of defendant as assailant of prosecutrix.

3. Criminal law 🔑393(1).

Admitting finger prints to establish accused's identity did not violate constitutional provisions securing defendant against being compelled to be witness against himself.

4. Rape 🔑57(5).

In prosecution for assault with intent to commit rape, whether defendant had necessary intent *held* question for jury under evidence.

5. Rape 🔑16(1).

Abandonment of intent to commit rape once shown to have existed would not free defendant from legal consequences of assault.

6. Criminal law 🔑823(4).

In prosecution for assault with intent to commit rape, error, if any, in instruction showing elements embraced within offense charged *held* cured by instructions correctly explaining offense.

Instruction told jury that rape embraced assault with intent to commit rape, and also assault, and that offense charged in indictment embraced two other offenses, to wit, assault with intent to commit rape and assault, sometimes called "simple assault," which is unlawful attempt, coupled with present ability to commit violent injury on person of another.

Appeal from Superior Court, Riverside County; G. R. Freeman, Judge.

Simon Jones was convicted of assault with intent to commit rape, and he appeals. Affirmed.

C. L. Foster and C. W. Benshoof, both of Riverside, for appellant.

U. S. Webo, Atty. Gen., and Ralph O. Marron, Deputy Atty. Gen., for the People.

BARNARD, P. J.

The defendant was convicted by a jury of assault with intent to commit rape, and from the judgment which followed this appeal is taken.

At 8:30 p. m. on the evening of September 11, 1930, Miss C. E. Ruttinger left a prayer meeting in Riverside, Cal., and, after walking three or four blocks to her home, stopped to do some watering in and about her garden before she entered the house. During the time she was watering she went into the house for the purpose of making a telephone call, and at that time turned on a dome light in the hallway of the second story of her home. Leaving this light burning, she returned to her watering, and at 9:15 again entered the house. She went into a kitchen on the second floor, where she turned on a light, lit the gas, and put on a teakettle. She then passed along the hallway, where the light had been left burning, and, as she arrived at the doorway to her bedroom, she saw a man standing just inside the door. She asked him what he was doing in her house; he did not reply but reached forward, caught her by the throat, and threw her on a bed in the room. She fought as much as she could, and tried to scream, but could make very little noise, as he held his hand over her mouth. Her glasses were broken and her lips and arms were scratched and cut. She testified that her assailant kept moving his hands, which resulted in getting blood all over her clothes. She tried to pull his hands away and tore a number of buttons from his shirt. He held one of her legs down with his knee or leg. She got her other knee up and was kicking him when he got one knee into her stomach and crushed her so she could not breathe, and at that point he let go of her and ran. She got up and tried to turn the light on, but found that the globe had been unscrewed in its socket so that it would not light. She then went out on a balcony and shouted for help, her shouts bringing a number of the neighbors. A man's coat was later found at the foot of the bed in the bedroom.

[1] The appellant first contends that the evidence is not sufficient to show that this assailant was a man. The prosecuting witness testified a number of times that it was a man who attacked her; that she did not see his face because of the darkness, but that he had on a white shirt unbuttoned at the throat, and dark trousers, and that his neck and arms were brown. Mr. and Mrs. Herrick, who live about 200 feet from Miss Ruttinger's home, testified that they heard her scream for help while they were standing in the front yard of their home. Just after they heard these screams they saw a man running rapidly away from the position of Miss Ruttinger's house, and, as he ran up the street, he passed within a few feet of them. They testified that he had on dark trousers, and a white or light shirt which was torn, loose, and hanging outside of his trousers. This evidence, with the presence of the defendant in the courtroom, and the other evidence identifying him as the assailant, is sufficient to sustain the finding of the jury in this regard.

[2] It is next urged that the evidence is not sufficient to establish the identity of the appellant as the assailant in question. The Herricks, in addition to their testimony above referred to, testified that through the aid of a nearby street light they took a good look at the running man as he passed, and, while they were unwilling to swear positively that the defendant was the same man, they both stated that they were almost positive of this fact. Some torn and bloody underwear was found at appellant's residence which he admitted was his. A light shirt torn and bloody, and which he admitted to be his, was found in his landlady's washing. Appellant's trousers matched the coat found in the bedroom. While he admitted ownership of the coat, and professed ignorance of how it got in the bedroom, his explanation of how he lost it is little short of ridiculous. A railing on the porch of Miss Ruttinger's home had been newly painted that afternoon, and in the fresh paint were found imprints of a man's fingers. The appellant's finger prints were taken by the officers and an enlargement of these, together with an enlargement of the finger prints on the porch railing, were introduced in evidence, and an expert along that line testified that the finger prints on the porch railing were those of the appellant. The finding of the jury that the appellant was the assailant, is amply sustained by the evidence.

[3] In connection with the finger prints referred to, appellant urges that the evidence of his finger prints was improperly admitted, being in violation of the provisions of the Constitution of the state of California and the Constitution of the United States, to the effect that no person shall be compelled, in a criminal case, to be a witness against himself. It is his theory that a defendant can no more be compelled to submit his body for examination to secure evidence against him, than he can be compelled to submit his mental faculties to such an examination, and that finger prints are therefore in the same category as oral testimony. There is no evidence that appellant's finger prints were taken by force, or that he made any objection to the taking of the same. Objection is not here made to the taking of such finger prints, but to their introduction in evidence. Appellant relies upon the case of People v. Hevern, 127 Misc. Rep. 141, 215 N. Y. S. 412. In that case the court was passing upon the constitutionality of a law which required the taking of the finger prints of an arrested person before admitting such person to bail. In People v. Sallow, 100 Misc. Rep. 447, 165 N. Y. S. 915, 924, the question of the admissibility of the finger prints of a defendant, as evidence in a criminal case, is fully and ably discussed. A number of quotations from this decision follow:

"It has always, at common law and in the practice prevailing under the Constitution and laws of our state, been permissible to put in evidence for the purpose of identification of the defendant, testimony as to his personal appearance, his hair, his eyes, his complexion, marks, scars, teeth, his hands, and the like. Finger prints are but the tracings of physical characteristics or the lines upon the fingers."

"No volition—that is, no act of willing—on the part of the mind of the defendant is required. Finger prints of an unconscious person, or even of a dead person are as accurate as are those of the living. * * * By the requirement that the defendant's finger prints be taken there is no danger that the defendant will be required to give false testimony. The witness does not testify. The physical facts speak for themselves; no fears, no hopes, no will of the prisoner to falsify or to exaggerate could produce or create a resemblance of her finger prints or change them in one line, and therefore there is no danger of error being committed or untruth told. The taking of finger prints is not a violation of the spirit or purpose of the constitutional inhibition."

"The admission in evidence of the fact that certain conditions exist, which fact has been ascertained by a reasonable examination of the defendant, that requires no torture for its ascertainment and no act of volition on the part of the defendant, is not a violation of the defendant's constitutional privilege."

"The proof was not the defendant's proof. She was not called as a witness. It was proof by a competent witness, based upon the record of this examination of the defendant. The constitutional inhibition, in my opinion, has reference to testimonial utterances by the defendant, and may not be used to prevent the establishment of the truth as to the existence or nonexistence of certain marks of identity upon the defendant's fingers."

While our attention has been called to no California cases upon this point, the introduction of such evidence is supported, not only by long established usage, but, in our opinion, by the better reasoning. As pointed out in the case just referred to, such evidence is not the evidence of the defendant, but is the evidence of a competent witness, and, while it is based upon an examination of the defendant, it is no more inadmissible than would be the testimony of one who testified to the existence of a scar.

[4] Appellant's principal contention is that the evidence is not sufficient to justify the jury in finding that the assailant of Miss Ruttinger intended to commit rape upon her. It is argued that there is no evidence to indicate that the assailant in this case had any intent other than to escape, and that the evidence shows that he fled as soon as he could release himself from the hold of the prosecuting witness. Reliance is placed upon such cases as People v. Moore, 155 Cal. 237, 100 P. 688, 690, People v. Fleming, 94 Cal. 308, 29 P. 647, and People v. Norrington, 55 Cal. App. 103, 202 P. 932. Without reviewing all of the cases cited, these cases and others like them, considered most favorably to this appellant, merely hold that, where the evidence tends to show that a defendant did not intend to use the requisite force to accomplish his purpose, but where it rather shows that he did not at any time intend to use such a degree of force, the evidence is not sufficient to sustain a conviction. For example, in the case of People v. Fleming, supra, which is especially relied upon by appellant, the court remarks that the evidence in that case preponderated to the effect that the accused depended for success in his efforts upon his own solicitations and blandishments, and further says that it appeared from the evidence that physical force was not an element in the defendant's mind in attempting to carry out his intention. In People v. Moore, supra, in discussing cases of this kind where verdicts have been set aside upon the ground of the insufficiency of the evidence upon the point in question, the court says: "The principle underlying those decisions is that a charge so easily fabricated should not be sustained upon the sole testimony of the prosecutrix, where it is not only uncorroborated, but is contradicted by the surrounding circumstances. It has no application to a case like this, in which all the outward facts are clearly established, and the only question is what the defendant intended." In the same case the court also said: "In all such cases the intent with which an assault is committed is a fact which can only be inferred from the outward act and the surrounding circumstances. It is, in other words, a question of fact for the jury, and not a question of law for the court, except in a case where the facts proven afford no reasonable ground for the inference drawn."

In People v. Estrada, 53 Cal. 600, the court said: "The question as to the intent with which the assault was committed is a question of fact; and if there was evidence tending to prove that the intent was as alleged in the indictment, the verdict will not be set aside on the ground that the evidence is insufficient to sustain the verdict."

We are unable to say from the evidence in the instant case that there is no reasonable ground from which the jury could draw the inference that the assailant intended to commit rape, and intended to use all requisite force to accomplish that purpose. The evidence and the surrounding circumstances are susceptible of that inference, and it is therefore a question of fact for the jury. This assailant apparently had every opportunity to know that the prosecuting witness was around her premises, that she was alone, and that she could reasonably be expected to come in soon. Some preparation was shown. Although the evidence shows without conflict that it was a chilly night, the assailant had removed his coat, unscrewed the electric light bulb in its socket so that it could not be turned on in the usual manner, and waited in the darkness just inside the bedroom. He grabbed the prosecuting witness as she entered, and made particular efforts to stop her from screaming, threw her upon the bed, held one of her legs down with one of his legs, and got upon her sufficiently to put the other knee upon her stomach. In our opinion these facts are sufficient to justify the submission to the jury of the question of the intent of the defendant. People v. Mit Singh, 59 Cal. App. 64, 209 P. 1013. The intention found by the jury not only appears a most natural and reasonable one, but under the circumstances existing it is rather difficult to imagine any other. The appellant argues that it would be more reasonable to assume that he was committing burglary, that at all times after the appearance of Miss Ruttinger he was attempting to get away, and that he fled as soon as he was able to escape from her clutches. Even if that were the more reasonable view, it would only be one of two conflicting inferences, and is not one that the jury was bound to draw. However, we cannot agree that it is the more reasonable. If his object was burglary, no reason appears for his taking off his coat on this chilly night. Nothing in the house was disturbed, although a pocketbook lay on a table and another on a dresser. If his only object was to escape, he had ample chance while she was engaged in the kitchen, or he could easily have rushed past her in the hall, surprised as she would have been. Or by waiting in the dark bedroom while she went to the center of the room to attempt to turn on the light, which he knew she could not readily do, he would have had a wonderful opportunity for flight. The evidence shows that she did not hold him, but that he held her, and that, instead of trying to restrain him, she was trying her best to release herself from him. Instead of trying to escape, the evidence shows his principal effort was directed toward keeping her from screaming, and holding her down, and that he continued to hold her down in spite of her fighting to release his hands from her body. Appellant argues that he might have accidentally fallen upon the bed in his effort to get away, but the position he assumed and the general circumstances shown justified the jury in reaching a different conclusion.

[5] Appellant further contends that the prosecuting witness was finally overpowered, and that the fact that her assailant then fled, after she was entirely within his power, shows that he had no such intention as that charged. In this regard we are again cited to People v. Fleming, supra. That was a case where the defendant never intended to use force, but the prosecuting witness had become exhausted by long and continued solicitations and blandishments, and had finally ceased to refuse and oppose the defendant's solicitations. And the court points out that the fact that the defendant then ceased his attempts, and the further fact that he did not flee, were important facts in showing what had been his intention. In the instant case we have a different situation. A careful reading of the entire evidence plainly shows that the prosecuting witness was not completely exhausted and was not completely in the power of her assailant, but that, long before she became exhausted from fighting, she was prevented from breathing by the knee in her stomach and the hand on her throat. Nothing appears to indicate that this was more than temporary, nor that her ability to fight would not have been restored had he changed his position to accomplish his purpose. She was fully able to get up, attempt to turn on the light, unlatch the door, walk to a balcony, and call for help, as soon as he released her. The fact that he released her and ran indicates that something happened to scare him away, rather than that his entire purpose had been to escape. In any event, the facts were sufficient to go to the jury. If the appellant at any time had the intent charged, but abandoned it, this fact does not free him from the legal consequences of his act. People v. Stewart, 97 Cal. 238, 32 P. 8; People v. Bowman, 6 Cal. App. 749, 93 P. 198. The contention that the evidence is not sufficient to support the verdict of the jury is without merit.

[6] Appellant complains of the following instruction given to the jury by the court: "Rape, embraces assault with intent to commit rape, also assault. Also embraced within the offense charged in the indictment are two other offenses, viz: 'Assault with intent to commit rape' and 'assault', sometimes called simple assault. An assault is an unlawful attempt, coupled with a present ability to commit a violent injury on the person of another."

However, appellant admits that in other instructions the jury were told correctly what the charge was. As we understand the objection to this instruction, it is that it told the jury that the defendant could be convicted either of assault with intent to commit rape, or of simple assault, and the argument is made that the evidence will support a conviction of nothing more than simple assault. This objection is without merit, and the jury were properly instructed that the offense charged included both assault with intent to commit rape and assault. It does not clearly appear that appellant objects to the use of the word "other" in this instruction. This word, as used in the instruction, has no meaning, and should not have been included. However, we fail to see where it could have done any harm, and, as appellant himself points out, any possible error was cured by the other instructions.

The judgment appealed from is affirmed.

We concur: MARKS, J.; JENNINGS, J.

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112 Cal. App. 117

PEOPLE v. MYRICK.

Cr. 1145.

District Court of Appeal, Third District, California.

Feb. 20, 1931.

1. Indictment and Information ⟜91(1).

Information, charging grand theft by feloniously taking property, *held* sufficient, though first count omitted word "unlawfully" (Pen. Code, § 952, as amended by St. 1929, p. 303).

The first count of the information accused defendant of grand theft, committed by wrongfully, willfully, and feloniously taking a cow belonging to a named company, while the second count accused him of the same crime, committed by wrongfully, willfully, unlawfully, and feloniously taking an automobile belonging to a named person. Pen. Code, § 952, as amended by St. 1929, p. 303, declares a count sufficient, if it contains in substance statement that accused has committed some public offense therein specified, and provides that in charging theft it shall be sufficient to allege that defendant unlawfully took the labor or property of another.

2. Criminal law ⚿1130(2)

Where transcript pages are not referred to in brief, nor assigned errors stated in substance or alleged form, appellate court need not search record therefor.

3. Larceny ⚿68(1)

Whether cattle sold by defendant, who assigned interest in contract for automobile, were those purchased by him on conditional contract, *held* for jury in trial for grand theft (Pen. Code, § 484).

4. Larceny ⚿65.

Evidence *held* to sustain conviction for grand theft of cow and automobile (Pen. Code, § 484).

5. Larceny ⚿70(1).

Instruction to convict of grand theft, if defendant took cow with intent to deprive owner thereof, *held* erroneous (Pen. Code, § 484).

6. Criminal law ⚿1186(4).

Instruction to convict of grand theft, if defendant took cow with intent to deprive owner thereof, *held* not reversible error, in view of preliminary instructions (Const. art. 6, § 4½).

In the preliminary instructions, the court set forth the counts of the information and stated that defendant's plea of not guilty put in issue every material allegation thereof and that it devolved on the prosecution to establish defendant's guilt of crimes charged beyond reasonable doubt.

7. Criminal law ⚿1186(4).

Judgment will not be reversed for errors in instructions which could not have prejudiced defendant, did not affect result, or were cured by evidence, other instructions, or verdict (Const. art. 6, § 4½).

Appeal from Superior Court, Butte County; H. D. Gregory, Judge.

Joseph Myrick was convicted of grand theft, and he appeals.

Affirmed.

C. I. Bennington, of Oroville, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

PLUMMER, J

The defendant appeals from a judgment of conviction based upon two counts in an information, which counts are in the following words and figures, to wit:

"Count I. In the Superior Court of the State of California, in and for the county of Butte, the 28th day of July, 1930. The said Joseph Myrick is accused by the district attorney of Butte county, by this information, found this 28th day of July, 1930, of the crime of grand theft, a felony, committed as follows: The said Joseph Myrick did on or about the 1st day of October, 1929, at Butte county, and State of California, and before the filing of this information wrongfully, wilfully and feloniously take one Jersey cow branded BS on the right shoulder and with ear tag with No. 4 on the right ear. Said Jersey cow then and there being the property of the Pacific Finance Company of Los Angeles, contrary to the form, force and effect of the statute in such cases made and provided, and against the peace and dignity of The People of the State of California.

"Count II. In the Superior Court of the State of California, in and for the county of Butte, the 28th day of July, 1930. The said Joseph Myrick is accused by the district attorney of Butte county, by this information, found this 28th day of July, 1930, of the crime of grand theft, a felony committed as follows: The said Joseph Myrick did, on or about the 5th day of April, 1930, at Butte county, and State of California, and before the filing of this information, wrongfully, wilfully, unlawfully and feloniously take certain personal property of Victor G. Strain, consisting of one 1930 Buick sedan automobile, engine number 2483927, 1930 license No. 2D9210, of the value of $1,100.00, contrary to the form, force and effect of the statute in such cases made and provided, and against the peace and dignity of The People of the State of California."

The information contained three counts, but as the defendant was acquitted on the third count, no attention need be given thereto.

[1] The first contention by the appellant is to the effect that neither count 1 nor count 2 of the information charges a public offense. As no demurrer was filed by the appellant, only the bare question as to whether a public offense is stated can be considered. While neither count does state fully all the particulars set forth in section 484 of the Penal Code, relative to grand theft and the offenses included under that designation, we think, in the absence of a demurrer, the counts are good. Each count charges the defendant

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⚿For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

with grand theft, a felony, and then particularizes the acts upon which the crime of theft is based without again alleging that the acts themselves constitute the crime of grand theft. Under section 952 of the Penal Code, as amended in 1929 (St. 1929, p. 303), no particular words are necessary. That section reads: "In charging an offense, each count shall contain, and shall be sufficient if it contains in substance, a statement that the accused has committed some public offense therein specified. * * * In charging theft it shall be sufficient to allege that the defendant unlawfully took the labor or property of another."

The first count charges that the defendant wrongfully, willfully, and feloniously took the property of another. The second count charges that the defendant wrongfully, willfully, unlawfully, and feloniously took the property of another. Thus, the second count uses all the words necessary to comply with the provisions of section 952 of the Penal Code, and while the word "unlawfully" does not appear in the first count, it does charge the defendant with willfully and feloniously and wrongfully taking the property of another, which fully advised the defendant as to the offense with which he was charged. Very similar informations have been upheld by this court. People v. Campbell, 89 Cal. App. 646, 265 P. 364; People v. Plum, 88 Cal. App. 575, 263 P. 862, 265 P. 322.

[2] A long list of assignments of error is set forth in the appellant's brief, but as the pages of the transcript are not referred to in many instances, and the alleged errors are not set forth either in substance or in the form in which the errors are alleged to have taken place, we do not feel that we are called upon to search through a record of some 500 pages to ascertain whether the assertions of the appellant's brief are or are not well founded. It has been frequently held that where an appellant sets forth no part of the record, and does not refer to the pages of the record to support his contentions, the court will not burden itself with an examination of the record to ascertain if error has been committed.

In the case of People v. Clark, 183 Cal. 677, 192 P. 521, quoting from pages 686 and 687 (192 P. 521, 525), we find the following: "Appellant's third assignment of error is to 'all of the rulings of the court overruling the objections of his counsel, or sustaining the objections of the district attorney, * * * together with the giving of the instructions as they appear in the record.' No portions of the record are referred to or quoted, no authorities are cited or discussed, and, indeed, appellant does not specify wherein the court erred in the giving of the instructions or in the rulings on the evidence. We do not feel called upon to consider points so presented." Citing Gray v. Walker, 157 Cal. 381, 108 P. 278; Dore v. Southern Pacific Co., 163 Cal. 182, 124 P. 817; Born v. Castle, 175 Cal. 680, 167 P. 138; Scott v. Times-Mirror Co., 181 Cal. 345, 184 P. 672, 12 A. L. R. 1007. See, also, People v. Lloyd, 97 Cal. App. 664, 275 P. 1010.

In People v. Morales, 77 Cal. App. 483, 247 P. 221, 222, in considering assignments of error such as we have presented in the instant case, this court, speaking through Justice Hart said: "The appellate courts are not supposed to perform the work of counsel who present cases thereto for review. The rule thus stated and to which the appellate courts of this state almost uniformly adhere is explained as follows in People v. McLean, 135 Cal. 306, 309, 67 P. 770, 771: 'We again repeat what we have said before that we will not examine alleged errors presented in this way. It is due to this court from the members of the bar to point out clearly and concisely the rulings complained of as erroneous and the reasons why they are so, with reference to authorities, if any. In case counsel will not take the trouble to do so, we shall deem the matter as of not sufficient importance to merit notice in an opinion.' " (Citing a number of authorities.)

In the instances where the pages of the transcript are referred to, no reasons are presented showing why such alleged errors are prejudicial. We will cite a few instances: "The court erred further in his remarks before the jury on pages 275 and 276 of the testimony transcribed, to show what money was paid to the defendant." And, further: "It is not competent for the prosecution to prove the commission of independent crimes committed by defendant, the evidence of which has no tendency to prove some material fact in connection with the offense charged." Our attention has not been called to any portion of the transcript where such testimony was admitted, nor has anything been set forth to show, if such testimony was admitted, that it was not competent to prove some issue in the case. The specifications of error, in the argument of counsel, do call our attention to alleged erroneous instructions given to the jury, which we will consider after first stating the substance of what the testimony shows.

[3, 4] The record shows that the defendant and a man by the name of Allen were engaged in dealing in cattle; that some time prior to October, 1929, E. A. Allen of Chico entered into a conditional sales contract with the defendant for the sale of some 30 or 40 head of cattle. Upon this contract the defendant made a small cash payment. The contract provided that Allen was to retain title to the cattle until they were all paid for. Title to the cattle in question never passed from Allen to the defendant. After the defendant obtained possession of the cattle included within the conditional sales contract, he sold one cow to a man by the name of S. S. Peters of Gridley, who paid him therefor the sum of $100. This is in substance what is included in the testimony relative to the first count. Thereafter, the record shows that the defendant sold, on a conditional contract of sale, to one Ramsey, 10 head of the cattle he had obtained from E. A. Allen; that the defendant represented to Ramsey that he owned the cattle. A conditional sales contract was entered into between the defendant and Ramsey, whereby Ramsey agreed to pay the defendant a certain sum of money for said cattle, the balance remaining unpaid on the contract being the sum of about $1,100. The record shows that some time before the contract of sale and purchase of the cattle in question was entered into between the defendant and Ramsey, Mrs. Myrick, the wife of the defendant, had purchased from a man by the name of Strain a Buick automobile, upon which there was still owing the sum of $1,100. After the execution of the conditional contract of sale for the cattle just referred to, the defendant assigned his interest in the contract to Strain, in full payment of the balance due upon the automobile, and obtained the "pink slip" therefor. Shortly after these occurrences, the defendant left the county of Butte, and was thereafter apprehended in the state of Oklahoma. The testimony introduced on the part of the people was to the effect that Myrick had no title to the property; that his sale thereof was fraudulent; and that by reason of these transactions he obtained possession of the title to the Buick automobile. In addition to what we have stated, the testimony shows that the defendant was loaned the sum of $800 to plant certain crops, and that the money loaned was not used for that purpose, the defendant and his wife having departed from the county of Butte shortly after obtaining title to the automobile and the $800 referred to.

On the part of the defendant considerable testimony was introduced relative to the transactions had between E. A. Allen and the defendant, to the effect that the 10 head of cattle mentioned and included in the contract of sale executed between the defendant and Ramsey, were not any of the cattle included in the conditional contract of sale entered into between Allen and the defendant. On the part of the prosecution, again, there was testimony introduced to the effect that they were the same cattle, description and markings being testified to. This, of course, was a question of fact for the jury. It is sufficient to say that a resume of the testimony shows that if the jury believed the testimony introduced on the part of the people, it is amply sufficient to remove all reasonable doubt as to the defendant's guilt. With this in view we will now consider the two instructions alleged to be erroneous.

[5] One instruction relates to count No. 1, and one instruction relates to count No. 2. The setting forth of the instruction relative to count No. 1 will be sufficient, as the instruction as to count No. 2 is subject to the same objections. The instruction as to count No. 1 reads: "If you believe from the evidence solely produced here in the court room before you, and beyond a reasonable doubt, that on or about the 1st day of October, 1929, at Butte county, and State of California, and before the filing of this information that the defendant Joseph Myrick did take one Jersey cow branded BS on the right shoulder, and with ear tag number 4 on the right ear, and convert the same to his own use, and that said Jersey cow was then and there the property of the Pacific Finance Company of Los Angeles, and with the intent then and there to deprive the alleged owner of its property, then you should find the defendant guilty of the charge alleged and made against him in count 1 of the information. Otherwise, you will find him not guilty as to the charge made in said count." It requires no argument to show that this instruction is erroneous, and should not have been given in the language in which it is couched. By its terms it would permit the finding of the defendant guilty upon acts not constituting a criminal offense. The instruction given in relation to count No. 2 is likewise as unquestionably erroneous.

[6] Following these instructions, however, the court did read to the jury a portion of section 484 of the Penal Code, to wit: "Every person who shall feloniously steal, take, carry, lead, or drive away the personal property of another, or who shall fraudulently appropriate property which has been entrusted to him, or shall knowingly and designedly, by any false or fraudulent representation or pretense, defraud any other person of money, labor, or real or personal property, * * * is guilty of theft."

In the preliminary instructions given to the jury the court set forth counts 1 and 2, and then said: "To this information, upon his arraignment in this court, the defendant entered a plea of not guilty to each of said counts, which plea puts in issue every material allegation of the information and charge, and it devolves upon the prosecution to establish to your satisfaction, beyond a reasonable doubt, that he, the defendant, is guilty of the crimes, or of any one of them, charged against him in the information." From this we conclude that the jury, as reasonable men, would understand, and did understand, that the defendant was charged with grand theft, and that grand theft meant willfully and feloniously depriving another of his property, and that the acts must be so performed as to constitute a felony, before the defendant could be found guilty, and not that the simple taking of property belonging to another constituted the crime of grand theft. Under such circumstances, section 4½ of article 6 of the Constitution is applicable, where it provides that no new trial shall be granted on the grounds of misdirection of the jury, unless the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.

[7] The text found in 8 California Jurisprudence, p. 628, we think states the rule that should govern our decision here. We quote as follows: "While formerly an erroneous instruction was presumed to be injurious unless the contrary clearly appeared, under the present state of the California law a judgment will not be reversed because of an error in misdirecting the jury, unless in the opinion of the appellate court, after an examination of the entire case, the error resulted in a miscarriage of justice. Hence, a judgment will not be reversed because of an error in instructions if the error can in no way prejudice the rights of the defendant, if it appears that the result would have been the same if the erroneous instruction had not been given, or if the error was cured by the evidence, or by other instructions, or by the verdict. Instructions which are calculated to mislead the jury under the circumstances of the case are erroneous and require a reversal, if they result in a miscarriage of justice. But mere uncertainty or lack of perspicuity which cannot have the effect of misleading the jury will not authorize a reversal, especially when the uncertainty is removed by other instructions."

As we have stated, a review of the testimony leads to the conclusion that the jury was not misled to the prejudice of the appellant. We may here state that we have read the entire transcript, notwithstanding that under the circumstances we were not required to do so, and have found nothing which would justify a reversal of the judgment, nor do we find anything that requires further special consideration.

The judgment is affirmed.

All concur.

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112 Cal. App. 125

KAST v. DUBUQUE FIRE & MARINE INS. CO. OF DUBUQUE, IOWA, et al.

Civ. 4149.

District Court of Appeal, Third District, California.

Feb. 20, 1931.

1. Appeal and error ⚷1011(1).

Findings of trial court on conflicting evidence are conclusive.

2. Insurance ⚷246.

Evidence *held* to support finding that there was cancellation of fire policy by consent of parties (Deering's Gen. Laws 1923, Act 3735, p. 1354, § 1).

Appeal from Superior Court, Stanislaus County; J. C. Needham, Judge.

Action by C. S. Kast against the Dubuque Fire & Marine Insurance Company of Dubuque, Iowa, and another. Judgment for defendants, and plaintiff appeals.

Affirmed.

Dennett & Zion, of Modesto, for appellant.

Redman, Alexander & Bacon, of San Francisco, and Griffin & Boone, of Modesto, for respondents.

Justice pro tem. McDANIEL delivered the opinion of the court.

This action was brought by the plaintiff against the defendants to recover upon a certain policy of fire insurance. Judgment was against the plaintiff and appellant and in favor of the defendants and respondents. After judgment a motion for a new trial was made by the plaintiff on the grounds: (1) That the evidence is insufficient to justify the decision of the court; (2) that the decision is against law; and (3) on account of errors of law occurring at the trial and excepted to by the plaintiff. The motion for a new trial in due course was denied by the court, and the only issue upon this appeal is the insufficiency of the evidence to support the findings and judgment of the trial court.

According to the complaint summarized, the plaintiff on the 17th day of April, 1927, was the owner of a certain frame hotel building situate in the town of Chowchilla, Cal., which building on the 4th day of August, 1927, was destroyed by fire; the value of the building was alleged to be $12,000; at the time of the fire and destruction of said property, it was subject to the lien of a deed of trust in favor of the San Francisco Building & Loan Association, but since said date said obligation has been paid; on the 17th day of April, 1927, the defendants issued to plaintiff the policy of insurance against loss by fire, in the form known as "California Standard Form Fire Insurance Policy," that form being as prescribed by the law of California; the policy, by its terms, recited that the loss, if any, shall be payable to San Francisco Building & Loan Association, "mortgagee"; the said last-named building and loan association having been paid in full since said fire, the plaintiff is entitled to the proceeds of said policy, which was averred to be in full force and effect on the date of the fire; all of the proofs of loss, etc., have been duly made by the plaintiff; plaintiff prays for judgment against the defendants for the sum of $3,000, interest and costs.

The issue presented by the answer, which admits the issuance of the policy of insurance on the 17th day of April, 1927, is that the said policy of insurance had been duly canceled at the request of the plaintiff; that defendant had been informed by the plaintiff at the time he requested cancellation of the policy that he intended to obtain other fire insurance in the same amount in another insurance company, and had done so by procuring from the American & Foreign Insurance Company insurance against loss by fire for the period of one year, in the sum of $3,000, covering the said property referred to in the complaint, which said last-named policy was in full force and effect at the time of said fire, and has since been paid by said American & Foreign Insurance Company to said plaintiff, by payment of the sum of $2,900, in satisfaction of all claims against it, arising out of said loss. Defendants deny that on August 4, 1927, the policy sued upon was in force and effect, but aver, as before stated, it had been canceled.

We have examined with care the evidence, and are satisfied the judgment of the court below must be upheld, for the reason that, by a preponderance thereof and without contradiction other than the contradictions found in the testimony of the plaintiff himself, it supports the judgment.

The facts, summarized chronologically as nearly as may be, are as follows:

For the year preceding April 17, 1927, the property was covered by a policy of insurance for $3,000, issued by the respondent. It expired on said date. It had been obtained for plaintiff by the company's local agent at Modesto, one William Falger, who was the local agent of the Pacific Coast agency, the general coast agent of the respondent companies. The plaintiff made no request of Falger for a renewal of this first policy upon its expiration, nor did Falger solicit the renewal, for the simple reason, he said, that Mr. Kast was in the hospital at San Francisco, and "I learned from parties from Modesto that his son was writing insurance. * * *" The policy was renewed, however, at the request of the secretary of the San Francisco Building & Loan Association, Mr. Steinbaugh, who, by letter dated April 16, 1927, addressed to plaintiff, notified him of the renewal, giving the number of the policy, the name of the company, the amount of the insurance, $3,000, and the premium of $135 for one year. On April 28, 1927, either the appellant or his son (who attended, as agent, to the business of his father in the latter's absence) wrote and mailed a letter to the loan association of San Francisco, concerning said policy. A copy of this letter, dated April 28, 1927, is not in evidence. Its contents, however, are indicated by the testimony of Steinbaugh, when considered with the statements in his letter of reply to Kast, which letter he wrote on May 2, 1927. It appears from that reply and from Steinbaugh's testimony that appellant was figuring on other insurance, and on handling the insurance matter himself, rather than to have the association do so, and did not wish to keep in force the policy now in question. Steinbaugh's letter to appellant follows: "Your valued favor of the 28th ulto., in regard to the fire insurance policy on the Chowchilla Hotel is at hand and contents appreciated. Regret that you are late in getting a new policy, as the old policy expired on April 17th. Same was renewed in the Reserve Underwriters for $3,000.00, premium $135.00 for one year, policy number 57,632, Pacific Coast Agency Company, Ltd., 60-Sansome Street, San Francisco, California. There might have been a serious loss, if we had not kept the insurance in force. Any arrangement you may make with the Pacific Coast Agency, provided we are protected, is all right with us. Regretting that you did not take this up 30 days ago, and hoping it will be adjusted to our mutual protection and satisfaction. With kind regards, we remain, Yours respectfully, San Francisco Building & Loan Ass'n, D. A. Steinbaugh, Secretary."

Steinbaugh, referring to the April 28, 1927, letter from appellant, testified as follows: "Q. Now will you state again what your recollection is as to the contents of that letter that you received from Mr. Kast? A. Just what this implies, that he was figuring on other insurance or handling the matter himself rather than us and he wanted to handle it rather than us—here is the idea—this will clear up the situation—he had been practically acting as agent for himself in that and other companies and he got the original Reserve policy and I renewed it—now the question was whether he was going to arrange to pay it down there or arrange for the commission, or whether we were going to get it, or whether he would pay it here—that seemed to be the line I was working on."

On the 29th day of April the appellant had made application through one Griffin, an insurance agent at Sacramento, from whom appellant's son, C. H. Kast, expected an appointment as an insurance agent, for a $3,000 policy in the American & Foreign Insurance Company, covering the same Chowchilla property. This policy was issued by the American & Foreign Company and duly sent to the San Francisco Building & Loan Association, the same being the policy to take the place of respondents' policy as security for Kast's indebtedness to the association.

On or about July 10th the plaintiff went to see Falger, the local agent of the respondent companies at Modesto, with whom he had a conversation concerning the policy here in question. The appellant states: "I asked Mr. Falger if he had renewed the policy. He said 'No,' and I told him that Mr. Steinbaugh wrote to me that he took out a policy for $3,000.00, and that my boy was in the insurance business now, and if he had a policy, I would want him to cancel it if he had rewritten it, and if he had not written it, not to write it, as my boy is in the insurance business, and I would give the boy the commission, and that would be all the insurance I would want to carry on the building."

The witness Falger, with reference to the same occasion, said that the plaintiff said to him: "Mr. Falger, that policy that has been issued, I have ordered it canceled, because my son is now writing insurance and is going to have a policy written and I want him to have the commission."

The court below must have interpreted this conversation as referring to appellant Kast's letter to the San Francisco Building & Loan Association of April 28th. On or about July 15, after having received from the Pacific Coast Agency Company a report of insurance business and outstanding premiums, Falger wrote the respondent company, informing it that "in speaking to Kast he said that this policy had been returned for cancellation, for the reason that one of his sons was now writing life and fire and he had rewritten same."

Falger also directed in the same letter that the premium charged against him for collection on policy number 57,632 of C. S. Kast, premium $135, should not be charged to the Falger account. Immediately after the receipt of that communication the respondent company, through its agent at San Francisco, Mr. George P. Duncan, who had delivered the policy to the San Francisco Building & Loan Association theretofore, made a notation upon the Falger letter, "Not received and should have E. P.," meaning that the policy was not returned to the respondent company, and that it should receive earned premium, i. e., from April 17, 1927, to July 15th or 16th.

Mr. Duncan, when a witness, stated that, upon receipt of the information from Falger, he called up Mr. Steinbaugh on the telephone and read the letter of Falger telling him the policy was canceled as of the date of July 15, 1927. He also informed Steinbaugh that the company was entitled to the earned premium from and after April 17th to date of cancellation. There were several conversations to the same effect with Steinbaugh, who interposed no objection as to the payment of the earned premium, but said "that it would receive attention right away." Steinbaugh failed to pay the premium or to return the canceled policy. Steinbaugh at all times represented both appellant and the San Francisco Building & Loan Association in the insurance transaction. Steinbaugh also informed Duncan, representing the respondent at the time of the conversation, that the association had received another insurance policy to take the place of the canceled policy.

It next appears that on August 9th, five days after the fire, Steinbaugh, acting for appellant C. S. Kast, mailed to respondent companies a check for $135, the total year's premium. This check was never cashed by the respondent companies, but retained in their possession, after notifying the maker that it was too large in amount, as the company had only coming to it the earned premium from April 17th to the date of cancellation on July 15, 1927. It was retained, Duncan testified, only as evidence of the attempt to pay the premium after the property had been burned.

In all of the transactions relating to the fire insurance company it appears that Steinbaugh, secretary of the San Francisco Building & Loan Association, acted for its protection as well as for the appellant. He procured the policy and must be considered appellant's agent in the transaction; he had been informed of appellant's intention to substitute a policy of appellant's own procurement in place of the policy sued upon and had kept appellant duly notified in all matters concerning the business.

The trial court evidently construed all of the foregoing facts, fairly weighed and interpreted, to mean that the policy, at appellant's request, was canceled on July 15, 1927, and as supporting by adequate preponderance the material averments of the complaint.

While it is true that no explicit and direct statement appears in the evidence to have been made by appellant requesting the policy in question to be canceled, the fair inference from all that was said and done by himself and his agents is that he actually did request the cancellation.

[1] The findings of the trial court upon conflicting evidence are conclusive. It is unnecessary to cite any authorities in addition to those used by respondent on this appeal. Migala v. Dakin, 99 Cal. App. 60, 61, 277 P. 898; Mercantile Investment Co. v. How, 99 Cal. App. 182, 186, 278 P. 243; Dellarowe v. Kirchner, 99 Cal. App. 599, 601, 279 P. 210.

[2] It is an admitted fact, alleged in the complaint and not denied, that the standard form of insurance policy was the form of the policy sued upon, and, under the law of California, that standard form contains the provision that the policy "shall be canceled at any time at the request of the insured." 1 Deering's Gen. Laws 1923, p. 1354, Act 3735, § 1. The facts, also, preponderate to support the court's finding that there was cancellation by consent of the parties.

We quote from Westchester Fire Ins. Co.

v. McMinn (Tex. Civ. App. 1916) 188 S. W. 25, 26, as follows: "A policy of insurance may be canceled at any time before loss, by agreement between the parties. And there may be cancellation by consent of the parties, independent of the terms of the policy; and in such case an immediate payment of the unearned premium may not be required in order to make valid the agreed cancellation. As to whether there was an agreement here was a question of fact."

In Stevenson v. Sun Ins. Office, 17 Cal. App. 288, 119 P. 529, 531, the following quotation is applicable and determinative of the instant appeal: "There is no merit in the contention discussed and urged by plaintiff that the contract of insurance in the case at bar cannot be considered as canceled merely because the policy in controversy was not formally and physically surrendered into the possession of the defendant prior to the fire. A contract of insurance must be governed and interpreted by the same rules which ordinarily apply to other contracts, and it will be enforced only according to the manifest intention of the parties. It is a self-evident proposition that a contract of insurance may be as readily rescinded, as it was made, by the mutual agreement of the parties or their authorized representatives; and, while the surrender of a policy of insurance by the insured and its acceptance by the insurer is usually prima facie evidence of cancellation, yet a formal physical surrender is not absolutely necessary to a rescission and cancellation of the contract. The formal surrender and acceptance of the policy is at best a piece of evidence tending to show a cancellation, and, if the fact of rescission is established (as we think it was in this case) by the mutual agreement of the parties, the rescission is as complete and effectual as if the policy had been actually indorsed 'canceled,' and surrendered into the possession of the defendant."

The judgment is affirmed.

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112 Cal. App. 109

EY v. FITTS, Dist. Atty., et al.

Civ. 7266.

District Court of Appeal, Second District, Division 2, California.

Feb. 20, 1931.

1. District and prosecuting attorneys ⚷3(1).

District attorney's specifications of reasons for discharging deputy *held* specific in showing district attorney considered deputy inefficient and out of harmony with administration of office.

> Reasons assigned by district attorney for discharge were incompetency, failure to perform duties, either through inability or neglect, lack of interest in work, and in welfare of those deputy served, failure to obey rules formulated by office, failure to meet standard required by office, and that efficiency and economy required that deputy be relieved from further duty.

2. Mandamus ⚷172.

If discharge of deputy district attorney was effective, question whether office was abolished is immaterial on petition for mandamus to reinstate.

3. Appeal and error ⚷750(1).

Specification of error that good faith in abolishing office must be shown *held* not specification that finding of good faith of district attorney in making charges was unsupported; hence argument against good faith could be ignored.

4. Appeal and error ⚷231(1).

Particular finding attacked must be specified.

> Such finding must be specified so that adverse party may know what evidence by way of amendments to embody in statement or bill and that trial court's attention may be directed to designated matters.

5. District and prosecuting attorneys ⚷3(1).

District attorney's letter requesting deputy's resignation without reflection upon ability or integrity *held* not necessarily to show bad faith in subsequent discharge.

> It could not be said that first letter was not open to construction that no charges were made and that it was courteous way of saving embarrassing situation, in view of subsequent letter wherein district attorney stated that he had earnestly sought to avoid embarrassment of discharging deputy from position, but that deputy's failure to respond to request for resignation necessitated formal action discharging him. First letter was purely in negative without affirmation of ability.

Appeal from Superior Court, Los Angeles County; James A. Smith, Judge.

Petition by Frank F. Ey for a writ of mandate against Buron R. Fitts, as District Attorney of Los Angeles County, and others. From a judgment denying the writ, petitioner appeals

Affirmed.

Frank F. Ey, of Los Angeles, in pro. per.

Everett W. Mattoon, Co. Counsel, and S. V. O. Prichard and Fred M. Cross, Deputy Co. Counsel, all of Los Angeles, for respondents.

Earl Warren, Dist. Atty., Frank M. Ogden, Asst. Dist. Atty., and James H. Oakley, Deputy Dist. Atty., all of Oakland, amici curiæ.

IRA F. THOMPSON, J.

The petitioner sought a writ of mandate in the superior court to compel the respondent Buron Fitts, as district attorney, of Los Angeles county, to reinstate petitioner as a deputy district attorney, the respondent Sam J. Chappel, as secretary of the civil service commission of Los Angeles county, to certify his name to the payroll as a deputy district attorney, and the respondent Payne, as auditor of Los Angeles county, to issue a warrant for petitioner's salary covering the period since January 15, 1929. The writ was denied, and this is an appeal from that judgment.

The appellant contends that this appeal is different from and not governed by the case of Fee v. Fitts (Cal. App.) 291 P. 889. However, the only point presented by him in his opening brief, and we quote it verbatim, is as follows: "The authority to remove an employee in the classified service is vested by the Constitution of the state of California, the charter of the county of Los Angeles and county ordinance No. 929, new series, in the Board of Supervisors only." This argument was directly determined against appellant in the case mentioned, and we can see no useful purpose to be served by a repetition herein of the reasons for our conclusions therein.

In his reply brief, the appellant, in addition to resisting two points raised by the respondents, assigns the following two reasons for a reversal of the judgment: "Purported reasons set forth in the letters of purported discharge served upon petitioner were 'not specifically stated'" and "Good faith in the abolition of an office must be shown."

[1] The first of these is identical with the argument presented in the Fee Case and which was determined adversely to appellant upon the authority of Cronin v. Civil Service Commission, 71 Cal. App. 633, 236 P. 339, 341. Without requoting at length from this last-cited authority, which construed the same rules involved in the instant appeal, it is not inappropriate to call special attention to the following language of the court: "While the commission is given power * * * in this one instance, we fail to find in this regulation of the commission any intention to divest the principal of his general power to remove and discharge deputies and employees whom he considers inefficient or out of harmony with his administration of his office. * * *" The reasons assigned by the respondent Fitts for appellant's discharge are as follows:

"1. Incompetency to perform the duties of deputy district attorney.

"2. Failure to perform the duties of your position, either through inability or neglect.

"3. Lack of interest in your work, and in the welfare of those you serve.

"4. Failure to obey the rules formulated by this office.

"5. Failure to meet the standard required by the present District Attorney's office.

"6. Efficiency and economy require that you be relieved from further duty."

If a hearing were provided for by the civil service regulations, it might be necessary to set forth concrete instances, but it definitely appears from the specifications, and their meaning cannot be doubted, that the district attorney, the respondent Fitts, discharged the appellant because he considered him "inefficient" and "out of harmony with his administration of his office." The charges were specific in these particulars.

[2-4] Turning then to the last assignment, to wit, "that good faith in the abolition of an office must be shown," it is first of all to be observed that, if the discharge of the appellant was effective, we need not concern ourselves with the question whether the office was abolished. It is also to be noted that assignment No. 4 of the specifications of error reads as follows: "The evidence plainly shows that the position occupied by plaintiff and petitioner was not in good faith abolished, but on the contrary, the evidence shows that defendant and respondent Buron R. Fitts attempted to fill the same position by a person other than petitioner on or about the time of his attempted removal." We would therefore be justified in closing our consideration of the question by a statement that the assigned error is not material to a disposition of the cause. In paragraph XV of appellant's complaint he alleged that the charges upon which he was discharged were a mere subterfuge "adopted by the said defendant Fitts for the purpose of avoiding, evading, circumventing and nullifying the provisions and requirements of the civil service law, and for the further and ulterior purpose of creating lucrative positions for his political friends at the public expense; and that none of said charges were made in good faith or in the interest of either efficiency or economy or for any other reason or reasons than above stated." The finding of the court responsive thereto is: "That the allegations contained in paragraph designated XV of the petition herein are not

true; except that the court makes no finding with reference to the truth or falsity of the reasons set forth in the letters of December 29, 1928, and of January 3, 1929." The court below very obviously set forth the exception in the above finding on the ruling of the case of Cronin v. Civil Service Commission, supra, to the effect that the rules and regulations did not contemplate a hearing before a principal could discharge a deputy. It is evident that the specification of error to which we have directed attention is not a specification that the finding here quoted is unsupported by the evidence, and hence we are under no necessity of determining the argument advanced by appellant on the oral presentation hereof that the evidence discloses a lack of good faith on the part of respondent Fitts in discharging appellant from his staff of deputies. It has always been the rule that the particular finding attacked must be specified, so that, as is said in Crow v. Crow, 168 Cal. 607, 143 P. 689, 690, "the adverse party may know what evidence by way of amendments to embody in the statement or bill and that the trial court's attention may be properly directed to these designated matters." See, also, Mazuran v. Stefanich, 95 Cal. App. 327, 272 P. 772; Schultz v. City of Venice, 200 Cal. 50, 251 P. 913; Citizens' Bank of L. A. v. Jones, 121 Cal. 30, 53 P. 354; State Compensation Ins. Fund v. Rothwell, 103 Cal. App. 607, 284 P. 943.

[5] However, this further observation may be made. It is the contention of appellant that it must be said, because the respondent Fitts wrote a letter to appellant on December 18, 1928, requesting his resignation in which he said, "This action is not to be construed by you as any reflection upon your ability or integrity as a deputy but on the contrary this office wishes you the best of success in your future career as a lawyer," that his discharge for the reasons heretofore quoted was not in good faith. This conclusion does not necessarily flow from the two letters. In the second it is said: "We have earnestly sought to avoid the embarrassment of discharging you from your present position. Your failure to respond to this request necessitates formal action discharging you from further duties as Deputy District Attorney." We cannot say, particularly in the face of the finding of the trial court, that the first letter is not open to the construction simply that no charges were made, and that it was a courteous way of saving an embarrassing situation. It is to be noted that the first letter is purely in the negative without affirmation of ability.

Judgment affirmed.

We concur: WORKS, P. J.; CRAIG, J.

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112 Cal. App. 97

PERONNET et al. v. RALPH et al.

Civ. 7721.

District Court of Appeal, First District, Division 2, California.

Feb. 20, 1931.

Rehearing Denied March 21, 1931. Hearing Denied by Supreme Court April 20, 1931.

1. Sales ⚿464.

Owner of personalty may make conditional sale thereof.

2. Chattel mortgages ⚿139.
Sales ⚿473(1).

Title of conditional seller is superior to that of subsequent mortgagee or purchaser, even if purchase or mortgage is made without knowledge of reservation of title.

3. Sales ⚿454.

Whether contract is for conditional sale is determined by intent of parties, expressed in and deducible from contract itself.

4. Sales ⚿454.

Whether parties intend to make conditional sale agreement must be collected from whole transaction and not from any particular feature of it.

5. Fixtures ⚿22, 35(2).

Evidence *held* to establish conditional and not completed sale of equipment, furniture, and fixtures pertaining to certain theater; hence subsequent purchaser did not obtain title.

> The evidence disclosed that the buyer entered into an agreement to purchase certain lease to theater and equipment under certain circumstances, and for certain sum, and that the owner signed instrument whereby he agreed to accept the proposition made by the buyer and to deliver the above-mentioned lease and render a clear bill of sale on the payment of a certain sum; it being agreed between the parties that the bill of sale, lease, and note were to be escrowed until terms of agreement were performed.

Appeal from Superior Court, Los Angeles County; E. N. Rector, Judge.

Action by Jules Peronnet and others against William A. Ralph, George R. Frampton, and others, in which the last-named defendant filed cross-complaint. From judgment for cross-complainant, plaintiffs appeal. Reversed.

W. W. Butler, of Los Angeles, for appellants.

Courtney A. Teel, of Los Angeles, for respondent.

BURROUGHS, Justice pro tem.

This is an action of claim and delivery. The property involved constitutes all the equipment, furniture, and fixtures contained in and pertaining to a certain theater known as the Tujunga Valley Theatre, situate at Tujunga, Cal., of the stipulated value of $5,000. Judgment was entered in favor of the cross-complainant, George R. Frampton, for the return of said property, or for $5,000, the value thereof. The plaintiffs have appealed from the judgment.

The bill of exceptions shows that on April 14, 1924, the plaintiffs Peronnet and the defendants William A. Ralph and Lulu E. Ralph entered into the following agreement:

"I hereby hand you my check for the sum of $100.00 to apply on the purchase of the lease and equipment of the Tujunga Theatre, situate at Tujunga, California. The lease is to be for the term of five years from April, 1924, at a monthly rental of $75.00, same to be straight transferable. The equipment is to be free and clear of all encumbrance except the sum of $2,300.00 due on organ, payable $45.00 per month or more, which I agree to assume. The organ contract is to run for a term of three years.

"The full purchase price is to be $6,500.00, payable as follows: $1,000 00 upon the signing of the lease, and the balance of $5,500.00 to be paid ninety days after the signing of the lease, this sum to be secured by demand note bearing interest at the rate of 7 per cent per annum.

"The above lease is to be secured by the first and last month's rent.

"Possession to be given on or before May 1, 1924. All bills, deposits, rents, taxes, insurance, etc., to be prorated date of delivery.

"The check for $100.00 to apply on purchase price when deal is consummated, otherwise to be returned to me. * * *

"I, R. Peronnet, owner of the above lease and equipment, hereby accept the above proposition and will deliver the above mentioned lease, and will render a clear bill of sale upon the payment to me of the sum of $6,500.00. Bill of sale not to include the organ. * * *

"It is agreed between the parties hereto that the bill of sale, lease and note are to be escrowed in a reputable bank until the terms of this agreement have been fully performed."

Two days later another agreement was entered into by the same parties as follows:

"Received of W. A. Ralph and L. W. Ralph the sum of one thousand one hundred and fifty ($1,150.00) dollars to apply on the purchase of the Tujunga Valley Theatre equipment and lease situate at Tujunga, California. One thousand dollars ($1,000.00) to apply on the purchase price of $6,500.00, and $150.00 to apply on the first and last month's rent, in accordance with the lease. * * * Possession of the above mentioned theatre is to be given April 24, 1924, and all bills, taxes, insurance, deposits and other expense bills are to be prorated date of delivery.

"R. Peronnet."

In accordance with said agreements, the Peronnets leased the theater building to the Ralphs for the term of five years, and the latter were let into possession of the building in accordance with the terms of said lease, and were given possession of all of the personal property. On April 16, 1924, the said lease, together with the following escrow instructions, were delivered to the Tujunga Valley Bank:

"I hand to Mr. Ralph Peronnet, cash paid out of escrow $1,000 a lease of Tujunga Valley Theatre and other papers to be signed and executed by me in connection with this escrow—which you are instructed to use when you can hold for me:

"(1) Covering the following described property:

"Bill of sale of theatre equipment, signed and acknowledged lease by all parties in interest. * * *

"Rent on theatre and equipment (full lease) paid till June 1, 1924, and no refund to be made to seller on same.

"Insurance adjusted out of escrow.

"Taxes adjusted out of escrow.

"One copy of lease goes to Mr. Ralph, and one copy to Mr. Peronnet, and bill of sale to be delivered to Mr. Ralph, all duly executed, upon the payment of that certain promissory note of $5,500.00, which is made and executed by W. A. Ralph and L. E. Ralph, April 16, 1924. Seven per cent interest due in 100 days from date.

"I have read the foregoing instructions and understand the contents thereof: I have also read the conditions printed on the back of this form, governing the administration of this escrow, and same are satisfactory to me.

"[Signed] William A. Ralph.
"[Signed] Lulu E. Ralph.

"The conditions above are hereby approved, and I will hand you a lease and bill of sale executed by Jules Peronnet and Ralph Peronnet in favor of William A. Ralph and Lulu E. Ralph, son and mother, leasing property as above described, which you are authorized to deliver upon payment to you for my account the sum of $6,500, $1,000 already paid outside escrow, and the balance of $5,500 to be by one certain promissory note of $5,500, dated April 16, bearing 7 per cent interest, and due in 100 days from date, within the time as above provided. * * *

"I have read the foregoing instructions and understand the contents thereof; I have also read the conditions printed on the back of this form, governing the administration of this escrow, and same are satisfactory to me.

"[Signed] Ralph Peronnet."

Among the conditions printed on the back of the escrow form is the following: "Bank reserves right to withhold performance in case parties disagree."

The promissory note mentioned in the foregoing escrow instructions was signed by the Ralphs and deposited with the lease and bill of sale as aforesaid. The Ralphs entered into possession of the theater under the terms of said lease and also took over the theater equipment. They failed to make any further payments than those heretofore mentioned. On July 24, 1924, the Peronnets gave instructions to the Tujunga Valley Bank that the Ralphs had failed to make any payment of the $5,500 note which was due at the expiration of said 100 days, to wit, July 25, 1924, and that they had asked for and had been granted an extension of time to July 30, and authorized the bank to accept payment of $2,750 on or before that date, and, in event of such payment, the time for the balance would be extended three months. On September 17, 1924, no payments having been made by the Ralphs, the Peronnets notified them that the contract of April 16, 1924, had been violated, and it was therefore declared forfeited, and demanded that all the property be returned to them. This the Ralphs refused to do. On October 6, 1924, the Ralphs were indebted to the cross-complainant Frampton in the sum of $1,500, and, after proceedings in accordance with section 3440 of the Civil Code, the Ralphs sold all of said property to Frampton for said indebtedness. Frampton thereupon endeavored to take possession of said personal property, but was refused the same by the Peronnets, who had previously obtained possession of the real property in which the personal property was situated, for nonpayment of rent by the Ralphs. Thereafter the Peronnets commenced this action against the Ralphs and Frampton, seeking to recover the possession of said personal property. The defendants Ralph made no defense, but Frampton appeared and filed a cross-complaint, claiming the ownership of said property, and demanded its return to him or the value thereof.

[1-3] The trial court concluded that under the foregoing facts the transaction constituted a completed sale and that the title to the property vested in the Ralphs. Appellants contend that the sale by them to the Ralphs was conditional and that the title to said property did not pass, but remained in them until the payment in cash of the sum of $5,500 still due them.

"The owner of personal property has the right to make an agreement to sell the same and deliver possession thereof to the buyer, upon the condition that the title thereto shall nevertheless remain in the seller until the price agreed on has been fully paid, and the title so withheld by the owner will, until full payment, be superior to that of a subsequent mortgagee or purchaser of such personal property from the buyer, even if such subsequent mortgage or purchase was made without knowledge or notice of the reservation of title and paid full value for the property." Oakland Bank of Savings v. California P. B. Co., 183 Cal. 297, 191 P. 524, and cases there cited.

"The question whether or not a given contract is or is not a contract of conditional sale is to be determined wholly by the intent of the parties, expressed in and deducible from the contract itself. In arriving at the solution of the question the whole contract is to be considered, and no detached term or condition is to be given prominence or effect over and above another. So that, if the legal effect of the whole contract be to establish a mortgage or a lease or an option to purchase between the parties, the mere negation or denial in another part of the contract of that legal effect will not control. But if, upon the other hand, the intent be clear that title shall not pass until the performance by the vendee of a condition precedent or concurrent, such a contract becomes a conditional sale, and not repugnant to any principle of justice or equity, even though possession of the property be given to the proposing purchaser. Harkness v. Russell, 118 U. S. 663, 7 S. Ct. 51 [30 L. Ed. 285]; Rodgers v. Bachman, 109 Cal. 552, 42 P. 448." Van Allen v. Francis, 123 Cal. 477, 56 P. 339, 340.

In support of their claim that the parties to the transaction intended that the sale was conditional, appellant cites that portion of the language of the acceptance as follows: "I * * * accept the above proposition, and will deliver the above mentioned lease, and will render a clear bill of sale upon the payment to me of the sum of $6,500.00," and the further language, "It is agreed between the parties hereto that the bill of sale, lease and note are to be escrowed in a reputable bank until the terms of this agreement have been fully performed," and "One copy of lease goes to Mr. Ralph and one copy to Mr. Peronnet, and bill of sale to be delivered to Mr. Ralph, all duly executed, upon the payment of that certain promissory note of $5,500, which was made and executed by W. A. Ralph and L. E. Ralph on April 16, 1924, 7 per cent interest, due in 100 days from date," and also the language in the contemporary instructions of the seller Peronnet referring to the lease and bill of sale, "which you are authorized to deliver upon payment to you for my account in the sum of $6,500.00, $1,000.00 already paid out of this outside escrow, and balance of $5,500.00 to be by one certain promissory note of $5,500.00, dated April 16, bearing 7 per cent interest, and due in 100 days from date within the time as above provided."

[4] On the face of the foregoing instruments, it appears that the appellants accepted the offer of the Ralphs to purchase the property, and agreed to render a clear bill

of sale upon payment to them in the sum of $6,500; that the Ralphs were to execute a promissory note in the sum of $5,500, bearing interest in the sum of 7 per cent. and due 100 days from its date; that the lease, bill of sale, and note were to be put in escrow in a reputable bank until the terms of the agreement had been fully performed, when they were to be delivered to the Ralphs. It is true that, in the instructions given by the appellants, but without reference to any other portion of the several agreements, the language used would seem to indicate that the balance due on the property sold, after the payment of the $1,000 in cash, should be paid by the promissory note, but, as said in Palmer v. Howard, 72 Cal. 293, 13 P. 858, 1 Am. St. Rep. 60, the intention must be collected from the whole transaction and not from any particular feature of it.

[5] It is apparent from reading the several instruments that they were not drawn by a person skilled in the law, and it is a matter of common knowledge that such persons usually believe that to complete a sale, such as the one in the case at bar, a bill of sale is necessary to convey title. However, no good reason has been shown why the documents were put in escrow, except that the sellers would not give "a clear bill of sale" of the property until the purchase price had been paid. Counsel for respondent claims that the documents in escrow were placed there as security for the payment of the sum due on the note, but he has not pointed out in what way they would amount to any security. We are satisfied from the record that the sale was a conditional one and that title did not vest in the Ralphs, but remained in appellants. At most, all that the respondent could have obtained by his purchase from the Ralphs was whatever equity, if any, the Ralphs had in the property.

The judgment is reversed.

We concur: NOURSE, P. J.; STURTEVANT, J.

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111 Cal. App. 675

WOODS et al. v. BERRY et al.

Civ. 3843.

District Court of Appeal, Third District, California.

Feb. 11, 1931.

1. Appeal and error ⇨612(2).

Judge has jurisdiction to sign and certify transcript as long as appeal was pending (Code Civ. Proc. § 953a).

2. Appeal and error ⇨1195(3).

Opinion on former appeal from order denying change of venue became "law of case," as regards right to certification of transcript (Code Civ. Proc. §§ 473, 953a).

[Ed. Note.—For other definitions of "Law of the Case," see Words and Phrases.]

3. Appeal and error ⇨939.

Presumption favors judge's ruling certifying transcript having effect of bill of exceptions (Code Civ. Proc. §§ 473, 953a, 1963, subds. 15, 16).

4. Appeal and error ⇨657(1).

Application for judge's certification of corrected transcript *held* properly granted within judge's discretion (Code Civ. Proc. §§ 473, 953a, 1963, subds. 15, 16).

5. Statutes ⇨243.

Statute authorizing amendments, time extensions, and relief from proceedings taken through mistake or inadvertence, is liberally construed (Code Civ. Proc. § 473).

6. Appeal and error ⇨643(3).

Appellants who, immediately following discovery that transcript was not certified, applied to judge for certification, which judge erroneously refused, *held* not guilty of laches, and hence certification was justified (Code Civ. Proc. §§ 473, 953a).

7. Appeal and error ⇨553(1).

Appellants' narrative statement of substance of affidavits on motion for change of venue, being certified by judge as correct, becomes portion of judgment roll, and can be considered on appeal in lieu of bill of exceptions (Code Civ. Proc. §§ 953a, 953c).

8. Appeal and error ⇨553(1).

Where appellants' brief quoted order denying change of venue, and stated parts of some affidavits and substance of others, and respondents set out their affidavits, appeal could properly be considered on merits (Code Civ. Proc. §§ 953a, 953c).

9. Venue ⇨22(2).

Principal and sureties sued on indemnity bond, not being residents of county of forum, *held* entitled to change of venue (Code Civ. Proc. §§ 382, 383, 395).

10. Indemnity ⇨15(2).

In action on indemnity bond, principal *held* proper and necessary party (Code Civ. Proc. §§ 382, 383).

11. Parties 🔑30.

In action on joint obligation, all persons jointly liable must be united as defendants (Code Civ. Proc. §§ 382, 383).

12. Abatement and revival 🔑43.

Action on indemnity bond does not abate merely by principal's insolvency or bankruptcy (Code Civ. Proc. § 385).

13. Bankruptcy 🔑391 (2).

Bankruptcy of person against whom judgment has been rendered will not prevent prosecution of appeal in his name (Code Civ. Proc. § 385).

14. Bankruptcy 🔑391 (1).

In action on indemnity bond, principal, being proper party, *held* entitled to be heard on any defense to defeat judgment against him or sureties, notwithstanding principal's adjudication of bankruptcy (Code Civ. Proc. §§ 382, 383, 385).

15. Bankruptcy 🔑391 (1).

In action on indemnity bond, principal, notwithstanding alleged bankruptcy, *held* not merely nominal party; affidavits concerning bankruptcy being hearsay and immaterial (Code Civ. Proc. §§ 382, 383, 385).

> So far as appeared, no order was made in trial court staying proceedings, and no supersedeas or stay order was issued from United States District Court in which alleged adjudication of bankruptcy was made.

16. Bankruptcy 🔑391 (1).

Filing petition in bankruptcy does not prevent commencement of action against bankrupt (Code Civ. Proc. § 385).

17. Venue 🔑80.

In action on indemnity bond, where principal was entitled to change of venue, sureties' motions and obligees' counter motions on ground of witnesses' convenience could be considered in proper county after transfer (Code Civ. Proc. §§ 382, 383, 395).

18. Venue 🔑70.

On motion by defendant for change of venue, his unchallenged affidavit of merits must be accepted as true (Code Civ. Proc. § 395).

Appeal from Superior Court, Shasta County; Walter E. Herzinger, Judge.

Action by Alfred D. Woods and another against Harry Berry and others. From an order denying defendants' motions for change of venue and granting plaintiffs' countermotion to retain the cause in the county in which it was brought, defendants appeal.

Reversed.

Herbert Choynski and Sidney Rhein, both of San Francisco, for appellants.

Carr & Kennedy, of Redding, for respondents.

Justice pro tem. McDANIEL delivered the opinion of the court.

This is an appeal from an order denying defendants' motions for change of place of trial from Shasta county to the city and county of San Francisco; and granting respondents' counter motion to retain the cause in Shasta county.

It is agreed that the action is a transitory one. Chew v. Storrie (Cal. App.) 291 P. 610. This case was here before on motion of respondents for affirmance; opinion filed April 4, 1930. Woods v. Berry, 286 P. 1073. The facts of the case are sufficiently stated therein. The motion for affirmance rested upon the claim that the transcript had not been properly authenticated by the trial judge. It was ordered by the Appellate Court that the transcript be withdrawn and returned to the superior court in and for Shasta county for the purpose of having the same certified by the judge, as required by section 953a, Code of Civil Procedure. The corrected and completed transcript, containing all of the affidavits used at the hearing of the motions for change of the place of trial, has been returned and filed. The respondents objected in the court below to the certification of said transcript, notwithstanding direction of this court that it be sent back for that purpose. The objections were overruled, and, by stipulation, were included in the transcript before us, and are on four grounds, to-wit: "1. That this court has no jurisdiction to act in said matter at this time; 2. That no proceeding in accordance with law has been taken or is pending before this court for the correction of any defect in said transcript; 3. That the application for the certificate and approval of said transcript by the trial judge comes too late; 4. That defendants have been guilty of laches in obtaining and filing a correct transcript upon the appeal herein."

In support of the objections which are again asserted here, although no appeal from the ruling of the court was taken by respondents, it is argued that the correction of the transcript was not based upon proceedings taken under section 473, Code of Civil Procedure, to relieve appellants of the default in procuring and filing a reporter's transcript within the time provided by statute, and that the charge of laches were obviously well taken.

[1-3] There is no merit in these objections. The demand for a transcript was in time. Immediately following the discovery by appellants that the original transcript was not signed and certified by the trial judge, they applied to him with request for his certification. Erroneously he refused to sign. The court had jurisdiction as long as this appeal was pending. The opinion and decision, supra, settled the fact and the law of the case, in so far as the right to certification of the record upon proper application therefor is concerned, and the correction was made on August 7, 1930, within six months thereafter. The record as now before us is in effect a bill of exceptions. "While it does not appear that the defendant in response to said objections made a formal motion for relief from his default under the provisions of section 473 of the Code of Civil Procedure, it does affirmatively appear therein that the trial judge 'exercised his discretion in favor of certifying said transcript,' and thereupon made an order that the same be settled, allowed, and certified as and for the bill of exceptions in said cause." Stenzel v. Kronick, 201 Cal. 26, 255 P. 199. The presumption is in favor of the ruling of the trial court. Weyse v. Biedebach, 86 Cal. App. 728, 261 P. 1096; section 1963, Code Civ. Proc., subds. 15 and 16.

[4, 5] It does not appear from the record herein whether or not appellant's application for certification of the corrected and completed transcript was for relief under section 473, Code of Civil Procedure. The application, however, was made and granted over the objections of respondents, in the exercise by the court of a sound discretion. Banta v. Siller, 121 Cal. 414, 53 P. 935. It does not appear there was an abuse of discretion in so doing. Stonesifer v. Kilburn, 94 Cal. 33, 29 P. 332. Courts give very liberal interpretation to the provisions of section 473, Code of Civil Procedure. Estate of Simmons, 168 Cal. 392, 143 P. 697; Anstead v. Pac. Gas & Elec. Co., 201 Cal. 198, 256 P. 209; Gross v. Hazeltine, 206 Cal. 130, 273 P. 550.

[6] As to laches, it appears to this court that appellants moved with reasonable celerity and due diligence to obtain the said transcript. The case of In re Barney, 191 Cal. 18, 214 P. 853, does not conflict with the foregoing views, when the fact is kept in mind, that the only default in obtaining proper certification in the case on appeal was chargeable, not to appellants, but to an erroneous ruling of the trial court.

Another objection of respondents to a hearing on the merits rests upon the claim that appellants have failed to print in their brief portions of the record necessary to be considered by the Appellate Court on appeal, or sufficient to justify a reversal, citing Jeffords v. Young, 197 Cal. 224, 239 P. 1054; Filmer v. Davis, 91 Cal. App. 195, 266 P. 985; Keele v. Clouser, 92 Cal. App. 526, 268 P. 682, and Code of Civil Procedure, § 953c, requiring the printing by appellants in their brief of such portions of the record as they desire to call to the attention of the court.

There is no quarrel with the foregoing authorities, which correctly state the rule; but they are hardly applicable in this case.

[7] Appellants, in their brief, did quote verbatim from the transcript the order of the lower court, that of February 8, 1929, from which they appeal, i. e., denying the change of place of trial. They also set out parts of the affidavits used in evidence by the respondent to retain the place of trial in Shasta county. They stated in narrative form the substance of other affidavits now incorporated in the record, and the narrative is not contradicted nor disputed by respondents as to any matter of form or substance. The dispute is only as to the legal effect of the record facts herein. No reporter was present; the showing before the court was entirely documentary, and the statement, certified as true and correct by the judge, became a portion of the judgment roll, and may be considered on appeal in lieu of the bill of exceptions. Section 953a, Code Civ. Proc.

[8] Respondents in their reply brief set out in the appendix their counter motion to retain the cause in Shasta county, together with the affidavits in support of their motion. Under these conditions, we have felt it our duty to consider this appeal upon the merits.

The Merits.

[9] The defendant Berry's motion for a change of venue on the ground that he and his codefendants are all residents of the city and county of San Francisco and are not now and never have been residents of Shasta county, where the action was commenced, should have been granted. The respondents, in response to the application and demand of the defendant Berry for a change of the place of trial, contend that since the commencement of the action Berry had been adjudicated a bankrupt in the United States District Court, Northern District of California, that said Berry had made application for his final discharge, and no longer has any personal interest in the outcome of the action, and that said motion and demand for a change were not in good faith, but merely to bolster up the demand and motions of the other defendants, Lesser and Ballen, for a change of the place of trial.

[10-13] Respondents do not find fault with the formal showing on behalf of Berry. The latter's notice of motion, demand for change, affidavit of merits, and demurrer to the complaint were in form and substance in accordance with the requirements of the law. It appears that the defendant Berry was a principal in the action on the bond. He was

a proper and necessary party under section 383, Code of Civil Procedure. When liability is joint, all persons upon whom it rests must be united as defendants in an action upon the obligation. This rule is general and applies to undertakings and promises of all descriptions. Section 382, Code Civ. Proc.; 20 Cal. Jur. 502, 503; Farmers' Exch. Bank v. Morse, 129 Cal. 239, 61 P. 1088. The action did not abate by reason of the insolvency or bankruptcy of the defendant Berry. Code Civ. Proc., § 385. The bankruptcy of a party against whom a judgment has been rendered before the taking of the appeal will not prevent the prosecution of the appeal in his name. O'Neil v. Dougherty, 46 Cal. 575.

The respondents in their complaint allege that Berry was insolvent. He was not served with summons until December 7, 1928, while motions upon the question of change of place of trial of his codefendants, sureties on the bond in question, were pending. On that date, however, he was served with summons, and made his appearance December 17, 1928, by filing his demurrer, and making his demand, etc. His codefendants, Lesser and Ballen, whose motions for a change of place of trial to the city and county of San Francisco were pending, in addition to their demurrers, had filed answers and amended answers. In opposition to their demands, counter motions of the respondents were presented to retain the cause in Shasta county, based upon the convenience of witnesses.

[14, 15] As a proper party to the action, Berry is entitled to be heard in whatever defense he may have to defeat the judgment against his sureties, as well as against himself. This is true, notwithstanding his adjudication of bankruptcy. Plaintiffs have not moved to dismiss the action against Berry, have made no request that the trustee in bankruptcy, if any, be substituted in Berry's place as defendant. No order was ever made in the trial court staying proceedings in this action, no supersedeas nor stay order ever issued from the United States District Court, so far as the record of this case shows. The statements in the affidavits on file herein concerning his bankruptcy were matters of hearsay and immaterial, as no change in his status as defendant has occurred in this case. He was neither an improper nor unnecessary party, nor merely a nominal party to the action.

[16] The liability of his codefendants is primarily dependent upon Berry's liability. "The filing of a petition in bankruptcy does not prevent the commencement of an action against the bankrupt." 7 Cor. Jur. 349, and citations, note 74. "The proper practice appears to be that the application for a stay should be made in the court in which the action is pending, and it should make the necessary order staying the proceedings. * * *" Id., on page 349, 350, note 85. "A statement of defendant's counsel at the trial that defendant was in bankruptcy could not operate as a stay of proceedings." McGowan v. Bowman, 79 Vt. 295, 64 A. 1121.

Even on this appeal respondents ask affirmation of the order denying Berry's application for a change of place of trial, and they continue to ask personal judgment against him, as well as his codefendants. Under these circumstances, it appears he is not merely a nominal party. The case of Donohoe v. Wooster, 163 Cal. 114, 124 P. 730, cited by respondents, is not in point. The facts in that case are not at all analogous in any sense to the facts of the case at bar.

"The language of section 395 requires the action to be tried in the county in which the defendants, or some of them, reside, not where they do not reside. The consent of certain defendants not residing in the county where the action is brought could not take away from the defendants who did not reside there the right to have the cause transferred to the county of their residence. To hold otherwise would be a violation of the provisions of section 395.

"The right of a defendant to have an action brought against him tried in the county in which he has his residence is an ancient and valuable right, which has always been safeguarded by statute and is supported by a long line of judicial decisions. 'The right of a plaintiff to have an action tried in another county than that in which the defendant has his residence is exceptional, and, if the plaintiff would claim such right, he must bring himself within the terms of the exception.' Brady v. Times-Mirror, 106 Cal. 56, 39 P. 209." Brown v. Happy Valley Fruit Growers, 206 Cal. 515, 274 P. 977, 979.

[17] The motions for change of place of trial of all three defendants were heard at the same time, and were denied with the one order herein appealed from; and in the same order were included the rulings of the court with reference to plaintiffs' motion to retain the cause in Shasta county on the ground of convenience of witnesses, and the orders striking out certain portions of the answers filed by the two answering defendants, namely, Lesser and Ballen. As Berry's motion was for the benefit of the other defendants as well as himself, and it must be granted, it will be unnecessary to follow counsel further in their argument as to the rulings of the trial court with reference to the motions of Lesser and Ballen, and the counter motions of respondents on the ground of the convenience of witnesses. Under the authorities cited, these last matters may be considered in the proper county, i. e., the city and county of San Francisco, after the transfer.

The appellants contend that the answers of Lesser and Ballen were filed merely on account of the then prevailing rule of the judicial council requiring the filing of answers at the same time demurrers were interposed to complaints in trial courts, and, that, therefore, the filing of answers under such circumstances should not open the door to plaintiffs to make a counter showing on the ground of convenience of witnesses. This contention may or may not have merit. It is unnecessary now to consider it.

[18] The charge of bad faith against Berry is overborne by his affidavit of merits. That affidavit stands unchallenged and must be accepted as true.

The said order denying the change of place of trial from Shasta county to the city and county of San Francisco is reversed.

113 Cal. App. (Supp.) 778

PEOPLE v. SCOTT et al.

Cr. A. 584.

Appellate Department, Superior Court, Los Angeles County, California.

Feb. 20, 1931.

1. Vagrancy ⚿**1.**

At common law single act did not constitute person a vagrant.

2. Vagrancy ⚿**1.**

Evidence that defendants danced in nude on single occasion at smoker sufficiently supported their conviction as "dissolute" persons under Vagrancy Statute (Pen. Code, § 647, subd. 5).

> "Dissolute" is defined as "loosed from restraint, unashamed, lawless, loose in morals and conduct, recklessly abandoned to sensual pleasures, profligate, wanton, lewd, debauched."

3. Criminal law ⚿**254.**

If evidence shows single act that no one not of lewd or dissolute character would do such act even once, inference to be drawn therefrom is exclusively for trial court (Pen. Code, § 647, subd. 5).

Appeal from Municipal Court of Los Angeles; Ellis A. Eagan, Judge.

Ruth Scott and Dolores Moreno were convicted of vagrancy, and they appeal.

Affirmed.

MacDonald & Thompson, of Los Angeles, for appellants.

Charles P. Johnson, City Prosecutor, and John L. Bland and Joe W. Matherly, Deputy City Prosecutors, all of Los Angeles, for the People.

McLUCAS, P. J.

Defendants were convicted of vagrancy, as being dissolute persons, and appeal from the judgment. According to the undisputed evidence, defendants presented dances on a stage before several hundred men assembled at a smoker. Upon the first appearance of defendants, they were partially clothed in dancing costumes, and thereafter each of the defendants in turn came back upon the stage and presented dances before the assembled men, and each of defendants upon the last occasion appeared and danced in the nude for a period not exceeding five minutes. There was no evidence offered that defendants had danced in the nude on any other occasion.

Appellants contend that the evidence was insufficient to support the conviction of vagrancy, for the reason that a single or specific act is not sufficient to constitute the actor a vagrant under subdivision 5 of section 647 of the Penal Code, which defines "every idle, or lewd, or dissolute person, or associate of known thieves" as being a vagrant. "Vagrancy at common law was defined as the wandering or going about from place to place by an idle person who has no lawful visible means of support, and who subsists on charity and does not work for a living though able so to do, but it has not infrequently been held by many courts that the statutes, in both England and America, have so much and so frequently dealt with the subject of vagrancy, that the common law on the subject has become unimportant. Where the legislature of a state has taken upon itself the regulation of vagrants by statute, the words therein must bear the interpretation thereby made or intended, and owing to the different wording of such statutes it is impracticable to lay down a definition that will include all who are vagrants, or to give the description of all those who come within this class in the various states." 8 R. C. L., p. 339.

It is generally conceded that, within certain broad limitations, the Legislature may by statute define vagrancy and impose punishment for the offense. Ex parte Hudgins, 86 W. Va. 526, 103 S. E. 327, 9 A. L. R. 1361. In Re McCue, 7 Cal. App. page 766, 96 P. 110, 111, it is said: "We are inclined to the view that while idleness, whether it be that of the 'idle rich' or 'idle poor,' is a prolific source of crime, still it is not competent for the Legislature to denounce mere inaction as a crime without some qualification. But this cannot be said of lewdness or dissoluteness, terms often used interchangeably, but each of which applies to the unlawful indulgence of lust, whether in public or private. 'Any practice, the tendency of which, as shown by experience, is to weaken or corrupt the morals of those who follow it, * * * is a legitimate subject for regulation or prohibition by the state, * * * and unless it clearly appears that a statute enacted for this purpose has no real or substantial relation to these objects, and that the fundamental rights of the citizen are assailed under the guise of a police regulation, the action of the legislative department is conclusive.' Ex parte Tuttle, 91 Cal. 590, 27 P. 933. The elements of lewdness and dissoluteness, under the accepted definition of those terms, come directly within the inhibited practices and are proper subjects of regulation and prohibition. The statute, then, is a valid exercise of police power as to these elements, and it is within the power of the court to determine whether one charged comes within the class of lewd or dissolute persons. Ex parte Ah Fook, 49 Cal. 404."

⚿For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

[1] Undoubtedly at the common law, and under many provisions of the statutes, a single act is not sufficient to constitute a person a vagrant. Under most of the provisions of section 647 of the Penal Code, a single act is not enough to make a person a vagrant. Appellants, in support of their contention, have cited many cases in which it has been held that a single act is insufficient to constitute vagrancy, but in each case the statute must be read in order to determine whether the statute requires more than a single act to be committed. In People v. Denby, 108 Cal. 54, 40 P. 1051, 1052, under a statute defining as a vagrant a "healthy beggar who solicits alms as a business," Penal Code, section 647, subdivision 2, prior to 1911 amendment, it was held that the Vagrancy Statute has no application to single instances of conduct, which, if habitual, would amount to vagrancy. It is self-evident that proof of habitual conduct was necessary under the language of the statute in the foregoing case. But, on the other hand, there are many cases in which the Vagrancy Statute was held to permit proof of a single act of vagrancy. See note 14 A. L. R., page 1498. In People v. Phelps, 189 App. Div. 775, 179 N. Y. S. 289, 290, it was held that, under a statute making one who offers to commit prostitution guilty of vagrancy, proof that the defendant offered to commit prostitution is sufficient to convict, and it is not necessary to establish "that the defendant was a common prostitute or nightwalker, that she solicited to the annoyance of the inhabitants or passers-by, and that she was there in a public place for the purpose of prostitution." In People v. Edwards (Gen. Sess.) 180 N. Y. S. 631, 634, under the statute which defined a vagrant as "a person who offers to commit prostitution," it was stated that "a man who induces, entices, or procures a woman to commit prostitution, either with himself or with another, is a vagrant, and the man who aids or abets or participates in the commission of prostitution by a woman is a vagrant." For further cases holding that a single act may constitute vagrancy under the statute, see People v. Lorraine (Sp. Sess.) 196 N. Y. S. 323; People v. West (Sp. Sess.) 204 N. Y. S. 234. In Ex parte Karnstrom, 297 Mo. 384, 249 S. W. 595, where the statute read, "every person found tramping or wandering around from place to place without any visible means of support, shall be deemed a vagrant," it was held (page 395 of 297 Mo., 249 S. W. 595, 596) that it is not necessary to establish a continuing offense or a habitual course of conduct extending over an appreciable period of time. In State v. Rayburn, 170 Iowa, 514, 153 N. W. 59, L. R. A. 1915F, 640, it was held that, under a statute forbidding the resorting of any person to a house of ill fame for the purpose of prostitution or lewdness, proof of one act would be enough, or the evidence might be such that the crime would be complete without proof of such single act if the evidence was sufficient to show the intent or purpose in resorting to the place, and that it was for the purpose of prostitution or lewdness. In State v. Gardner, 174 Iowa, 748, 156 N. W. 747, L. R. A. 1916D, 767, Ann. Cas. 1917D, 239, it was held that a single offense will support a conviction of resorting to a house of ill fame for the purpose of lewdness.

Appellants rely upon certain language in People v. Craig, 152 Cal. 42, 91 P. 997. In that case the court discussed the statutory definition of vagrancy contained in Penal Code 647, and especially subdivisions 5 and 6, which then read as now:

"Every idle, or lewd, or dissolute person, or associate of known thieves; or,

"Every person who wanders about the streets at late or unusual hours of the night, without any visible or lawful business."

The court said (page 46 of 152 Cal., 91 P. 997, 999): "We think the evidence was clearly relevant, as tending to prove that the arresting officers were personally cognizant of facts constituting the appellant a vagrant within the statutory definition of vagrancy. Pen. Code, § 647, and especially subdivisions 5 and 6. It was to the effect that for a period of three months prior to the assault charged he had been seen by Sergeant Wilson at all hours of the night, from 9 p. m. to 3 a. m., in and about the saloons clustering around Second and L streets, 'McCarthy's,' 'The Art,' 'The Palm,' and 'The Casino,' and in the immediate neighborhood of the 'Concentration Camps' (a local euphemism for houses of ill fame). It was to the further effect that he had no visible or lawful business and that he associated with a reputed prostitute. This was vagrancy, and, if vagrancy of this species is a misdemeaner which can be committed 'in the presence' of an observer, this misdemeanor, supposing the evidence to be true, was committed in the presence of the arresting officer. If, as a witness, he could testify from actual knowledge to every element of the offense, the offense must have been committed in his presence. And it makes no difference that this species of vagrancy cannot be committed by a single act observable at one point of time. A series of acts extending over a considerable period of time, and only constituting a criminal offense because of their continuance and repetition, alone or in conjunction with other circumstances, being capable of observation and actual knowledge by a peace officer, will justify him, when the series of acts is complete, in making an arrest without a warrant as fully as in the case of any other misdemeanor committed or attempted in his presence."

We do not interpret this language of the court as holding that under no circumstances is proof of a single specific act sufficient to support a conviction of vagrancy, as a dissolute person, but rather that, under the facts as stated, such species of vagrancy cannot be committed by a single act observable at one point of time.

[2, 3] Webster's Unabridged Dictionary defines "dissolute" as "loosed from restraint, unashamed, lawless, loose in morals and conduct, recklessly abandoned to sensual pleasures, profligate, wanton, lewd, debauched." We conclude that the evidence is sufficient to support the judgment of the trial court that the defendants are dissolute persons as so defined. Conceding that vagrancy is chronic rather than acute, as stated in People v. Craig, supra, yet we think the existence of such a chronic condition may be ascertained from a single examination, if the characteristic reactions of that condition be found present. There are many acts which, if committed repeatedly over a period of time, would be evidence of the species of vagrancy here charged, but which are of such doubtful import, because they might proceed from other causes than a lewd or dissolute character, that a single instance would afford no certain foundation for the inference that the actor is a person of such character. There are, however, other acts which are of such nature as reasonably to justify an inference that no one not of lewd or dissolute character would do such an act even once. If the evidence shows a single act of the kind last mentioned, the question as to the inference to be drawn therefrom is one for the trial court, and we cannot interfere with its decision. We think the acts of the defendants, taken in conjunction with the circumstances under which they were performed, as shown by the evidence, are of this class.

Judgment is ordered affirmed.

We concur: **SHAW, J.; BISHOP, J.**

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113 Cal. App. (Supp.) 775

PEOPLE v. FRENCH.

Cr. A. 572.

Appellate Department, Superior Court, Los Angeles County, California.

Feb. 20, 1931.

ntoxicating liquors 🔑236(4).

Conviction of wife for possessing intoxicating liquor *held* not supported by proof that liquor was present, with wife's knowledge, in matrimonial residence (Civ. Code, §§ 156, 157).

Appeal from Municipal Court of Los Angeles; Daily S. Stafford, Judge.

Lucile French was convicted of possession of intoxicating liquor, and she appeals.

Reversed and remanded.

Paul Taylor, of Los Angeles, for appellant.

Charles P. Johnson, City Prosecutor, and Joe W. Matherly and John L. Bland, Deputy City Prosecutors, all of Los Angeles, for the People.

BISHOP, J.

Appellant's conviction on the charge that she was illegally in possession of intoxicating liquor is dependent entirely on the proof that it was present, with her knowledge, in the residence where she and her husband lived. Were she living alone, or were there any evidence that she claimed or had exercised any dominion or control over the liquor, we would have no hesitation in affirming the judgment. We do not believe that a conviction of a wife is supported when no fact is established other than the presence of the liquor in the house of herself and her husband, even though she had knowledge of its presence.

So far as we are aware, the precise question has not been decided by any appellate court of this state; but we are not without the guidance of judicial authority. In Tewmy v. Commonwealth (1925) 206 Ky. 522, 267 S. W. 1087, the wife was convicted of the possession of whisky found in a chicken coop twenty feet back of the premises where she and her husband resided. He had already been convicted on the same charge. We find this pertinent language in the court's opinion: "Appellant's guilt must be found, if at all, from inference arising from the presumption of guilt because of her occupancy of the premises upon which the contraband liquor was found as a member of her husband's household, he of course being, under the proven facts, the head of the family as well as the controller of the premises."

The court then expressed a doubt of the validity of the conviction even had the wife known of the presence of the liquor, "since we do not conclude that under such circumstances she would be called upon, in order to exculpate herself, to abandon her home, and separate from her husband, and dissolve the bonds of matrimony between them," but, as the wife had no knowledge, her conviction was held to be without doubt improper.

This Tewmy Case was followed with approval in Gullett v. Commonwealth (1928) 225 Ky. 194, 7 S.W.(2d) 1050, where a wife and husband were jointly charged with possession of a still. The location of the still was known to the wife in this case, a fact that made no difference in the result. The court said (page 198 of 225 Ky., 7 S.W.(2d)

1050, 1051): "Of course we do not mean to hold that a married woman cannot commit the offense under consideration, or similar ones, but we do declare her conviction must be sustained by something with more probative force, and of more tendency to convict, than the mere inference to be drawn from the fact of her being the wife of a husband with whom she resides in the household where the contraband goods were discovered."

The wife was the owner and in possession of the key to the residence of herself and husband in the case of Wampler v. Corporation of Norton (1922) 134 Va. 606, 113 S. E. 733, 735. They were jointly charged with the possession of liquor found hidden under the floor and in the yard. His conviction was upheld, but hers was set aside, the court saying:

"None of the many progressive changes made by the laws of this state in respect to marital rights has gone so far as to destroy the theoretical status of the husband as the responsible and authoritative head of the family and director of conditions in the home. * * *

"But where a married woman is charged with keeping ardent spirits for sale there must be something more to establish her guilt than the mere finding of the spirits on premises where she and her husband jointly make their home, no matter to whom the premises belong."

In reversing a judgment of conviction of possession, the court in Crocker v. State (1922) 148 Tenn. 106, 251 S. W. 914, 915, based its decision on much the same reasoning, as will appear from these quotations.

"There is nothing in the state's evidence which shows that the defendant, rather than her husband, owned or stored the whisky, or that she, and not the husband, was keeping it at their residence for the purpose of present sale.

"The leased premises were under the dominion and control of the husband, not the wife. The husband's domicile was, of course, that of the wife. * * *

"But the husband is in law the head of the family. * * * The family must have one head."

With respect to the effect of her knowledge that the liquor was on the premises, the court said: "We do not think that the mere fact that the defendant may have known (and in this case did know) of the presence of the whisky on the premises is sufficient to show a violation of this statute."

In State v. West (Mo. Sup. 1930) 24 S.W.(2d) 1005, 1006, liquor was found in a restaurant operated by defendant's husband. Anent the insufficiency of the evidence to support her conviction, the court said: "There must be something more to convict a married woman of the possession of whisky than the fact that she was washing dishes on premises controlled and operated by her husband, even though she was aware that whisky in violation of the law was stored on the premises."

To the same effect, we find Watson v. State (1929) 113 Tex. Cr. R. 210, 24 S.W.(2d) 830. No case to the contrary has been called to our attention, nor has one been discovered by us.

The conclusion agreed upon in these cases is predicated upon the fact that the husband is the head of the family, at least "theoretically," as was said in Wampler v. Corporation of Norton, supra. This was his status at common law, 13 R. C. L. 984, and is his position under our Code. Section 156 of the Civil Code reads: "The husband is the head of the family. He may choose any reasonable place or mode of living, and the wife must conform thereto." And in section 157 it is declared: "Neither husband nor wife has any interest in the property of the other, but neither can be excluded from the other's dwelling."

We conclude, therefore, that the evidence is insufficient to support the judgment of conviction. The judgment is reversed; the cause remanded for a new trial.

We concur: McLUCAS, P. J.; SHAW, J.

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211 Cal. 583

DUNN v. MULLAN et al.

Sac. 4371.

Supreme Court of California.

Feb. 25, 1931.

1. Husband and wife ⚷262(1).

Deed naming both husband and wife as grantees presumptively vests property in spouses as tenants in common.

2. Husband and wife ⚷262(1).

Interest of wife under deed naming both husband and wife as grantees is presumptively separate property, and husband's interest community property (Civ. Code, § 164, as amended by St. 1923, p. 746).

3. Husband and wife ⚷262(1).

Presumption that interest of wife under deed naming both husband and wife as grantees was separate property is form of evidence binding unless controverted (Civ. Code, § 164, as amended by St. 1923, p. 746; Code Civ. Proc. § 1957).

4. Husband and wife ⚷258.

Generally, improvements during marriage on separate property of either husband or wife, though with community funds, belong to spouse owning separate property.

5. Husband and wife ⚷258.

Expenditure of community funds by husband in improvements did not create lien in favor of community as to wife's separate property.

6. Husband and wife ⚷266.

Mere fact of conveyance of separate or community property by husband to wife raises prima facie presumption that it was intended as gift.

7. Husband and wife ⚷266.

Husband expending community funds for benefit of wife's separate property may be presumed to have intended gift.

8. Husband and wife ⚷265.

Rules arising from existence of marital relationship prevail in case of conflict with those arising out of relationship of tenancy in common.

9. Husband and wife ⚷270(1).

Action to quiet title was not proper action for determination of whether marital community was entitled to reimbursement for expenditure of community funds in improving wife's separate property.

In Bank.

Appeal from Superior Court, San Joaquin County; C. W. Miller, Judge.

Action by Loren B. Dunn, as administrator with the will annexed of the estate of Patrick J. Lyons, deceased, against Helen Mullan and another, as administratrices, and others. From the judgment, plaintiff appeals.

Affirmed.

Foltz, Rendon & Wallace, of Stockton, for appellant.

Nutter, Hancock & Rutherford and A. P. Hayne, all of Stockton, for respondents.

PER CURIAM.

Action to quiet title. Plaintiff, as administrator with the will annexed of the estate of Patrick J. Lyons, deceased, sought to quiet title to certain described property, consisting of sixty-eight acres located in the San Joaquin Valley. Patrick J. Lyons and Margaret Lyons were husband and wife; their marriage occurring in the year 1913, and continuing up to the time of the death of Patrick J. Lyons on the 9th day of June, 1924. His wife, Margaret Lyons, died the following day. Patrick J. Lyons by will left all of his property to his wife, and Margaret Lyons by will left all of her property to her husband. By virtue of the fact that her husband predeceased her Margaret Lyons became entitled to all of the property by the terms of his will and to all practical purposes died intestate. The property in controversy at the time of their death stood in the name of both Patrick J. Lyons and Margaret Lyons; thirty-eight acres of it having been conveyed to them by deed dated June 28, 1917, and the remaining thirty acres having been conveyed to them by deed dated November 28, 1917. It appears without dispute that in each deed of conveyance Patrick J. Lyons and Margaret Lyons were named the grantees as husband and wife. It further appears that on June 28, 1917, they executed a trust deed to the thirty-eight acre parcel to secure the payment of $3,000 and on November 28, 1917, they executed a trust deed to the thirty-acre parcel to secure the payment of an amount not indicated in the record. On November 30, 1917, a reconveyance by the holders of the trust deed, covering the thirty-eight acre parcel was made to both husband and wife; and on August 8, 1919, a reconveyance by the holders of the trust deed covering the thirty-acre parcel was made to both husband and wife. Subsequent to the acquisition of the sixty-eight acres, a five or six room bungalow with concrete basement, barn, garage, and tankhouse was constructed. These improvements, according to the testimony of the inheritance tax appraiser of San Joaquin county, who in that capacity had made the appraisement for the estate of Margaret Lyons, deceased, were of the reasonable value of $5,000.

The suit to quiet title was opposed by the joint administratrices of the estate of Margaret Lyons, and the findings were in accordance with the answer filed by one of the administratrices, in which she alleged that one-half of the property involved was the separate property of the deceased wife and the remaining one-half interest was the community property of the deceased wife and her deceased husband.

The judgment of the trial court, based on said findings, was to the effect that on the date of the death of Patrick J. Lyons, his wife, Margaret Lyons, was the absolute owner of an undivided one-half interest in and to all of the real property described in the complaint as her separate property; that the remaining one-half undivided interest in said real property was the community property of Patrick J. Lyons and his wife, Margaret Lyons, and that immediately upon the death of Patrick J. Lyons said community property became vested in Margaret Lyons, as his surviving wife, by and pursuant to the terms of the last will and testament of said Patrick J. Lyons, deceased; that the administrator of the estate of Patrick J. Lyons, deceased, was entitled to the possession of the undivided one-half interest in said real property which was the community interest for the purpose of the administration of the estate of Patrick J. Lyons, deceased; and that the administratrices of the estate of Margaret Lyons, deceased, were entitled to the possession of the remaining one-half interest which was the separate property of Margaret Lyons for the purpose of the administration of the estate of said Margaret Lyons, deceased. It was further ordered, adjudged, and decreed that the heirs of Patrick J. Lyons were entitled to a one-half interest in the community property (which interest was, therefore, a one-fourth interest in the entire property in controversy), and that the heirs of Margaret Lyons were entitled to a one-half interest in the community property and to the whole of the separate property of Margaret Lyons (which interest was, therefore, a three-fourths interest in the entire property in controversy). From this judgment, the administrator of the husband's estate has appealed on the judgment roll and bill of exceptions.

No evidence was offered as to the source of the funds used for the purchase price of the two parcels of land. The deeds in which the wife was named as one of the grantees were offered in evidence, and the presumption expressed in section 164 of the Civil Code (1923) that, "in case the conveyance is to such married woman and to her husband, * * * the presumption is that the married woman takes the part conveyed to her, as tenant in common, unless a different intention is expressed in the instrument," was relied upon in support of the claim that an undivided one-half interest in the property belonged to the wife as her separate property. Neither was there any evidence offered as to the source of the funds used to pay off the incumbrances represented by the trust deeds or to pay for the improvements constructed on the land. An attempt was made on behalf of the administrator of the husband's estate to show that a portion of the purchase price was the proceeds of money owned by the husband before marriage, but the finding of the trial court was against this claim, and it is conceded by appellant that the evidence offered in that behalf was not sufficient to overcome the presumption that it was community funds.

[1, 2] Appellant contends, first, that if, under the presumption set forth in section 164 of the Civil Code, the wife is to be deemed to hold her share of the property as her separate property as a tenant in common, it must necessarily follow that the husband holds his share of the property as his separate property as a tenant in common and not as community property. It would follow therefrom that, if an undivided one-half interest in the property were the separate property of the husband, upon the death of his wife without issue, the heirs of the husband under subdivision 8 of section 1386 of the Civil Code would be entitled to this undivided one-half interest which had been the husband's separate property. Although we may concede that there appears to be some merit in this contention, nevertheless in view of the fact that it is definitely and distinctly held in Miller v. Brode, 186 Cal. 409, 414, 199 P. 531, and Estate of Regnart, 102 Cal. App. 643, 283 P. 860, that deeds naming as grantees both husband and wife presumptively vest property in spouses as tenants in common, the interest conveyed to the wife being presumed under section 164 of the Civil Code to be her separate property and that conveyed to her husband the community property of the marriage, we think this question is no longer open to controversy. Community Property, Cal. Jur. Suppl. 1930, § 51, p. 76.

[3] An attempt is made to distinguish these cases from the instant case upon the ground that in each of the cited cases some evidence that the property was purchased with community funds was adduced in support of the findings, whereas in the instant case the findings are supported only by a presumption. The cases cannot, however, be distinguished upon this ground, for the reason that it has been repeatedly held that the presumption, although disputable and susceptible of being overcome by other evidence, is a form of evidence under section 1957 of the Code of Civil Procedure, and, unless controverted, the court is bound to find in accordance with said presumption. Estate of Jolly, 196 Cal. 547, 238 P. 353.

It follows that, in so far as this objection is concerned, the findings of the trial court that Margaret Lyons at the date of the death of her husband was the owner of an undivided one-half interest in said property as her separate property, and that the remaining undivided one-half interest in said property was held by the husband as community property was correct, and the judgment based thereon must be affirmed.

Appellant, however, contends that the marital community was entitled to compensation or contribution for sums advanced by it in making improvements and paying off the trust deeds upon the wife's separate property and that the court erred in quieting title to one-half of the property as the separate property of the wife without requiring as a condition precedent thereto that reimbursement be made to the community for one-half of the improvements made and incumbrances discharged with community funds.

[4, 5] We cannot agree with appellant's contention. At the very outset appellant admits that title to an undivided one-half interest in the improvements was vested in the wife by virtue of her ownership of an undivided one-half interest in the real property. This is necessarily so, for it is the general rule that improvements made during marriage on the separate property of either husband or wife, although with community funds, belong to the spouse owning the separate property. 21 Cyc. 1648; Peck v. Brummagim, 31 Cal. 440, 89 Am. Dec. 195; Shaw v. Bernal, 163 Cal. 262, 267, 124 P. 1012, 1014; Potter v. Smith, 48 Cal. App. 162, 191 P. 1023; Smith v. Smith, 47 Cal. App. 650, 191 P. 60. Appellant also concedes, as indeed he must, that no lien was created in favor of the community on account of the expenditure of community funds by the husband. This rule is also well established. Peck v. Brummagim, supra; Carlson v. Carlson, 10 Cal. App. 300, 303, 101 P. 923, 925; McRae v. McRae, 67 Cal. App. 480, 227 P. 933; Flournoy v. Flournoy, 86 Cal. 286, 24 P. 1012, 21 Am. St. Rep. 39. In Carlson v. Carlson, supra, the court said: "In the absence of any specific agreement, no lien would be created on account of money expended by a husband upon the separate property of the wife. * * * The law will not infer from such expenditures alone an agreement either to change the character of the property or an intent to charge the same with a lien. It must rather be presumed that it was the intention of the husband to advance the money paid for the benefit of the wife's estate, and that it was intended to accrue to her interest."

[6, 7] We think the same reasoning which warrants a presumption that a husband did not intend by the expenditure of community funds for the benefit of his wife's separate property to create a lien upon said property compels the conclusion that he did not expect repayment for the community funds expended by him to improve his wife's separate property or to relieve it of an incumbrance. It is well established that, if a husband conveys to his wife his separate or community property, the mere fact of the conveyance itself will raise the prima facie presumption that he intended the conveyance to be a gift. It has also been held that any moneys furnished by the husband before or after marriage in payment of the purchase price of property taken in the separate name of the wife will be presumed to be intended as a gift, and this presumption has been extended to apply when a man prior to marriage procured a deed to property to be taken in the name of his intended wife and thereafter paid off a trust deed thereon with his own separate property. Alferitz v. Arrivillaga, 143 Cal. 646, 77 P. 657; Kimbro v. Kimbro, 199 Cal. 344, 347, 249 P. 180. With like reason, we think it may be presumed that, if a husband expended community funds for the benefit of his wife's separate property he intended, in the absence of any evidence of a contrary intent, such improvements or benefits to be a gift, and that he made such expenditures without expectation of repayment.

This conclusion is not impaired by the fact that in some of the community property states it has been held generally that the separate estate of one member of the community must reimburse the community for improvements made in good faith upon the separate lands of either. Rice v. Rice, 21 Tex. 58; Sims v. Billington, 50 La. Ann. 968, 24 So. 637; Legg v. Legg, 34 Wash. 132, 75 P. 130. In California a distinction is made between the case where, as here, the husband has improved his wife's lands with community funds and where he has improved his own lands with community funds. In the former case he is presumed to have intended a gift. In the latter case a right of reimbursement is granted to the wife upon the theory that to permit a husband to appropriate the community property under his management to his own separate use operates as a constructive fraud upon his wife. McKay, Community Property (2d Ed.) § 1017, p. 661. The reason underlying this distinction is well expressed in Provost v. Provost, 102 Cal. App. 775, 283 P. 842, 844. In that case findings had been made by the trial court that the husband after improving his separate property at the expense of the community had deeded the property to a daughter by a prior marriage for the fraudulent purpose of depriving his wife of her right to separate maintenance, and it was held therein that the wife, through proper proceedings and pleadings, had a right to compensation in the amount of her share in the community, measured by the improvement that such property had effected in his separate property. After a careful analysis of the California cases dealing with the question of the expenditure of community funds upon the separate property of a spouse, the court points out that all of these cases, with one exception, involved a situation where a husband had expended community funds upon the separate property of the wife, and said: "It is apparent that the reason back of each of these decisions stressed in the opinion on the subject * * * is that a husband had authority to control the disposition of the community funds, and that he voluntarily annexed them to the separate property of the wife, who exercised no such power. From these facts the intention of the husband is presumed to have been that the improvements made with the community money should become a part of the separate property of the wife. To merely state a case where the facts are reversed and the husband has spent community funds in improving his own separate estate is to make manifest the palpable impropriety of applying these decided cases as precedents for holding that, simply because community property is annexed to the separate property of one of the spouses, the whole is thereby for all purposes the separate property of that spouse. Since the facts are reversed, logic compels the conclusion that the community funds do not merge in the separate property where the husband has, without the consent of the wife, improved his own separate property with that belonging to the community. To hold otherwise would be to permit the authority of the husband in controlling the community property, given him in the interest of greater freedom in its use and for its transfer for the benefit of both himself and his wife, to become a weapon to be used by him to rob her of every vestige of interest in the community property with which the law has expressly invested her. Such a conclusion would violate every sense of justice, and outrage every principle of fair dealing, known to the law."

Appellant stresses the fact that the wife is presumed to hold her separate property as a tenant in common, and insists that, entirely eliminating from consideration the question of the right of the marital community for reimbursement by virtue of the expenditure of community funds, a lien exists by reason of the relationship of tenancy in common, and that this lien is enforceable in favor of the community irrespective of the existence of the marital relationship.

[8] Conceding it to be true, as appellant alleges, that a tenant in common who has paid a debt or obligation for the benefit of the joint property is entitled as a matter of right to have his cotenant refund to him a proportionate share of the amount paid and that it is proper to provide in the decree of partition that the share of the latter be charged with a lien (Rich v. Smith, 26 Cal. App. 775, 148 P. 545; Willmon v. Koyer, 168 Cal. 369, 143 P. 694, L. R. A. 1915B, 961), it is at once apparent that a conflict exists between the rules arising out of the marital relationship and those arising out of the relationship of tenancy in common. The community property system is a comprehensive system governing and controlling all of the property rights and obligations of the spouses during the continuance of the marital relationship or arising from such relation, and in case of a conflict there is no question in our minds but that the rules arising from the existence of the marital community must prevail.

[9] Moreover we are of the opinion that the judgment herein might well be affirmed upon the ground that, there being no lien upon the separate property of the wife, an action to quiet title was not the proper action for a determination of whether or not the marital community was entitled to reimbursement. The complaint was in the ordinary form of an action to quiet title containing the usual averments of ownership, possession, etc., of the described property, and nothing contained in any of the pleadings or even in the specifications of error indicates that a claim for reimbursement was presented to or adjudicated by the trial court. Apparently the purpose of this action, brought pending the administration of the estates of the deceased husband and wife, was to predetermine, prior to the decree of final distribution, the rights of the respective heirs of the husband's and wife's estate. Although an action to quiet title may be a permissible action to determine the status of the property of the spouses, it is not a proper action for an adjudication of all claims and possible equities existing between the estates.

In Shaw v. Bernal, supra, which was a suit in the nature of an action to quiet title brought by the surviving husband against the executor of the will of his deceased wife to determine whether or not certain property was the community property of the spouses, the court expressly declined to consider the question of whether or not the community was entitled to reimbursement, saying: "The authorities hold that the most that the marital partnership may acquire under such circumstances, if anything, is a right to reimbursement to the extent of the value added to the property by the improvements. Whether the right to reimbursement exists in such cases is a question not at all involved in this proceeding and we express no opinion thereon."

The judgment is affirmed.

211 Cal. 722

PEOPLE v. KEATON.

Cr. 3416.

Supreme Court of California.

March 6, 1931.

1. Homicide 🔑270.

In first-degree murder prosecution, on plea of not guilty because of insanity, sole question for jury is whether defendant was legally sane at time of homicide.

2. Criminal law 🔑48.

To overcome presumption of sanity, it must appear that defendant, when homicide occurred, was so mentally deranged that he was not conscious of wrong.

3. Homicide 🔑27.

Defendant, although mentally abnormal or suffering from nervous disorder, is fully responsible for homicide, unless within strict legal meaning of insanity.

4. Criminal law 🔑1165(1).

Where strong conflict exists in evidence, any substantial error may justify reversal of conviction of first degree murder.

5. Criminal law 🔑1171(3).

Error, if any, in district attorney's commenting on failure of defendant, pleading insanity, to call family doctor, who was in court, *held* harmless.

> It appeared that defendant had been a patient of doctor in question; that doctor was present at jail when defendant was being examined by medical expert, and was present in court during trial; and, although it might have been better practice to have omitted comment involved, there was no motion to strike it out and no request that jury be instructed to disregard it.

6. Criminal law 🔑730(8).

Misconduct, if any, in district attorney's commenting on failure of defendant, pleading insanity, to call family doctor, could be cured by instructing jury to disregard it.

7. Criminal law 🔑723(1).

District attorney's referring to defense counsel's success in swaying juries against evidence *held* not error; remainder of statement being legitimate argument on evidence.

8. Criminal law 🔑981(2).

After conviction notwithstanding insanity plea in protracted murder trial, denying statutory trial of defendant's present insanity *held* not abuse of discretion (Pen. Code, § 1368).

> Trial judge had opportunity to observe defendant throughout course of protracted trial, and concluded that defendant's conduct at trial was that of a sane man.

In Bank.

Appeal from Superior Court, Los Angeles County; B. Rey Schauer, Judge.

Frank D. Keaton was convicted of murder in the first degree, and he appeals.

Affirmed.

Paul Barksdale D'Orr and Thomas A. Reynolds, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and William F. Cleary, Deputy Atty. Gen., for the People.

LANGDON, J.

This is an appeal by defendant from a judgment of the superior court of Los Angeles county, imposing sentence of death after conviction of murder in the first degree, and from an order denying his motion for a new trial.

[1] On July 14, 1930, the defendant came to the courtroom of Judge Frank C. Collier. A civil trial was then in progress, in which Motley H. Flint, the deceased, was a witness. At the conclusion of his testimony, Flint walked off the stand, and, when he reached the spectator's section, the defendant drew a pistol and fired three shots at him, which took instant effect. Defendant was at once taken to the police station and interrogated. It appeared that he was not personally acquainted with the deceased, but in some manner imagined him to be, with others, responsible for his financial losses. The following day he was indicted for murder. He pleaded "not guilty" and "not guilty by reason of insanity." Subsequently he withdrew his plea of "not guilty," and the trial was held on the other plea. The sole question presented to the jury, therefore, was whether the defendant was legally sane at the time he committed the act.

[2, 3] In order to overcome the presumption of sanity and sustain the burden of proof on that issue, it must be made to appear "that the defendant, when the act was committed, was so deranged and diseased mentally that he was not conscious of the wrongful nature of the act committed." People v. Willard, 150 Cal. 543, 89 P. 124, 129. See, also, People v. Sloper, 198 Cal. 238, 244 P. 362. Responsibility depends upon whether the defendant knew the nature and quality of the act at the time of its commission, and the wrongfulness of the act. If he had sufficient mental capacity to know what he was doing, and to know that it was wrong, he is legally accountable for his act. Even though

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

he may be mentally abnormal or defective, or may suffer from some nervous disorder, he is, under our law, held to full responsibility for his act, unless the evidence brings him within the strict legal meaning of insanity. See People v. Gilberg, 197 Cal. 306, 240 P. 1000; People v. Sloper, supra.

[4] Considerable testimony was presented at the trial which tended to show that the defendant was mentally defective. Indeed, two medical men, one produced by the defendant, and the other an alienist appointed by the court, were of the opinion that he was insane. Other witnesses, including neghbors of the defendant's family, testified to peculiar conduct on his part which tended, in their opinion, to show insanity. There was, however, a great deal of evidence to the contrary, both expert and nonexpert. In the face of this conflict, counsel for defendant concede, as they must, "that there is sufficient evidence in the record to sustain the verdict." Their appeal is taken on the theory that, where there is a strong conflict in the evidence, any substantial error in the proceedings might tip the scales and prejudice the rights of the defendant. We agree that this is so, and have accordingly examined the entire record to determine whether any such error is present. No charge is made that any evidence was improperly introduced; and an objection leveled at an instruction of the court may be disposed of with the observation that the instruction was full and correct in all respects. Apart from the attack on this one instruction, the alleged errors are all concerned with the conduct of the deputy district attorney.

[5, 6] The first of the instances of alleged misconduct was the comment by the deputy district attorney on the failure of the defense to call the family doctor of defendant as a witness. This is vigorously denounced as an attempt to inject matters outside the record. The record shows that the defendant had been a patient of Dr. Walker, that the doctor was present at the jail when the defendant was being examined by the medical experts, and that he was present during the court sessions and was identified by rising when his name was called by the deputy district attorney during the course of the trial. His name appears in the record in a number of places. Under the circumstances, we do not deem the statement to be reversible error, if it was error at all, although it would doubtless have been better practice to have made no such reference. That it was not considered serious misconduct by counsel for defendant is clear, for no motion was made to strike it out, and no request was made that the jury be instructed to disregard it. If it did constitute misconduct, the error could have been cured by such instruction.

[7] Considerable stress is laid also upon remarks of the deputy district attorney alleged to be derogatory to counsel for defendant. Of these, one example is sufficient: "* * * Who else in fact would be able to go out and find even a Hollywood actor doctor to come in and say, because a man had a little twitching of the eyes, he had four kinds of insanity. Those are the acts of the great D'Orr! No wonder he was able to tell you in advance of his prowess, victories and success in swaying juries, and of his success in persuading men against all evidence." Statements of this type can hardly be said to deserve the importance given them in the brief of appellant. It seems to us that, apart from the tribute, possibly a genuine one, made to defendant's counsel, the statement was nothing more than argument on the evidence, which is clearly within the proper scope of the closing address of the prosecutor.

We find none of the other assignments of misconduct worthy of mention, and we feel bound to say that, considering the length of the trial, the conduct of it was remarkably free from irregularities of any kind, and that the defendant was ably represented and his rights were safeguarded throughout the proceedings.

[8] A final point which requires disposition is the refusal of the trial court to grant the motion of counsel for defendant, made after the jury brought in its verdict, requesting that the defendant be tried as to his present sanity, under section 1368 of the Penal Code. The court's denial of this motion is assigned as error. We are satisfied, however, that the trial judge exercised a reasonable discretion in this instance. He had the opportunity to observe the defendant throughout the course of a protracted trial, and he concluded that the defendant's conduct at the trial was that of a sane man. Viewing this conclusion in the light of the evidence and verdict finding defendant to have been sane at the time of the commission of the act, the record discloses no ground upon which we might interfere.

It necessarily follows that the judgment and order of the trial court must be, and they are hereby, affirmed.

We concur: WASTE, C. J.; PRESTON, J.; CURTIS, J.; RICHARDS, J.; SEAWELL, J.; SHENK, J.

211 Cal. 631

GUNTHER v. THOMPSON et al.

Sac. 4377.

Supreme Court of California.
Feb. 25, 1931.

1. Appeal and error ⚷1011(1).

Judge's finding on conflicting evidence on matters of fact will not be disturbed.

2. Corporations ⚷182.

Statute invalidating conveyance of corporate business if made without stockholders' consent *held* available only for stockholders and creditors, precluding purchaser from rescinding contract for exchange of properties (Civ. Code, § 361a).

3. Executors and administrators ⚷92.

Where party to contract for exchange of properties was precluded from rescinding, his administrator had no greater right.

4. Exchange of property ⚷8(4).

Evidence showed that purchaser who obtained clothing store under exchange contract knew that store was incorporated, precluding rescission for alleged fraud (Civ. Code, § 361a).

In Bank.

Appeal from Superior Court, Tehama County; J. O. Moncur, Judge.

Action by Albert C. Gunther, as administrator of the estate of Lawrence J. Gunther, deceased, against Ernest E. Thompson and another. Judgment for defendants, and plaintiff appeals.

Affirmed.

J. Oscar Goldstein, of Chico, for appellant.

McCoy & Wetter and Fred C. Pugh, all of Red Bluff, for respondents.

PER CURIAM.

[1] This appeal is taken by plaintiff, as administrator, from a judgment rendered in favor of defendants in an action praying for the cancellation and rescission of a written contract entered into by said intestate and defendant for the exchange of real and personal properties owned, respectively, by plaintiff's intestate, Lawrence J. Gunther, and defendant Dr. Ernest E. Thompson. The properties involved in the exchange owned by Lawrence J. Gunther in his lifetime consisted of farm lands situate near the city of Red Bluff, county of Tehama, a timber claim situate in the county of Humboldt, and two promissory notes, aggregating in value $8,500. The property owned by Dr. Ernest E. Thompson, which passed in the exchange, was the entire capital stock, to wit: 50,000 shares of the Quality Shop, Incorporated, the same being a gents' furnishing store of sixty-four years of business existence, located at 705 Main street, city of Red Bluff, county of Tehama. Said Lawrence J. Gunther, appellant's intestate, at the time the exchange was made was of the age of thirty-two years, and was born and reared on a farm within ten miles of Red Bluff, and was a customer of said Quality Shop in his lifetime and was personally acquainted with the employees of said Quality Shop. Some five days after the transaction and after said Lawrence J. Gunther had taken possession of the shop and its business both personally and with the assistance of a former manager and employee of said shop, he committed suicide. The exchange had been solicited by said deceased and was consummated through the agency of defendant Bruch, a real estate agent, who was found by the trial court to have been the agent of Gunther and not of respondent Thompson. Bruch, at the request of said Gunther, had attempted to negotiate exchanges of his real property on several prior occasions, but each attempt failed, generally because the properties proposed did not appear to said decedent to be good investment propositions. Bruch, on preparing the exchange agreement, used a printed form of contract for the sale of real estate without eliminating much of its inappropriate phraseology. Neither party, it would seem, had the aid of legal assistance. Bruch, who did not know that said Quality Shop was incorporated, merely described the property that was to pass to decedent as "that certain stock of merchandise and fixtures located at 705 Main street." Two supplemental escrow agreements were executed by the parties, which show their understanding as to what was actually exchanged and the property that decedent was to receive. Appellant does not press the several other grounds of fraud set forth in the complaint and which were found adversely to his contention by the trial court for the reason that the finding of a trial court as to a matter of fact, in a case where a conflict of evidence exists, will not be disturbed by an appellate court.

After the death of Lawrence J. Gunther, his personal representatives gave notice of rescission and tendered back the store and its contents. Respondents refused the offer.

[2, 3] The 50,000 shares of the capital stock of the corporation were owned by said Thompson. One share of the stock had been issued to his son and one share to his nurse. Those two shares were assigned to respondent and he held them in his possession, making him the sole owner and holder of the entire issue. Appellant's grounds for the avoidance of the exchange is bottomed on the ground that the transaction was not one as between individu-

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

als, but a corporation transaction on the part of the corporation and inasmuch as there was no meeting of the directors authorizing the sale, or any formal action taken in compliance with section 361a, Civil Code, which provides that: "No sale, lease, assignment, transfer or conveyance of the business * * * or any corporation now existing * * * shall be valid without the consent of stockholders thereof, holding of record at least two-thirds of the issued capital stock of such corporation; * * *" the transaction amounted to a nullity. The provisions of section 361a are for the protection of stockholders and creditors of the corporation, and the stockholders and creditors alone have the right to object to such a transfer. Lost Burros Gold Mining Co. v. Inyo County Bank, 83 Cal. App. 679, 257 P. 209; South Pasadena v. Pasadena L. & W. Co., 152 Cal. 579, 93 P. 490. It would be a startling proposition to announce as a principle of law or equity jurisprudence that one, with knowledge that he is dealing with a corporation in the purchase of its stock, as in the instant case, may elect to take as assignment of all the capital stock of a corporation, together with every corporate privilege and right that its ownership conveyed, enter into possession of the business and property and thereafter be heard at will to repudiate the transaction on the ground of nonconformity by the corporation with the provisions of said section 361a. The decedent himself could not have repudiated the transaction, and it follows that his personal representative may not have greater rights.

The court found that the stock transfer was signed in blank by respondent and delivered to a bank to be held as security for decedent's indebtedness to respondent upon a deferred payment in the sum of $6,500 arising out of the transaction.

[4] There is no merit in the contention that decedent did not know that the Quality Shop was a corporation. Respondent testified that he discussed the subject with him, and it is incredible that he was not made acquainted with the fact by the papers and books which he examined in his investigation of the business done by the shop. The decedent became the owner of the stock the day he took possession, May 11, 1928, and he had the right from thence forward, if he desired to continue the corporate existence of the business, to elect directors and officers of his own choice and do every act which the franchise granted. It is also in evidence that the value of the property which the decedent received in the exchange was some $2,000 or $3,000 greater than the value of the property he parted with. This evidence was given by persons who were experienced and familiar with the Quality Shop and its business, and apparently disinterested in the result of the case. The trial court accepted their appraisement of values as against others who testified on the subject. The findings are quite lengthy. Every finding made by the court, with special emphasis on the one that the decedent knew at all times he was buying 50,000 shares of stock of the corporation, its entire issue, owned solely by respondent, finds ample support in the evidence.

The judgment is therefore affirmed.

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211 Cal. 593

CHRIST v. SUPERIOR COURT IN AND FOR CITY AND COUNTY OF SAN FRANCISCO et al.

S. F. 13955.

Supreme Court of California.

Feb. 25, 1931.

1. Mandamus 🔑4(1).

Appeal is not always speedy or adequate remedy barring mandamus (Code Civ. Proc. § 1086).

2. Mandamus 🔑14(1).

Demand for new subpœna after quashing of original *held* not condition precedent to mandamus for commission to take testimony, where respondent court refused to compel witness' attendance.

3. Depositions 🔑39.

Commission to take testimony may issue on foreign letters rogatory showing pendency of either action or special proceeding to perpetuate testimony (Code Civ. Proc. §§ 2021, 2035, 2036a, 2083 et seq., 2084).

> Code Civ. Proc. § 2021, provides that testimony of witness in state may be taken by deposition in action at any time after service of summons and in special proceeding after question of fact has arisen; section 2035 provides that any party to action or special proceeding in sister state may obtain testimony of witness residing in California for use in such action or proceeding; section 2036a provides that witnesses may be compelled to appear and testify in proceedings pending in foreign jurisdiction by same process as in proceedings pending in state; sections 2083 et seq. provide complete method for taking and perpetuating testimony of witness when no other action is pending; and section 2084 authorizes superior court to issue commission for such purpose on petition showing that applicant expects to be party to action in state court.

4. Evidence ⚷81.

Courts must presume, in absence of contrary showing, that law of foreign country is same as that of California.

5. Evidence ⚷81.

Court must presume, on mandamus for commission to take testimony on foreign letters rogatory, that proceedings to perpetuate testimony, like those authorized by state law, are pending in foreign country.

6. Mandamus ⚷40.

Petitioner *held* entitled to mandamus for commission to take deposition on letters rogatory in Spanish language, where English translation was filed before commencement of proceeding (Const. art. 4, § 24; Code Civ. Proc. § 2036a, and § 2083 et seq.).

> Const. art. 4, § 24, provides that judicial proceedings shall be in English language only.

7. Mandamus ⚷174.

Generally, facts existing when application for mandamus was made determine petitioner's right and respondent's duty.

8. Depositions ⚷40.

Foreign letters rogatory, to which were attached affidavit, verified before American consul general and transmitted with letters by foreign consul general, pursuant to foreign minister's instructions, *held* properly authenticated.

9. Depositions ⚷57.

Petition for subpœna, pursuant to order to take deposition, *held* sufficient, in view of attached affidavit as to facts expected to be proved (Code Civ. Proc. § 2084, subd. 3).

10. Depositions ⚷57.

Where right to subpœna, pursuant to order to take deposition, is statutory, motive of petitioner is immaterial, and court cannot deny it.

In Bank.

Original proceeding in mandamus by Rodolfo Christ against the Superior Court of the State of California, in and for the City and County of San Francisco, and James G. Conlan, as Presiding Judge thereof.

Peremptory writ granted.

Superseding opinion of District Court of Appeal in 287 P. 560.

George G. Olshausen and John B. Ehlen, both of San Francisco, for petitioner.

Orrick, Palmer & Dahlquist, Garret W. McEnerney, and Andrew F. Burke, all of San Francisco, for respondents.

PER CURIAM.

A hearing was granted in this cause after decision by the District Court of Appeal. 287 P. 560, 561. After further consideration of all of the issues involved we adopt the following portions of the opinion of the District Court of Appeal, of which Mr. Presiding Justice Nourse was the author, as the opinion pro tanto of this court:

"This is an original proceeding in mandamus to require the superior court to issue a commission for the taking of testimony of two witnesses upon letters rogatory issued out of a court of record of Guatemala.

"The letters rogatory were presented to respondent court showing that the petitioner represented to the Guatemala court that he was about to commence an action against Adolfo Stahl and the American Finance & Commerce Company, for which it was necessary that the depositions of J. Beaumont and Frank L. Jackson, residing in the city and county of San Francisco, be taken. In the proceeding before the Guatemalan court the general nature of the questions to be asked these witnesses was stated, accompanied by a showing of the materiality of their testimony. This showing having been made to the respondent court, an order that the deposition of Frank L. Jackson be taken was made and a subpoena was issued pursuant to said order. Thereafter a motion was made on behalf of said witness to quash said subpoena upon the grounds that the respondent court had no jurisdiction to make the order. This motion was granted, and respondent has since refused to take any other steps to compel attendance of said witness for the taking of his deposition in response to the letters issued by the Guatemalan court.

[1] "Preliminarily respondents argue that this is not a proper case for mandamus because the petitioner has another remedy by appeal from the order to quash the subpœna. The remedy by appeal, conceding that there is such, is not always an answer to a petition for mandamus. This writ must be issued when 'there is not a plain, speedy, and adequate remedy, in the ordinary course of law' (section 1086, Code Civ. Proc.); that the right of appeal is not always a speedy or adequate remedy is well settled. S. F. Gas & Electric Co. v. Superior Court, 155 Cal. 30, 39, 99 P. 359, 17 Ann. Cas. 933.

[2] "It is also argued that the petition is insufficient because it fails to allege a specific demand upon the respondent court to issue a new subpoena. Such a demand is excused when it appears that demand, if made, would have been futile. Here the petition alleges that the respondent refuses to take any steps whatever to compel the witness to attend the taking of his deposition and the answer ad-

mits this to be true. It thus appears that a formal demand for the relief prayed for would have been futile because the respondent court conceived that it was without jurisdiction to grant this relief. Such a demand was, therefore, unnecessary. 16 Cal. Jur., pp. 771, 772. * * *

[3] "Upon the merits of the case it is argued that the superior court is without jurisdiction to recognize the letters rogatory or to issue a subpœna for the taking of the deposition because it appears on the face of the petition that there is no action pending in the Guatemalan court. The authority to issue the commission upon letters issued out of a foreign jurisdiction is found in section 2036a, Code of Civil Procedure. That section provides that witnesses may be compelled to appear and testify in the same manner and by the same process as may be employed for taking testimony for proceedings pending in this state. Section 2021 of the same Code provides that the testimony of a witness in this state may be taken by deposition in an action any time after the service of summons and in a special proceeding after a question of fact has arisen therein. If this were the only provision for the taking of a deposition of a witness in proceedings pending in this state, the argument of respondent would be sound, but sections 2083 et seq. of the same Code provide a complete method for the taking and perpetuation of the testimony of a witness when no other action is pending. Section 2084 permits the superior court to issue a commission for that purpose upon a petition showing 'that the applicant expects to be a party to an action in a court in this state, and, in such case, the names of the persons whom he expects will be adverse parties; or * * * and, the name of the witness to be examined, his place of residence, and a general outline of the facts expected to be proved.'

"Respondent relies upon section 2035, Code of Civil Procedure, which provides that 'any party to an action or special proceeding in a court or before a judge of a sister state, may obtain the testimony of a witness residing in this state, to be used in such action or proceeding.' It is argued that section 2036a must be read in connection with 2035 so that a commission shall not issue upon letters coming from a foreign jurisdiction to a better advantage than upon letters coming from a sister state of the United States, and that under the provisions of section 2035 such a commission cannot issue in any case, except where an action or special proceeding is pending in the sister state. If it were conceded that such should be the proper interpretation of section 2036a, this would not aid the respondent. Under the provisions of section 2035, relating to depositions upon letters coming from a sister state, and under section 2021, relating to proceedings pending in this state, the commission to take a deposition of a witness is authorized whenever an action or a special proceeding is pending. It is true that under section 2021 a commission may not issue in a special proceeding until after a question of fact has arisen, but the term 'special proceeding' as used in that section must be interpreted as including all special proceedings other than those to perpetuate testimony which are specially covered by sections 2083 et seq. of the same Code. Thus, when proceedings to perpetuate testimony are instituted under the provisions of the later sections, the deposition is to be issued in the manner therein prescribed, but there is no reason for holding that the term 'special proceeding' as used in section 2035 in reference to matters pending in a sister state does not apply to both characters of special proceedings—those referred to in section 2021 and those referred to in sections 2083 et seq. of the Code.

"Therefore, if we are to read section 2036a with section 2035, the construction of the latter section must be that a commission to take testimony may issue upon letters from a foreign jurisdiction showing the pendency of either an action or special proceeding as the latter term is used in our Code.

[4, 5] "On the record before us we must presume, in the absence of a contrary showing, that the law of Guatemala is the same as that of California. Wickersham v. Johnston, 104 Cal. 407, 38 P. 89, 43 Am. St. Rep. 118; 5 Cal. Jur. 431. We must, therefore, presume that the proceedings instituted in Guatemala are like the proceedings authorized by sections 2083 et seq. of the Code of Civil Procedure, and that it is pending until such testimony is completed and the deposition duly filed with the court out of which the commission issued.

"We do not deem it necessary to discuss the authorities cited from federal and other jurisdictions, for they are all based upon statutes in nowise similar to the Code sections above noted. The question presented here is simply one of interpretation of these Code sections in which we are not aided by the citation of any California authorities."

Other points seemed to be worthy of consideration when the petition for hearing was granted.

It appears from the petition that on the 24th day of October, 1929, letters rogatory were secured by the county clerk of the city and county of San Francisco from the office of the consul general of Guatemala at San Francisco, by a letter of transmission, addressed to said clerk. Attached to the letters rogatory was an affidavit of the petitioner herein purporting to have been subscribed and sworn to on July 15, 1929, before G. K. Donald, the American consul general at Guatemala. This affidavit set forth that the affiant is a stockholder of the Ocos Railroad Company, which is now dissolved; that affiant intends to file a suit in the courts of Guatemala against Adolfo Stahl and the American Finance Commerce Company alleging that the contemplated defendants and Schwartz Brothers, the predecessors in interest of the contemplated corporation defendant, fraudulently and illegally acquired control and possession and retained the profits arising from the operation of the Ocos Railroad Company from 1900 to 1910, and have not, according to affiant's knowledge, accounted to the stockholders of said railroad company; that on October 15, 1910, the contemplated defendants, in the name of Schwartz Brothers, sold said railroad to the Guatemala Central Railroad Company; that for the purpose of the contemplated suit it is necessary to ascertain what price was received by said Schwartz Brothers for said railroad; that the Pacific Improvement Company had a controlling interest in the Guatemala Central Railroad Company; that the books of the Pacific Improvement Company indicate what price was paid for the Ocos Railroad and that affiant has no other means of ascertaining the price so paid except by inspection of said books; and that said Frank L. Jackson is an officer of the Pacific Improvement Company residing in San Francisco.

When the letters rogatory and accompanying affidavits were presented to the respondent judge, an order was made directing that a subpoena issue commanding said Jackson to appear before a designated notary public on November 17, 1929, at 10 o'clock a. m., then and there to give his deposition in accordance with said letters rogatory. Thereafter a motion was made on behalf of the witness to set aside the order and to quash said subpoena on the ground that the respondent court had no jurisdiction to make the order, and that if the court had jurisdiction it should, in its discretion, deny it. In support of the motion an affidavit of Jean Wohlwind was filed wherein it was averred that neither of the contemplated defendants resided, was doing business, or had property in the republic of Guatemala; that there is pending in the District Court of the United States, in and for the Northern District of California, a suit by and on behalf of the stockholders of the Ocos Railroad Company for the identical purpose for which the contemplated suit in Guatemala is intended to be prosecuted; and that the purpose of the proposed deposition is in aid of the prosecution of the action in the United States court. A counter affidavit of Ricardo Kiobge was filed in which it was averred, on the information and belief of the affiant, that Stahl owned real and personal property in Guatemala and that the American Finance and Commerce Company has been and is now doing business in that republic. There is also an averment in the counteraffidavit that there is pending in the superior court in and for the city and county of San Francisco an action on behalf of the stockholders of the Ocos Railroad Company against Stahl arising out of his relationship as a receiver of the Ocos Railroad Company and his handling of the funds of that corporation. The motion to quash was presented to the court, argued, and finally submitted for decision on November 20, 1929. At all times prior to December 2, 1929, the document designated as letters rogatory was entirely in the Spanish language with no accompanying English translation. All other documents were in English. On December 2d the petitioner filed with the clerk of said court an English translation of the letters rogatory. On December 31, 1929, the court granted the motion to quash the subpoena, and the present proceeding was commenced on January 24, 1930.

[6] Assuming, as respondents contend, that section 24 of article 4 of the Constitution, providing that judicial proceedings shall be in no other than the English language, is applicable to a proceeding to take a deposition under sections 2036a and 2083 et seq. of the Code of Civil Procedure, nevertheless the position of the respondents is not advantaged thereby, because of the state of the record, which discloses that at the time of the commencement of this proceeding and of the issuance and service of the alternative writ herein and for some twenty days or more prior thereto there had been on file with the respondentt court an English translation of the Spanish letters rogatory and the English translation is attached to the petition herein.

[7] It is the general rule that the facts as they exist at the time the application for the writ of mandamus is made determine the right of the petitioner and the duty of the respondent. U. S. ex rel. International Contracting Co. v. Lamont, 155 U. S. 303, 308, 15 S. Ct. 97, 39 L. Ed. 160; Ward v. Flood, 48 Cal. 36, 17 Am. Rep. 405; 38 C. J., p. 602.

[8] It is insisted that the letters rogatory were not properly authenticated. It appears that the affidavit of the petitioner attached to the letters was verified before the consul general of the United States at Guatemala and these documents were transmitted to the respondent court by the consul general of Guatemala located at San Francisco by a communication which recited that they were so transmitted pursuant to instructions of the Guatemalan minister at Washington, D. C. The letters rogatory, the accompanying affidavit, and the letters of transmittal were original documents and their genuineness was not denied in the answer to the petition herein. In addition there is much force in the contention of the petitioner that the original documents prove themselves. See Wickersham v. Johnston, 104 Cal. 407, 413, 38 P. 89, 43 Am. St. Rep. 118.

[9] It is also contended that the petition for the issuance of the subpoena does not state "a general outline of the facts expected to be proved," as required by subdivision 3 of section 2084 of the Code of Civil Procedure. We think the affidavit of the petitioner, the substance of which has been hereinbefore related, is a complete answer to this contention.

[10] The pendency of the actions in the state and federal courts in California involving the same issues, the adjudication of which is contemplated in the Guatemalan courts, lends strong support to the contention of counsel for the respondents that the proffered deposition of Jackson is but a "fishing expedition," and that the respondent court would be justified in refusing the subpoena if any discretion is reposed in the court so to do. However, we feel impelled to adhere to the rule that where, as here, the right to the subpœna is a statutory right, the motive of the party is immaterial and the court was without discretion to deny the same. Hobbs v. Tom Reed Gold Min. Co., 164 Cal. 497, 502, 129 P. 781, 43 L. R. A. (N. S.) 1112; S. F. Gas & Electric Co. v. Superior Court, 155 Cal. 30, 39, 99 P. 359, 17 Ann. Cas. 933; Johnson v. Langdon, 135 Cal. 624, 626, 67 P. 1050, 87 Am. St. Rep. 156; Poor v. Yarnell, 28 Cal. App. 714, 153 P. 976.

No other points require discussion.

Let the peremptory writ issue as prayed.

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211 Cal. 607

BAZET v. NUGGET BAR PLACERS, Inc., et al.

Sac. 4291.

Supreme Court of California.

Feb. 25, 1931.

Rehearing Denied March 26, 1931.

1. Trial 🔑66.

In action to determine water rights, reopening case for additional evidence on important branch after informal decision *held* not abuse of discretion.

> After both sides had announced that neither had any further evidence to offer, trial court made written announcement of its decision, but did not sign findings or decree binding it to such informal decision. Subsequently, order was made setting aside decision and reopening case for single purpose of receiving additional evidence on an important matter involved in case. It did not appear that defendant was surprised or in any manner prejudiced by such action.

2. Waters and water courses 🔑152(7).

In action to determine water rights, testimony showing result of ground sluicing for several years *held* admissible.

> Plaintiff asserting water rights involved in action, basing her claim on user, appropriation, and prescription. Ground sluicing was practically only mining process used for period of ten years by plaintiff.

3. Waters and water courses 🔑152(8).

Evidence *held* to establish that neither plaintiff nor predecessor acquired either title or right to use all waters of named creek, or used waters during considerable portion of year.

4. Water and water courses 🔑137.

Prescriptive right to water during period in which water was not used could not be acquired.

5. Waters and water courses 🔑152(8).

In action to determine water rights, evidence *held* not to establish plaintiff or predecessor used 8,000 miners' inches for useful purposes.

6. Waters and water courses 🔑143.

Appropriator of water having acquired prescriptive right may not waste water as against riparian owner who can beneficially utilize water (St. 1913, p. 1012, § 20a, as added by St. 1917, p. 748).

7. Waters and water courses 🔑152(7).

In action to determine water rights, testimony on depletion of waterflow, showing rain and snowfall in other portions of area in which mining section was located, *held* admissible.

In Bank.

Appeal from Superior Court, Shasta County; Walter E. Herzinger, Judge.

Action by Angele Bazet, formerly Angele Beaudry, against Nugget Bar Placers, Inc., and others. From the judgment rendered, defendant named appeals.

Reversed.

H. R. Given, of Weaverville, and Carr & Kennedy, of Redding, for appellant.

Dozier & Kimball, F. J. Solinsky, and Edw. R. Solinsky, all of San Francisco, for respondent.

SEAWELL, J.

This appeal involves a controversy between respondent and appellant as to the first and superior right of said parties herein to the use of the waters of the East fork of Stuart's fork of the Trinity river and Strope creek, respectively, which are of first importance to conducting and carrying on hydraulic mining operations. Strope creek is a tributary of the East fork of Stuart's fork of the Trinity river. The East fork of Stuart's fork of Trinity river, which is the main stream, will, for the sake of brevity, hereafter be referred to as the East fork. The mining claims belonging to or in the lawful possession of said parties, both as to patented and unpatented claims, are within adjacent areas, situate in Minersville mining district, county of Trinity. No question as to title or the possessory rights of either party is involved in the appeal.

Beginning with some time prior to the month of December, 1898, Fred Beaudry, the former husband of respondent, patented eight and located twenty-one other mining claims in said district, which he began operating and continued to operate intermittently until his death, which occurred in 1912, by the use of such waters as were appendant or appurtenant to said mining claims, or which were acquired by prescription or user, together with the diversion of large quantities of waters from said East fork, a stream of considerable volume, and Strope creek. Respondent, as the widow of said Fred Beaudry, succeeded to his entire interests. After his death, six additional mining claims were located in 1914 and 1915, which also form a part of the mining properties of respondent.

It was claimed at the trial and found as a fact by the court that for more than ten years immediately preceding June 14, 1913, to wit, June 14, 1903, respondent's said predecessor in interest became, and she as his successor in interest now is, the owner of the first right to divert and use all the waters of said streams to the extent of 6,000 miners' inches of the first flow of East fork and 2,000 miners' inches of the first flow of Strope creek, measured under a six-inch pressure, and is entitled to divert the entire flows of said streams at such times as either or both of said streams should from natural causes become diminished below the amounts awarded by the judgment to respondent. In the month of September, 1922, appellant entered into the possession of a group of mining claims situate at a point below the confluence of Strope creek with said East fork, and began to operate them. All of appellant's claims are riparian to said East fork, while none of respondent's claims is riparian to said East fork. Said Fred Beaudry, respondent's former husband, during the early period mentioned, in preparing to engage in hydraulic mining operations, intercepted the waters of North fork by constructing a wooden dam across said stream at a point several miles northerly from the situs of his own mining activities and approximately an equal distance from the situs of appellant's present mining claims and conducted the waters of said stream into a system of ditches and waterways which he constructed. The water first enters North fork ditch, a portion of which feeds the Greenhorn ditch and its branches, and the remaining portion continues southerly, intercepting and transporting in its course the waters of Strope creek. From that point it takes the name of Diener ditch. In its lower reaches it ramifies into branches known as the Ridgeville ditch, Upper ditch, and Lower ditch. Respondent's diversion works and conduit system consists of dams and headgates, ditches, old creek channels, flumes, and ravines. The system is quite primitive in construction, and there is, no doubt, some wastage of water in the course of transportation. An ancient ditch or water course called Unity ditch parallels the East fork in its southerly course, which water was diverted by appellant by means of a dam constructed across said stream. It seems that it had fallen into disuse until appellant recently restored it. This dam is located a number of miles southeasterly from respondent's dam and several miles northerly and upstream from appellant's operative grounds. Said Unity ditch in its course southerly crosses Strope creek at a point near its confluence with East fork.

On June 14, 1923, and again on July 3, 1923, appellant obstructed the flow of water of East fork into respondent's intake and diversion works, which obstructions, and threatened obstructions, resulted in the commencement of this action, in which it was adjudged that respondent had a legal right and claim to take and divert, and that she owned, 6,000 miners' inches, measured under a six-inch pressure, of the first flow and was entitled to the first right to divert and use said quantity of the waters of the East fork, and also 2,000 miners' inches of the waters of Strope creek, similarly measured, and for similar purposes, during all seasons of the year from January 1st to December 1st, inclusive, for operation and development work in and about said mines, including 10 miners' inches thereof, for irrigation and domestic purposes. Respondent's title was quieted to the extent of said quantities of water against any and all claims of appellant, and appellant was perpetually enjoined from maintaining any dam or obstruction in the channel of said East fork or Strope creek, or in any way interfering with the flow of the waters of either or both of said streams into respondent's diversion works, or to or upon her mining properties, to the full amounts awarded by said judgment. The judgment further decreed that appellant is entitled to divert and use 2,500 miners' inches of the waters of said East fork, measured under a six-inch pressure, during all seasons of each year for mining purposes upon appellant's mining properties over and above and subject and subordinate to the 6,000 miners' inches of the first flow of said stream which was awarded to respondent. This award was doubtless made to accord with the permit issued to appellant by the State Department of Public Works, Division of Water Rights, on February 6, 1923, granting to appellant, subject to prior vested rights, the right to divert by means of the Unity dam and ditch 2,500 miners' inches of water from East fork and Strope creek, and was not intended to limit appellant in the exercise of its riparian rights, but only as an appropriator. The state by its permit designated the amount of water that appellant might take at the point of diversion, and the court made it plain that it did not in any wise modify the water commission's order. As a matter of fact, the appellant was awarded the full quantity of water asked for in its answer by means of Unity ditch, subject, however, to the first right of respondent to receive the quantity which the decree awarded her. The only impediment placed in appellant's way as far as receiving the quantity asked for, is said first right of respondent.

[1] From the decree as above outlined, the appeal was taken by Nugget Bar Placers, Inc., a corporation, assigning a number of grounds as constituting reversible error. Appellant concedes respondent's claim to the ten miners' inches of water awarded to her for irrigation and domestic purposes, and makes no complaint as to that portion of the decree. Respondent concedes that error was committed inadvertently in the judgment which provides for the measurement of said awarded quantities of water to be made under a six-inch pressure rather than a four-inch pressure, and consents that the judgment be modified to the extent of basing the award upon a four-inch pressure to conform with the proofs, and, as so modified, asks that the judgment be affirmed. Complaint is also made to the order of the court reopening the case for the reception of further evidence after both sides had announced that neither had any further evidence to offer, wherefore the court made a written announcement of its decision to the effect that respondent was entitled to judgment awarding her the first flow of the waters of the East fork and Strope creek in the same quantities and measured by the same pressure as set forth in the signed decree herein, but limited the period of use from May 1st to November 1st of each year, and awarded to appellant the first flow of all the waters of said streams during the months from November 1st to May 1st of each year, and also to all the waters flowing in said streams without limitation as to quantity in excess of the amounts awarded to respondent during the period from May 1st to November 1st of each year. No findings or decree had been signed binding the court to its informal decision, and some time thereafter and before findings and conclusions of law or judgment had been prepared or signed, the court made an order setting aside said decision and reopened the case for the single purpose of receiving evidence as to whether during the months of November, December, January, February, and March of each year, beginning with November 1, 1913, to and including April 1, 1923, there had been sufficient water flowing in said streams to conduct and operate the mining properties of respondent as a hydraulic mine as the same had been operated for many years prior to November 1, 1913. The reason given for reopening the case was that the evidence was silent as to an important matter. We see no abuse of discretion on the part of the court in reopening the case for the reception of additional evidence on an important branch of the case, and it does not appear that the appellant was surprised or was in any manner prejudiced by the court's action. The cause was still within the control of the court. Whether the evidence introduced upon the reopening of the case supplied the deficiencies pointed out by the court could not affect the question of the reasonable exercise of judicial discretion. This brings us to the consideration of the more substantial assignments of error.

Appellant insists that a proper regard for the fundamental rights of a riparian landowner to the use of at least a portion of the waters of a stream which flows over its lands as against a nonriparian owner who asserts the right to use all the waters of such a stream, founded upon user, appropriation, or prescription, imposes upon such a claimant the onus of establishing her claim by evidence more convincing in effect and more definite in character than the evidence which has been adduced by respondent in support of her claim. Especially it is contended that the evidence impels, at least, a reasonable partition of said waters, regulated by hours of use or a limitation as to quantity. Appellant further contends that whatever rights respondent may have acquired from 1903 to 1913, were lost by nonuse and abandonment during the period from 1913 to the commencement of this action, which was filed in 1923, and that the evidence does not sustain the finding that respondent or her predecessor used the waters of either of said streams in the operation of hydraulic or placer mines continuously or consecutively for the statutory five years' prescriptive period at any time during her ownership or the ownership of her predecessor either as to the quantity or for beneficial or useful purposes as found by the court, or that said waters were used for mining or other beneficial purposes during any month from November to May of the succeeding year during the entire term of occupancy and ownership of respondent and her predecessor. It is also earnestly contended that said mines were at no time operated as such for a consecutive period of five years from November to May of each succeeding year. This contention has not been satisfactorily met. It cannot be successfully contended that respondent's mines were operated as such from May to November of any year beginning with 1903 and ending at the time suit was filed, to wit, August 3, 1923. But very little work of any kind was done in or about said mining claims during any month or season after the death of Fred Beaudry, the original owner, which occurred in 1912. No claim is made that any work was done upon the properties for more than a year after his death. The only work done during the ten years succeeding his death was occasional ground sluicing, piping, and such annual assessment work as was necessary to protect respondent's rights. The Diener flume, which had a carrying capacity of approximately one-half of the waters of the two streams combined, went out in the winter of 1914–15 and was never restored. A portion of the flume of the Lower ditch went out in 1912, and was restored in 1922 to a carrying capacity of about 500 inches. Appellant complains, not entirely without reason, that no actual measurements were ever made, and no data or other information is to be found in the record by which any estimate may be made as to the quantity of water Strope creek carried at any season. It is admitted that East fork ditch, under a four-inch pressure, has a carrying capacity of the amount of water respondent claims to have diverted, but it is disputed that the balance of the equipment had such capacity or that said amount of water was applied to a useful or beneficial purpose, the burden of so doing being upon plaintiff respondent. On the other hand, respondent contends that she and her predecessor used the full maximum quantity of waters, to wit, 6,000 miners' inches, which debouched from the East fork into the intake of the East fork ditch, and 2,000 additional inches at a point lower down, necessary in the reasonable operation and developing of her mining claims, from 1903 until she was prevented from continuing operations by reason of an extended period of insufficient fall of rain and snow in the mountain regions which reduced the flow of said streams to a point where it was impossible to operate her mines by the hydraulic process, or from doing any kind of work other than occasional ground sluicing. This period of marked decrease in the water supply, it is contended, began with the year 1913 and continued for a period of approximately ten years, with the possible exception of one or two years when storm conditions were somewhat normal. There is testimony to the effect that in some years the snow packs dropped from the normal depth of four feet to twelve or sixteen inches. Respondent sought to excuse the shutting down and practical suppression of operations during said period to changed weather conditions rather than to any fault chargeable to her. One or two witnesses produced by her testified that the flow of water in said streams at certain seasons of certain years was as low as 300, 500, and 1,000 miners' inches. Testimony was also adduced on her part that it was necessary to close the headgate of North fork ditch during the winter and early spring months in order to protect the flumes and lower ditches from damage which would result from the débris and detritus which the torrential storms would have brought with them. The country in which the mines are located is mountainous and rugged. The area of the watershed which feeds the streams is some ten or twelve square miles. The extent of the mining operations carried on by respondent or her predecessor were at no time extensive, and at no time does it appear from the evidence that the number of workmen employed exceeded six or eight men, and the inference is that at times there was not more than one employee, if any. The development work was begun by Fred Beaudry in 1903. Some of the claims were worked by tenants for periods of one, two, and three seasons. It appears that Beaudry did some hydraulic mining at intervals and in a limited fashion through the years of his occupancy, and that three giant monitors were brought to the property at different periods. Appellant contends that said giants could not have handled anything like 8,000 miners' inches of water. It appears that some tunneling was done upon the original Beaudry claims and a sawmill of unknown capacity was early constructed upon said premises, which it is claimed cut 115,000 square feet of timber for flume repairing and other purposes in 1915. No evidence has been pointed out in the briefs showing that said mines ever produced precious metals in paying quantities or at all. The results of ground sluicing, which was practically the only method claimed to have been used from 1913 to 1923 as a mining process, were kept out of evidence upon the objection of respondent. In an effort to rebut the claim that any ground sluicing had been done in good faith (1913–1923) and that, if any water not under pressure was used to flood the surface of any of the claims as indicating ground sluicing, it was done as a mere pretense, as no "clean-ups" of sluice boxes were ever made, and consequently no accounting could have been made as to any gold or other precious metals obtained from such a process.

[2] While we are of the view that said excluded testimony was admissible, we are not prepared to say that its exclusion was of sufficient importance of itself to justify a reversal. The principal witness for respondent was a graduate engineer, J. F. Bovier, and a

nephew of respondent. He was frequently upon the premises during the lifetime of Mr. Beaudry, and after his death he became the manager or agent for respondent. His testimony shows beyond question that the headgate of the East fork ditch was closed from November 1st of each year until approximately May 1st of the succeeding year during the ownership of both Fred Beaudry and respondent; further, that the mining season, under the weather conditions which there existed, began with May and concluded before the close of the year. The greatest shortage of water was suffered during the fall and winter months, and the high flows were during the freshet seasons of the spring and the summer months, June, July, and a part of August, before the snows had melted completely under the heat of the spring and summer months.

[3, 4] It is very apparent, as the record now stands, that neither Fred Beaudry nor respondent acquired either title to or a right to use all of the waters of East fork, or did use said waters during a considerable portion of the year measured from November 1st to April or May 1st. Appellant's counsel during the progress of the trial conceded that the evidence showed that the mining season began usually in May, some years in April. This question on the state of the record before us is not open to controversy. Respondent never acquired a prescriptive right to the use of waters during a period in which she did not use said waters, at least as to the quantity for which she here contends. This question has been settled by many decisions of this state, and there is no difference where waters are sought for irrigation purposes or for any one of the many industrial affairs of the state. The value of water is too great to permit it to be withheld from use. The principle, reduced to what may be termed its minutest terms, is clearly set forth in Northern California Power Co. v. Flood, 186 Cal. 301, 199 P. 315, 317, where it is said: "The evidence leaves the question of the use of the water during the nighttime uncertain, not showing clearly whether the continuous use spoken of was during the day only or both day and night for the entire irrigating season. The value of water for irrigation is too great in this state to allow a landowner to gain a right thereto for the entire 24 hours of each day by using the same for only a half or any other portion of the time less than the whole. If he has used it continuously for a certain period each day long enough to gain a prescriptive right to such use, he would have the right only for that period, and he could not lawfully object to the use by others of the flow during the intervening time of each day."

[5] We find it rather difficult upon the evidence to convince ourselves that respondent or her predecessor ever used the entire volume of 8,000 miners' inches of water for useful purposes on the Beaudry premises. There is a very serious question as to whether the ditches and flumes had a capacity to carry more than 6,800 to 7,000 miners' inches. Next it is not pointed out what beneficial uses this vast quantity of water could have been applied to. That some water was devoted to beneficial uses and that such uses have grown into a legal right there is no doubt, but there is grave doubt as to the need of respondent for the quantity of water which she would have awarded to her. Counsel on both sides have elaborately briefed the law as to the means and methods by which the appropriative and prescriptive uses and rights of a nonriparian appropriator of the waters of a stream may be lost to a riparian owner. It is respondent's contention that the right to the use of water once acquired by prescription becomes a vested absolute right which cannot be lost or divested by nonuser, howsoever long said use be discontinued. We do not deem that question controlling in the instant case, for the reason that the first question here for determination is whether the appropriative rights of respondent ever ripened into a prescriptive right. In short, does the evidence show, first, that she or her predecessor ever used all of said waters during the months above pointed out; and, second, did said parties devote the full quantities taken to a useful or beneficial purpose? Those are the main points upon which the reversal is urged.

[6] We cannot agree with the proposition that one whose appropriation right has developed in a prescriptive right may permit water thus appropriated to run to waste for an indeterminate period as against riparian owners upon the stream who can use it and have undertaken to put said waters to a beneficial use. This contention is contrary to the spirit and purpose of section 20a of the State Water Commission Act (Stat. 1917, pp. 746, 748) and is not in harmony with a long list of decisions of the courts of this state. The rule applicable to this case is well stated as follows in Lindblom v. Round Valley Water Co., 178 Cal. 450, 173 P. 994, 996: "The theory underlying section 1411 * * * is thus explained in the decision on the first appeal in Smith v. Hawkins: 'Considering the necessity of water in the industrial affairs of this state, it would be a most mischievous perpetuity which would allow one who has made an appropriation of a stream to retain indefinitely, as against other appropriators, a right to the water therein, while failing to apply the same to some useful or beneficial purpose.' 110 Cal. 127, 42 P. 454. The reasoning is as applicable to the situation of the parties in this case as it was to that of the opposing claimants in Smith v. Hawkins.

There, as here, a valid appropriation had been made while the land below the point of diversion was still a part of the public domain. There, as here, a part of that land, bordering on the stream, had passed into the ownership of one claiming a superior right in the flow as against the prior appropriator who, it was asserted, had failed to apply the water to a beneficial use. The defendant's position is not strengthened by resting its right on the basis of prescription. All it could acquire, by diverting or impounding the water, was a usufructuary right (Wiel on Water Rights [3d Ed.] § 18), not an ownership in the corpus of the water, except, perhaps, so much thereof as it has actually reduced to possession in its reservoir. The matter here in dispute is, not the ownership of any particular quantity now impounded but the right to dam and control the water as it runs into and through Round Valley. Storage of water in a reservoir is not in itself a beneficial use. It is a mere means to the end of applying the water to such use. Kinney on Irrigation (2d Ed.) p. 1480. The defendant's prescriptive rights do not extend to the impounding of the water for the mere purpose of holding it in storage. If, then, the defendant has ceased for a period of more than five years to apply to a beneficial use any part of the water so retained and impounded by it, the considerations of public policy pointed out in Smith v. Hawkins, supra, demand that it shall not be permitted to continue the diversion and storage of the excess over its legitimate needs, and thus prevent the application of such excess to the needs of others who, if there had been no impounding by the defendant, would have been entitled to use it. The evidence in this case fairly shows that for a period of more than five years before the commencement of the action the defendant had not applied to beneficial uses all of the water so impounded by its dam and reservoir. While there is some suggestion in the evidence that the defendant supplied water for irrigation, as well as for mining purposes, the record indicates very clearly that the service of water for irrigation was too trifling to be worth considering." Doubtless there is considerable seepage of water through the East fork dam built to prevent the flow of water down the main channel to appellant's mining properties, as its construction is of boulders and earth material, but the greater volume of the stream's flow is held back by the obstruction.

[7] The mining section involved is within the country known and designated as the "Weaverville Quadrant." Appellant, in rebuttal of testimony offered by respondent as to the depletion of the water flow from 1913 to 1923 called a witness who was, and for many years had been, generally familiar with the weather, water, and mining conditions of said area, and proceeded to examine him as to the rain and snowfall in other portions of said area, to which objection was sustained. The mountain areas being generally similar in climatic conditions, we are of the view that said evidence should have been received.

We fully appreciate the difficult problems which the judge of the trial court was called upon to decide, but, after a considerable time spent in the examination of the questions presented, we are of the opinion that a better adjustment of the conflicting claims of the litigants could be made upon a retrial.

For the reasons above assigned, the judgment is reversed.

We concur: WASTE, C. J.; CURTIS, J.; SHENK, J.; RICHARDS, J.; PRESTON, J.; LANGDON, J.

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112 Cal. App. 186

Ex parte LATOURELL.

Cr. 1622.

District Court of Appeal, First District, Division 1, California.

Feb. 25, 1931.

Habeas corpus ⚷3.

Whether petitioner was Indian and exempt from vagrancy law *held* not determinable by habeas corpus, being determinable in prosecution (Pen. Code, § 647).

Application by Richard Latourell for writ of habeas corpus to secure release from custody under a municipal court charge for vagrancy.

Application denied.

Raine Ewell, of San Francisco, for petitioner.

PER CURIAM.

An application for a writ of habeas corpus. The petitioner is charged by a complaint filed in the municipal court of the city and county of San Francisco with a misdemeanor, to wit, vagrancy. The form of the complaint is not questioned, but section 647 of the Penal Code defining vagrancy, by its terms, is not operative, however, against a "California Indian," and it is alleged in the petition for this writ that petitioner "is an Indian of the Yakima Tribe, of Yakima, Washington." He contends, therefore, that the municipal court is without jurisdiction to try him for the offense

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of vagrancy. Admittedly, however, the municipal court has jurisdiction in vagrancy cases, and therefore the question of whether or not petitioner is of the race which exempts him from the operation of the vagrancy law manifestly is one of fact which must be determined upon trial of the action. It is not a proper subject of inquiry before this court in a proceeding on habeas corpus. The application is therefore denied.

DALLAS v. CHURCH, Judge.*

Civ. 7884.

District Court of Appeal, First District, Division 1, California.

March 5, 1931.

Rehearing Granted March 19, 1931.

1. Wills ⚷195.

Upon execution of revocation, all former wills made by deceased cease to exist.

2. Executors and administrators ⚷1.

Proceedings for administration of estates of deceased persons are purely statutory.

3. Executors and administrators ⚷22(1).

Court in appointing special administrator must give preference to person entitled to letters testamentary or of administration.

4. Executors and administrators ⚷22(1).

Appointment of stranger as special administrator, by reason of fact that he was named as executor of will which had been revoked, would constitute error.

5. Prohibition ⚷11.

Court's appointment of stranger as special administrator, in preference to heir, devisee, or legatee, constitutes mere error which could not be controlled by writ of prohibition; trial court having jurisdiction to hear and determine application and decide it correctly or incorrectly.

Petition by Robert L. Dallas for writ of prohibition to be directed to Lincoln S. Church, Judge of the Superior Court for Alameda County.

Petition denied.

H. H. McPike, of San Francisco, for petitioner.

PER CURIAM.

Petition for writ of prohibition.

[1, 2] It appears therefrom that Mary Hickman died on March 3, 1930. Thereafter an instrument in writing, purporting to be her last will and testament, was filed by A. B. Costigan, one of the executors thereof. Costigan subsequently applied to be appointed special administrator of said estate. One Robert L. Dallas filed his answer to said petition and prayed that the petition be denied, and that special letters upon said estate be issued to him. In his answer Dallas alleged that he was an heir at law of the deceased. Further answering, he alleged that the instrument filed by Costigan as the last will and testament was not her last will, as the testatrix by an instrument in writing other than a will, but executed with all the formalities thereof, which instrument was entirely written, dated, and signed in the handwriting of Mary Hickman, revoked all wills made by her. This revocation was executed subsequent to the making of the will in question. It is alleged in the petition that the court, after a hearing, has expressed the opinion that the petition of the executor to be appointed special administrator should be granted. The filing of the instant petition followed. It is manifest that upon the execution of the revocation all former wills made by the deceased ceased to exist. Proceedings for the administration of estates of deceased persons are purely statutory.

[3-5] In making the appointment of a special administrator the court must give preference to the person entitled to letters testamentary, or of administration, but no appeal may be taken from such order. Costigan is only entitled to appointment by reason of the fact that he is named as one of the executors of the will which has been revoked. Beyond this he has no standing. Conceding the allegations of the petition to be true, the court would commit gross error in appointing him special administrator. Dalgren v. Superior Court, 8 Cal. App. 622, 97 P. 681. However, this question cannot be raised under the present proceeding. The appointment of a stranger as a special administrator of the estate of a deceased person in preference to an heir, devisee, or legatee constitutes an error in the exercise of jurisdiction which, however gross, cannot be questioned upon prohibition. Here the court has jurisdiction to hear and determine the application and decide it correctly or incorrectly. Dalgren v. Superior Court, supra.

For the reasons given the petition is denied.

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Superseded by opinion in 297 P. 565.

112 Cal. App. 244

GOODMAN v. DAM.

Civ. 4164.

District Court of Appeal, Third District, California.

Feb. 26, 1931.

Rehearing Denied March 28, 1931. Hearing Denied by Supreme Court April 27, 1931.

1. Judgment ⚷586(2).

Judgment in action upon open account, wherein issue tried was that of rental of farm machinery, *held* res judicata of subsequent action for rental of farm machinery; causes of action being identical.

2. Judgment ⚷956(2).

Stenographic report of testimony taken at prior action was properly admitted in determining plea of res judicata.

Appeal from Superior Court, Butte County; H. D. Gregory, Judge.

Action by Bruce Goodman against F. H. Dam. Judgment for defendant, and plaintiff appeals.

Affirmed.

Fred M. Harter, of Marysville, for appellant.

F. H. Dam, of San Francisco, for respondent.

Mr. Justice PLUMMER delivered the opinion of the court.

The defendant had judgment in the trial court, and from this judgment the plaintiff appeals. The judgment went in favor of the defendant by reason of his plea of res adjudicata.

The complaint in this action seeks judgment against the defendant for and on account of an assigned claim from L. A. Dunning to the plaintiff, wherein and whereby it is claimed that the defendant was indebted to the plaintiff in the sum of $481.25, in consideration of certain work and labor performed, and money expended by said L. A. Dunning, in and about the repair and upkeep of certain tractors, discs, harrows, and other equipment rented by the said L. A. Dunning to the said F. H. Dam. The defendant in this action pleaded a prior judgment involving the same cause of action. The complaint in the prior cause of action is in the following words: "Defendant heretofore became indebted to Lew Dunning (assignor of plaintiff) upon an open account, for labor and materials sold and delivered, at the defendant's special instance and request, in the sum of $427.50." In the instant action the complaint alleges a payment in the sum of $53.75, which leaves the amount sued for in both actions exactly the same.

[1] While several questions have been presented as to the sufficiency of the pleadings in this action, only one question really possesses sufficient merit to call for an expression of opinion herein, to wit: Whether the two causes of action are identical; that is, whether the basis of the two causes of action is the same, even though the complaints are couched in different allegations.

In the present action the complaint, without any ambiguity or concealment of the true cause of action, alleges that the amount claimed from the defendant is due for and on account of the rental of certain farming machinery. In the prior cause of action the complaint is so worded as not to express the real substance of the action, as it only sets forth that the account constituting the indebtedness is for labor and materials sold and delivered by Dunning to the defendant. In the present action, the answer of the defendant pleads the previous action as a bar, and sets forth that the same questions were therein determined as are involved in the present action. Upon the trial of the instant action, there being no question as to the claim of the indebtedness being based upon an alleged rental of certain farming machinery, the only question tried by the court was as to what was really involved in the prior action. To determine this issue, the court admitted the judgment roll, and also the reporter's transcript of the testimony taken in the first action. From this testimony it appears without any conflict that, while the complaint in the first action was worded as we have herein stated, the rental of the farm machinery was involved and was the basis of the suit. To show this, we have only to quote a short excerpt from the testimony, to wit (testimony of Dunning, the assignor of the plaintiff in both actions):

"By Mr. Harter: Q. Now, state whether or not at any time you rented a tractor or farming machinery to F. H. Dam? A. Yes, sir.

"Q. What kind of machinery was that, Mr. Dunning? A. 75 Best and disc.

"Q. How many 75's? A. Two 75's.

"Q. And any other equipment besides? A. some discs, disc-harrows, they called them.

"Q. You say you never spoke to Mr. Dam about this bill? A. No, sir.

"Q. You never sent Mr. Dam a bill for any work at all, did you? A. No, sir.

"Q. How many times were you present when it was working? A. I would say not less than five or six times.

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"Q. And how long were you there on each of those five or six times? A. Not very long.

"Q. A few minutes? A. Yes, sir."

We might quote additional testimony to the same effect, but it is sufficient to say that all of the testimony in the first case related to the alleged rental of the farming machinery mentioned in the complaint in this action. The findings were waived in the first action, but a review of the testimony shows that there was a failure of proof to establish the fact of the rental of the farming machinery to the defendant in that action, who is the defendant in this action.

[2] At the trial of this action, objection was made to the introduction of the judgment roll, and also as to the introduction of the stenographic report of the testimony adduced at the prior action. The ruling of the court admitting such testimony is assigned as error.

In 34 C. J. 1074, we find the following: "In making good the plea of res adjudicata the evidence must necessarily vary with the nature of the issues presented in the first trial. The usual and appropriate manner of making this proof is to offer the judgment roll and other parts of the record. But the inquiry is not limited to the mere formal judgment. It extends to the pleadings and other documents prepared and filed in the case, agreements of counsel on file, stenographic reports or minutes of the testimony taken, the evidence submitted, the respective contentions of the parties, the testimony of the judge and jurors who tried the case, the rulings and findings of the court, the court's charge or instructions to the jury, the verdict, the bill of exceptions or case prepared for appeal, the evidence that the parties alleged to have been estopped sought to amend their pleading so as to have the question determined, but that the amendment was disallowed," etc. It is further held in the same volume, page 1076, that parol evidence is admissible to identify the points or issues adjudicated in the former action, when the record thereof is silent or ambiguous on this point. In the present case, the court did not allow an amendment of the pleadings in the first trial, but, as it appears that the testimony was admitted showing the actual facts of the case and the merits of the controversy to be the same in both instances, no prejudice resulted by reason of the pleadings being allowed to remain, as they were in the first action so ambiguous as not to disclose the real merits of the contention.

In Rauer v. Rynd, 27 Cal. App. 556, 150 P. 780, 782, this court quoted with approval the following from 23 Cyc. 1300, to wit: "The true test is identity of issues. If a particular point or question is in issue in the second action, and the judgment will depend upon its determination, a former judgment between the same parties will be final and conclusive in the second, if that same point or question was in issue and adjudicated in the first suit; otherwise not." In the same action this court further said: "But the rule is equally well settled that: 'If it does not appear from the record that the cause of action in the former suit was identical with that in the action in which it is pleaded in bar, this fact may be proved by evidence aliunde' "—citing 23 Cyc. 1535. "In Gray v. Dougherty, 25 Cal. 266, it is stated as follows: 'The issues passed on in a former suit may be ascertained by an inspection of the judgment roll; and, if that fails to disclose all the facts necessary to a complete determination of the question, a resort may be had to extrinsic evidence.' " To the same effect is the case of Horton v. Goodenough, 184 Cal. 451, 194 P. 34. On page 461 of 184 Cal., 194 P. 34, 38, the authorities which we have cited relative to the rule of admitting extrinsic evidence will be found. Other cases might be cited, but they all uphold the rule followed by the trial court in this cause in admitting the stenographic report of the evidence introduced at the prior action.

From this testimony only one conclusion can be reached: That the cause of action in both cases is identical, and that the plea of res adjudicata is good.

The judgment is affirmed.

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112 Cal. App. 333

MONTES et ux. v. PECK et ux.

Civ. 351.

District Court of Appeal, Fourth District, California.

March 4, 1931.

Rehearing Denied March 27, 1931.

1. Release ⚷57(1).

Evidence showed that release of vendor from effect of misrepresentations regarding rentals applied to all leases.

2. Release ⚷17(1).

Release of vendor from effect of misrepresentations was subject to be set aside for fraud.

3. Release ⚷57(2).

Evidence showed release of vendor from effect of misrepresentations regarding income of property was induced by fraud.

4. Release ⚷17(1).

Purchaser's release of vendor from effect of misrepresentations regarding income of property, in consideration of price reduction, *held* part of entire agreement, and fraud inducing release tainted entire transaction.

> It appeared that, when purchaser discovered misrepresentations as to some leases, he insisted on reduction in purchase price as condition of consummating sale, and agreement was executed wherein purchaser released vendor from effect of such representations in consideration of reduction in purchase price. It afterwards transpired that vendor had made misrepresentations regarding main lease in building and had effectually prevented discovery of such misrepresentations until some time after consummation of purchase. Hence such further fraud tainted, not only release, but entire transaction of which release was part.

5. Fraud ⚷31.

Defrauded purchaser may rescind or affirm and sue for damages.

6. Release ⚷24(2).

Where release of vendor from effect of misrepresentations was induced by fraud and part of entire transaction tainted by same fraud, purchaser was not required to rescind release and restore consideration before suing for damages.

> Purchaser received nothing in consideration of release except reduction in purchase price. He had right to retain property which he purchased and sue for such damages as were suffered through fraud of vendor.

7. Release ⚷24(2).

Where release of vendor from misrepresentations was itself induced by fraud tainting entire transaction, it was not inequitable to permit purchaser to retain purchase price reduction forming consideration for release and recover damages, where reduction plus judgment was less than loss.

Appeal from Superior Court, Los Angeles County; Marshall F. McComb, Judge.

Action by Rodolfo Montes and wife against C. L. Peck and wife. From a judgment in favor of plaintiffs against named defendant, the latter appeals.

Affirmed.

Bauer, Wright & Macdonald and Newlin & Ashburn, all of Los Angeles, for appellant.

Meserve, Mumper, Hughes & Robertson, of Los Angeles, for respondents.

BARNARD, P. J.

This is an action for damages for fraud and misrepresentation in the sale of certain real property. The defendant, C. L. Peck, owned a building in Los Angeles, various portions of which had been leased to different persons for shops, stores, offices, and a public garage. In October, 1926, Peck gave to a real estate agent named Canon a written "exclusive option to buy or sell" the property, and furnished him with a list of the various leases, with the time they were to run and the amounts of rental provided for. Two such statements of leases and rentals, one of which was signed by Peck, were shown by Canon to the plaintiff Rodolfo Montes, who agreed to purchase the property at a certain price. Peck and Canon then went into an escrow for the sale of the property, and on December 24, 1926, Canon substituted Montes for himself, as a party to that escrow. In the original list referred to, it was stated that the lease on the public garage ran for ten years, the first five years at $550 a month and the second five years at $600 a month. How or when it got there does not appear, but there later appeared in this escrow a letter from Peck to Canon, dated December 24, 1926, showing that four or five of the tenants were paying a lesser amount of rent than the rentals listed, but still listing the garage as then paying $550 a month. Montes, being unable to speak the English language very well, sent one of his employees to interview the various tenants, giving her a list of the rentals they were supposed to be paying, as shown by the statements furnished him. She found four or five cases in which the tenants were paying a smaller rental than that represented. However, the tenant in the garage assured her that he was making money; that the lease was exactly as represented; that he was paying $550 a month for the first five years and $600 for the remaining five years; that his rent was paid up to date; and that he was well satisfied with his lease. Upon receiving this information, Montes called Canon's attention to the discrepancies found, and Canon referred him to Peck. On January 6, 1927, Montes and Peck, with their respective attorneys, met to discuss the matter. Montes asked for a reduction of $5,000 in the purchase price because of the discrepancy discovered in the amounts of rent paid. Peck expressed surprise that Canon had not advised Montes of these discrepancies in rent, and took him to the escrow office and showed him his letter to Canon of December 24, 1926, wherein he set forth that he was receiving a lesser amount of rent in the instances in which Montes had discovered a discrepancy, but in which he again asserted that he was receiving $550 per month for the garage. Peck then offered to reduce the purchase price in the amount of $2,000, which offer was accepted, and Montes agreed to go ahead with the deal. This agreement was arrived at on January 7, 1927, at which time Montes signed a paper

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

prepared by Peck's attorney, reading as follows:

"Los Angeles, California, January — 1927

"Mr. C. L. Peck, Los Angeles, California.

"Dear Sir: Please be referred to Escrow No. 959342 of Title Insurance and Trust Company, through which said escrow I expect to acquire title to certain property therein particularly described. Some question has heretofore arisen with reference to the income which the owner of said property is entitled to receive by reason of the existing leases. In consideration of the payment to me by you through said escrow of the sum of two thousand dollars ($2,000.00), I hereby agree that, upon the consummation of such sale through escrow, I will have no claim against you should it develop that the income from said property is less than the income as represented to me; provided, however, that this shall not release you from the effect of your representations in connection with the rental and lease deposit adjustment made through said escrow, and provided, further, that this release is upon the express condition that no new leases shall be made covering any portion of said property and no changes shall be made in any existing leases covering any portion of said property pending the close of said escrow.

"Yours truly, R. Montes."

Later, the deal was closed, the consideration paid, and a deed and assignments of the various leases were delivered to Montes. The evidence shows that, for a long period of time prior to the closing of this deal, Peck had been receiving, as rental for the garage mentioned, a sum very much less than $550 a month, and further that Peck had told the tenant of the garage that he desired to sell the property and had asked him to tell any one who inquired that he was paying $550 a month. Even after Montes took possession of the property, Peck handed to the tenant of the garage $150 in currency each month for two or three months, in order that he might pay to Montes the rent called for by the lease. Subsequently, this tenant became insane, and in a few weeks died. Then for the first time Montes discovered the misrepresentations which had been made in regard to the rentals from the garage, and this action followed. The complaint is in the usual form, and asks damages only for the fraud and misrepresentations as to the rental value of the garage. The court found in favor of the plaintiffs, and gave judgment for the difference between the rental value of the garage as shown by the evidence and the amount called for by that lease. From this judgment the defendant Peck has appealed.

Appellant relies for a reversal of the judgment upon two propositions, to wit: (1) That the release agreement referred to was executed in consideration of $2,000 which was taken off of the purchase price of the property, and which amount was therefore paid by the appellant, and that this completely bars this action until and unless the same should be rescinded by the respondents; (2) that this release agreement could not be rescinded by the respondents until, as required by section 1691 of the Civil Code, the $2,000 paid by the appellant was returned, or offered to be returned, by the respondents, and that no such restoration, or offer to restore, was made.

It is respondents' theory that the release agreement mentioned applied only to those leases in which discrepancies in the rentals had been discovered; that it was not the intention of the parties that this release agreement should cover all of the leases in question; and that, under the law, they were not required to restore, or offer to restore, anything to appellant, before maintaining this action.

[1-3] We are unable to agree with the respondents that the release agreement mentioned was not intended by the parties to cover the matter of the garage lease. Just prior to its execution, the parties had been discussing the four or five leases in which discrepancies in the rent paid had already been discovered. Mr. Irving Walker, who was then acting as attorney for respondents, testified that, in the presence of all of the parties, he asked Montes whether or not there was any question with reference to any of the other leases. Mr. Montes replied that the others were all right, and the attorney then said that he would draw this release in general terms. At another time this attorney testified that he asked Montes whether or not there was any question in regard to the leases other than those which had been under discussion, and that Montes replied that there was not, that he or his representative had talked with all of the other tenants, and the other tenants were paying the rentals called for by the leases, and there was no question as to those. Montes himself testified: "Mr. Walker said he could not advise me on the commercial part of it, that if I was sure that outside of those four leases, four or five, I cannot remember, the rest were all right, it was up to me to decide whether I should take less than the $5000 reduction."

Under such circumstances, we think that the intention of the parties at the time was, that the release agreement should apply to all of the leases in the building. However, it appears that the appellant had made, and continued to make, gross misrepresentations as to the rental being received from the garage. While admitting the discrepanices in the other leases that had already been discovered, he continued to represent that the garage lease, which is the most important one in the building, was then paying $550 a month. He disarmed suspicion by taking Montes to the title company to see written evidence of his fairness in the form of the letter calling attention to the lower rentals in the cases that had been discovered. But in this letter thus shown for the purpose of inducing Montes to sign the release and go on with the deal he again listed the garage as then paying $550 a month. Even in the adjustment of the current month's rents, which was made between the parties based upon the date the respondents took possession, the appellant represented he had collected the full amount of rent for the garage for that month, and paid to respondents a sum which purported to offset the amount he had already collected for the remainder of that month, at $550 a month. He not only maintained this representation throughout, but, for two or three months after the deal was closed, handed that particular tenant $150 in cash each month, to enable him to keep up the deception. Moreover, he had rendered any investigation which the respondents undertook, or which they might undertake, valueless, by inducing that tenant to misinform them as to the true state of facts. Under these circumstances, although the release agreement was intended by the parties to cover the garage lease, it was subject to be set aside for fraud and misrepresentation, under the rules of law applicable thereto. Upon sufficient evidence, the court found that this release agreement would not have been entered into by respondents, except for the fraud and misrepresentation of the appellant, and the judgment awarded was for damages found upon sufficient evidence to have been caused by this fraud. While certain other facts were found by the court which cannot be sustained, these are immaterial and harmless.

This appeal then turns upon the question whether or not it was necessary for the respondents, before maintaining this action, to return, or to offer to return, to appellant, $2,000 which appellant claims to have paid for the release in question, through a reduction in the purchase price of the property sold. Appellant argues that this release agreement, which is being attacked for fraud in its procurement, was voidable only, and therefore it must be rescinded and restoration made or offered, before a recovery could be had. He relies upon Garcia v. California Truck Co., 183 Cal. 767, 192 P. 708; O'Meara v. Haiden, 204 Cal. 354, 268 P. 334, 60 A. L. R. 1381; and section 1691 of the Civil Code. It has been held in the cases referred to, and others, that, where it is sought to set aside a release agreement where the parties understood what was involved, but where it is claimed that the making of the release contract was induced by fraud, the contract is voidable and not void; and that, where the amount claimed by the plaintiff is an unliquidated amount, or, in other words, where the plaintiff is not in any event entitled to keep the amount paid, the consideration paid for the release must be restored, or an offer to restore must be made. In all of the cases laying down this rule to which our attention has been called, the action was one for damages for personal injuries, and the plaintiff sought to avoid a release agreement in order to go back to an original cause of action for tort; the action itself having no connection with the contract, except that the contract purported to bar such an action.

[4] In the instant case we have a different situation. The thing here purported to be released, while a form of tort, is one based upon fraud growing out of a prior executory contract; and the consideration given, which was a reduction in the purchase price of certain property, was really given to induce the other party to go on and complete a contract already agreed upon, but endangered by the discovery of a part of the fraud. The release agreement was contemporaneous with, and an actual part of, a new agreement which merely continued the previous contract, in all respects the same, except for the one change in the amount of the purchase price. The original fraud, only a part of which had been discovered by the other party, was about to disrupt the deal, and the main, but undiscovered, part of this fraud was continued and recommitted for the purpose of inducing, and it actually did induce, the other party not only to sign the release agreement, but to continue with the entire contract for the purchase of the real property, although at a slightly different purchase price. We think such a release agreement may not be taken alone, and considered as a new contract, separate and distinct and independent from the entire agreement, and that the issue as to fraud in the execution thereof may not be here treated independently of the original controversy and original fraud, in the manner in which a release agreement, in such cases as those referred to, is treated independently of the original cause of action. On the other hand, we think this entire matter is one transaction, all contractual to begin with, but all tainted by the fraud which is here complained of, which continued throughout and touched all phases thereof. The entire deal is one contract for the sale of real property, and the release, with the fraud used to secure its execution, is but a part of the same fraud that induced the plaintiff to buy the property.

[5, 6] In cases like those above cited, if the plaintiff desires to go back to his original cause of action for tort, it is essential that he effect a rescission of the contract which purports to bar his cause of action. In other words, if he wants to sue on the original tort, he can neither stand on the release agreement

nor act in violation thereof, but must move to set it aside. But in such a case as this, involving fraud in the sale of real property, it is well settled that a plaintiff may either rescind or stand on his contract and sue for damages. Paolini v. Sulprizio, 201 Cal. 683, 258 P. 380. The respondents here have elected to stand on their contract. Having chosen this remedy to which they are entitled, we think the purported release, which was a part of the entire contract, may not be segregated from the rest of the agreement, nor may the respondents be required to rescind as to that portion of the agreement, while permitted to sue for damages on the other part. The respondents have set up one cause of action based upon the main fraud in the entire deal, through which they were induced to purchase the real property. While a part of this fraud was discovered, and was partially rectified, this was done in such a manner as to inspire confidence in the respondents as to the good faith of the appellant, and to further throw them off their guard. The main and larger element of fraud which had existed from the beginning, in reference to the lease on the garage, was at the same time continued and used to induce the plaintiffs both to sign this release agreement and to go on with the entire transaction. The same fraud was then continued for an additional two or three months, apparently to prevent discovery. Because a part of this contract was put in the form of a separate letter, and because it purports to be a release of certain things, does not make it a separate contract, disassociated from the entire agreement. We think this case falls within the general rules governing real estate contracts which have been entered into because of fraud practiced upon the purchaser, and that it does not fall within the rules governing such contracts as must be rescinded before the form of action brought can be maintained. The plaintiffs having elected not to rescind but to sue for damages, neither a restoration nor offer thereof was necessary.

The inapplicability of the rule contended for by appellant is further seen in the fact that the respondents have received nothing as a consideration for this purported release, except the property which was being purchased in the deal, and the appellant paid the respondents nothing for this release, except in the way of reducing the purchase price of that property. To require respondents to rescind one part of the contract, and, as a part thereof, to restore, or offer to restore, $2,000 in cash which they never received, while under the established rule of law they cannot be required to rescind the whole contract, or restore the entire property, which they actually did receive, would be a most unusual situation. They received nothing except the property they were buying, and they had the right to retain that property and sue for such damages as were suffered through the fraud of the other party.

[7] While the so-called release is not such a separate agreement as must be separately rescinded, as one of its effects, it did make a settlement of all claim for damages on account of the fraud already discovered. Its validity and effect for this purpose has not been, and is not here, attacked by either party thereto; this action involving only the fraud in respect to the garage lease which was then undiscovered. Incidentally, however, appellant argues that it would be inequitable to let this judgment stand, since respondents would then receive all they lost through the fraud, and $2,000 additional. No such situation exists. It appears that, as to that part of the transaction, respondents received a reduction of $2,000 in the purchase price as an offset to a difference of $7,800 in rentals under specific leases, aside from the garage lease, between said leases as represented and the same leases as actually existing. While the point as to the sufficiency of the evidence to sustain the amount of the judgment has not been raised on this appeal, it is apparent from the record that the amount of the judgment, plus the amount of the reduction in the purchase price of the property, is less than the amount shown by the evidence to have been lost by the respondents through the misrepresentations made.

The judgment is affirmed.

We concur: MARKS, J.; JENNINGS, J.

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112 Cal. App. 366

LAWSON v. RUSCONI et al.

Civ. 319.

District Court of Appeal, Fourth District, California.

March 6, 1931.

1. Sales ⚿273(2).

Implied warranty arising from sale of article manufactured for particular purpose is only that article will be reasonably fit (Civ. Code, § 1770).

2. Contracts ⚿205.

Implied warranty, if any, arising from lease of esofumer, device for diffusion of sulphur dioxide gas in refrigerator car, is that device is reasonably fit for purpose intended (Civ. Code, § 1770).

3. Contracts ⚿205.

Implied warranty that leased esofumer, device for diffusion of sulphur dioxide gas in refrigerator car, was reasonably fit for purpose intended, would only require reasonable result under circumstances (Civ. Code, § 1770).

4. Contracts ⚿323(1).

Whether leased esofumer, device for diffusion of sulphur dioxide gas in refrigerator car, was reasonably fit for purpose intended, was question of fact (Civ. Code, § 1770).

5. Contracts ⚿322(3).

Evidence *held* to support finding that leased esofumer, device for diffusion of sulphur dioxide gas in refrigerator car, in view of implied warranty, if any, was reasonably fit for purpose intended (Civ. Code, § 1770).

Appeal from Superior Court, Fresno County; C. E. Beaumont, Judge.

Action by W. E. Lawson against Louis Rusconi and another, doing business under the firm name and style of L. & E. Rusconi. Judgment for the plaintiff, and the defendants appeal.

Affirmed.

Everts, Ewing, Wild & Everts and C. M. Ozias, all of Fresno, for appellants.

Calkins, Hagar, Hall & Linforth, of San Francisco, and Ray W. Hays, of Fresno, for respondent.

BARNARD, P. J.

The defendants were in the business of purchasing fresh grapes in the San Joaquin Valley and shipping the same to, and selling them in, various Eastern markets. It is an admitted fact that shippers of such grapes frequently suffered loss and damage by reason of decay and mold of the grapes, when shipped in ordinary refrigerator cars. In September, 1927, the defendants entered into two contracts with the plaintiff, each of which contracts recited that the plaintiff was the owner and entitled to the exclusive use in California of a certain device or apparatus known as an esofumer, being a device for the diffusion of sulphur dioxide gas. Under these contracts, the plaintiff leased to defendants, and the defendants hired from the plaintiff, two of these machines, with the right to use the same for a period of three months, the defendants paying a deposit of $100 on each machine, which deposit was to be returned when the machines were redelivered. The defendants further agreed to pay to the plaintiff $10 for each car of grapes treated by the use of said esofumer; the plaintiff agreeing to furnish the necessary gas. It is conceded that these machines were to be used to diffuse gas through cars of grapes after they were loaded, and that the purpose of such gassing process was to prevent mold and decay of the grapes while in transit. The only contest here is as to the degree of perfection required of the process. During the fall of 1927, defendants shipped 307 cars of grapes, of which 174 cars were treated with this process and 133 were not. This action was brought to collect the stipulated price for the cars treated, at $10 per car. In their answer, the defendants set up the defense that many of the cars arrived in Eastern markets with the grapes in a moldy and decayed condition. From a judgment in favor of the plaintiff, the defendants have appealed.

[1] The various points made by appellants may be summarized as a contention that the evidence is not sufficient to support various findings of the trial court to the effect that the plaintiff had fully performed his contracts, for the reason that the trial court overlooked and ignored the warranty implied by law, which was to the effect that the grapes would arrive at market free from decay and mold; and that, since the evidence shows that some of the grapes arrived in a moldy condition, the contracts were not complied with by the plaintiff. Appellants contend that section 1770 of the Civil Code applies to these contracts, and that there was therefore an implied warranty that the use of this apparatus and process would result in accomplishing the particular purpose for which it was used. Under the statute referred to, such an implied warranty would only be that it was reasonably fit for such purpose. Appellants, however, take the position that the purpose to be here accomplished was a total prevention of all decay and mold of the grapes. They rely upon the following testimony of Edna Rusconi, one of the appellants: "Mr. Rusconi asked Mr. Babcock, and I may have asked questions too but I don't remember, to tell him what the Esofumer would do and the gassing process and it was—there was considerable general talk about the condition of grapes and Mr. Babcock told Mr. Rusconi that persons using this process should get their grapes to the eastern markets in better condition than persons not using it; that it would prevent, particularly as I remember it, mold from coming onto the grapes and rot while they stayed on track before they were sold, and Mr. Rusconi agreed with him that it was a very good thing provided it would do that and Mr. Babcock assured him that it would do that and on the strength of that Mr. Rusconi told him he would take it, and left me to complete details as he had an appointment and had to leave."

Appellants do not claim that this was an express warranty, as evidence of the same would have been inadmissible under the circumstances, but they argue that, properly interpreted, her testimony was that appellants were told that this process would prevent rot and mold, and that, where it was used, grapes would arrive at market free from such mold or decay. And it is argued that this evidence discloses the nature and terms of the warranty that is implied by law. Without considering such questions as the admissibility of this evidence, or the fact that, if interpreted as contended for by appellants, it would amount to an express contract, the court was not compelled to draw the inference contended for, but could properly interpret the language used as a representation that a person using this process would get his grapes to market in better condition than a person not using it, which, at most, would merely corroborate any warranty that could be implied by law; namely, that the process was reasonably fit for the purpose intended.

It is doubtful whether any such warranty may be implied by law in this case, there being no evidence to show that either the device or the gas was manufactured by the plaintiff, the contract being a lease and not a sale, and the contract providing that the defendants acknowledge receipt of the machine in good order, and "accepts the same as such without any express or implied warranty of any kind or nature whatsoever." However, we feel it is not necessary to decide that question.

[2-4] Assuming an implied warranty, as contended for, it would be to the effect that the device was reasonably fit for the purpose intended. The court found that the contracts were fully complied with by the respondent, and, even if an implied warranty be assumed, we think this finding is supported by the evidence. Such a warranty would not call for 100 per cent. efficiency upon the part of the machine and process, but only for such results as would be reasonable under the circumstances. While certain machinery for certain purposes may closely approximate perfection in its operation, many kinds of machinery and processes are extremely valuable, and constitute a great improvement over prior methods of doing certain things, although, from the very nature of the case, perfect results are impossible. In such cases, reasonable fitness for the purpose intended is to be judged by a comparative standard rather than by an arbitrary one. This is particularly true with reference to a method of handling fresh grapes, and attempting to get them to market in good condition. Such fruit is perishable at best; it is of varying degrees of ripeness when picked; it varies in size, soundness, condition, and quality; it must be handled several times; it may be much or little injured by less or greater care in handling; it is extremely sensitive to such conditions as temperature and moisture; and many other things, particularly time, play a most important part in affecting its condition at its destination. In reference to an appliance and process designed to attempt to get such a product, in good condition, to a market several thousand miles away, no warranty that all fruit shipped will arrive in a perfect or practically perfect condition can be implied by law. If any warranty can here be implied, it was only that this process was reasonably fit for the purpose intended, and whether or not it was so fit was a question of fact for the trial court.

[5] Accepting appellants' own evidence, it appears that five out of every seven cars that were treated with this process arrived in New York entirely free from mold, while only one out of every two of the cars not so treated arrived free from mold. It further appears that some of the cars that did show mold only showed it slightly. Appellants take the position that any mold at all is a violation of the implied warranty. Their agent, who received the grapes in New York, testified that he did not examine an entire car, but, if mold showed up at all he did not pay any attention to the other boxes. As was said by the court in Nye & Nisson v. Weed Lumber Co., 92 Cal. App. 598, 268 P. 659, 663, "It cannot reasonably be said that there is a breach of warranty as to the quality of processed eggs, merely because a case may contain a defective egg or two." The evidence further shows that at least eight of the cars were delayed in starting for three days because of car shortage, and that mold is much more apt to occur after a delay of twenty-four hours. While the condition of the grapes when packed is most important, the evidence upon that point is not too satisfactory. Louis Rusconi, one of the appellants, testified that he did not see any mold before they were shipped. When asked if he had made an examination of them, he replied, "I am watching them pretty close." Since the grapes were being shipped from two separate points, the court may well have considered the answer somewhat evasive. While apparently stressing the fact of his careful handling of the grapes, he testified that most of them were hauled on wagons equipped with springs. The inference is that those not so handled may not have been in as good condition. All of the circumstances considered, and bearing in mind the only warranty which could be implied by law, even if an implied warranty be assumed, the findings of the court that the contracts were complied with by the respondent are fully sustained by the evidence.

The judgment is affirmed.

We concur: MARKS, J.; JENNINGS, J.

112 Cal. App. 157

KLEIN et al. v. BAKER.

Civ. 145.

District Court of Appeal, Fourth District, California.
Feb. 24, 1931.

1. Carriers 🔑**4.**

Owner of trucks engaged in hauling goods for hire *held* not "common carrier," in absence of regular routes or established termini (Civ. Code, §§ 2168, 2200).

> A "common carrier" is one who holds himself out to all persons as willing to carry goods and deliver them for hire, and the public profession of his employment must be such that, if he refuse, without just ground, to carry goods in the course of his employment and for a reasonable and customary price, he will be liable to an action, and he must carry goods between certain termini.
>
> [Ed. Note.—For other definitions of "Common Carrier," see Words and Phrases.]

2. Appeal and error 🔑**1071(6).**

Judge's failure to find on particular issue, where only finding thereon warranted by evidence would not change result, is not reversible error.

3. Carriers 🔑**107.**

Ordinarily, private carrier of goods must use only ordinary care, and, in absence of negligence, is not liable for loss.

4. Evidence 🔑**589.**

Owner's testimony that goods, damaged by fire, were being transported by private carrier under special contract, is sufficient, if believed, to support finding establishing contract.

5. Carriers 🔑**62.**

Bailment for transporting goods for hire is recognized at common law.

6. Carriers 🔑**107.**

General liability of bailee, as private carrier, may be increased by special contract, making him insurer and liable for loss by fire, notwithstanding absence of negligence.

7. Carriers 🔑**132.**

In absence of evidence to contrary, court can assume that private carrier's charges included compensation for additional liability under special contract making carrier insurer of delivery at destination.

Appeal from Superior Court, Kern County, Robert B. Lambert, Judge.

Action by E. A. Klein and wife and the Continental Insurance Company, against C. Fred Baker, also known as C. F. Baker, doing business under the name and style of Baker's Transfer & Storage Company. Judgment for plaintiff last named, and defendant appeals.

Affirmed.

Borton & Petrini, of Bakersfield, for appellant.

Miller & Thornton, of San Francisco, for respondents.

MARKS, J.

Respondents brought this action in the court below to recover from appellant the value of household furniture, family stores and provisions, and personal effects which were destroyed by fire while being transported in trucks by appellant from the city of Bakersfield to the city of Hollywood, Cal. The complaint contains three separate causes of action. The first is based upon an express contract between E. A. Klein and Ethel Klein, his wife, and appellant to transport the goods and deliver them to the Kleins in Hollywood. The second cause of action is based upon the statutory liability of appellant as a common carrier of goods for hire. No point is raised by either party under the third cause of action and it need not be considered here.

The evidence discloses that the Kleins were the owners of household furniture, wearing apparel, and personal effects which they desired to have appellant transport for them. It is alleged that this property was of the reasonable value of $10,500. The respondent Continental Insurance Company had issued and delivered its policies of fire insurance upon this property in the amount of $3,500, which amount it paid to the Kleins. By its contract it was subrogated to the rights of the insured to this amount. Judgment was rendered in its favor for $3,500. The Kleins recovered nothing.

Appellant earnestly urges that the judgment must be reversed because the trial court failed to find upon the issue presented by the pleadings of whether or not appellant was a common carrier. He maintains that if he was a common carrier the measure of damages suffered by respondents would be governed by the provisions of section 2200 of the Civil Code which would reduce the amount of the recovery of respondents to a sum much less than that awarded in the judgment.

[1] We have examined the evidence in this case and have concluded that, had the trial court found that appellant was a common carrier, such finding would not be supported by the evidence. In December, 1925, appel-

lant filed an application with the railroad commission whereby he sought permission to operate as a common carrier under the jurisdiction of the commission. From this application it appears that he was engaged in conducting the business of hauling household goods and personal effects by motortrucks "anywhere for hire." His motor vehicles did not travel upon regular routes nor between established termini. From his petition it does not appear that his business was anything more than the hauling of household goods and personal effects upon private contracts with the owners as and when the opportunity presented itself. His application was denied by the railroad commission. There is no other evidence in the record of the nature of his business except the transportation of the goods in question which appears to have been undertaken upon a special contract and not as part of regular freighting business over a fixed route or upon any schedule between Bakersfield and Hollywood.

In the case of Associated Pipe Line Co. v. Railroad Commission, 176 Cal. 518, 169 P. 62, 63, L. R. A. 1918C, 849, a common carrier was defined as follows: "In his work on Carriers, Mr. Moore, at page 20, vol. 1, defines a common carrier as one who 'holds himself out as such to the world; that he undertakes generally and for all persons indifferently to carry goods and deliver them for hire; and that his public profession of his employment be such that, if he refuse, without some just ground, to carry goods for any one, in the course of his employment and for a reasonable and customary price, he will be liable to an action.' It is one who offers to carry goods for any person between certain termini and who is bound to carry for all who tender their goods and the price of carriage."

In the case of Forsyth v. San Joaquin Light & Power Corporation, 208 Cal. 397, 281 P. 620, 623, the Supreme Court drew the following distinction between a common carrier and a private carrier: "Section 2168 of the Civil Code defines a common carrier as follows: 'Every one who offers to the public to carry persons, property, or messages, excepting only telegraphic messages, is a common carrier, of whatever he thus offers to carry.' 'Private carriers are such as carry for hire and do not come within the definition of common carrier. Certain common characteristics mark the difference between these two classes. To impress upon one the character of common carrier it must be shown that he "undertakes generally and for all persons indifferently to carry goods and deliver them for hire; and that his public profession of his employment be such that if he refuses, without some just ground, to carry goods for anyone, in the course of his employment and for a reasonable and customary price, he will be liable to an action." On the other hand, private carriers are not bound to carry for any person unless they enter into a special agreement so to do.' 4 Cal. Juris., 815."

To the same effect are the cases of Frost v. Railroad Commission, 271 U. S. 583, 46 S. Ct. 605, 70 L. Ed. 1101, 47 A. L. R. 457; Alexson v. Steward, 55 Cal. App. 251, 203 P. 423; and Gornstein v. Priver, 64 Cal. App. 249, 221 P. 396.

We conclude that from the evidence before us appellant was not shown to be a common carrier and must be held to have been a private carrier in his undertaking to transport the Klein property.

[2] If the court had made any finding at all upon the question of whether or not appellant was a common carrier, it must have found that he was not, but was a private carrier. With this finding the limit of recovery of respondents would not have been governed by section 2200 of the Civil Code. Therefore, the failure of the trial court to find upon this issue, which would not have changed the results it reached, cannot be held to be prejudicial error or ground for reversal. Comer v. Los Angeles Railway Corporation, 95 Cal. App. 545, 272 P. 1100.

[3] The remaining question to be determined on this appeal is the duty resting upon appellant in transporting the Klein goods as a private carrier, and his liability for their destruction by fire in the absence of any showing of negligence upon his part. Under ordinary circumstances the private carrier is only required to use ordinary care in the transportation of personal property and is not liable for its injury or destruction in the absence of a showing of negligence on his part. Gornstein v. Priver, supra. In this case no negligence on the part of the carrier was either alleged or proved.

[4] As we have observed, respondents alleged a special contract on the part of appellant to deliver the goods to the Kleins in Hollywood. The trial court found that such a special contract was entered into. E. A. Klein testified to it, and while this is the only evidence in the record indicating it, this evidence is sufficient to support the finding of the trial court on this appeal, it having apparently believed the testimony.

[5] At common law one of the recognized purposes of a bailment was the transportation of personal property for hire. The earliest declaration of this rule was given by Lord Holt in the case of Coggs v. Bernard, Ld. Raym 909, 5 Eng. R. C. 247. In this case it was held that one of the kinds of bailments was the hiring of the carrying of goods when they are bailed either to a public or private carrier for the purpose of being transported from place to place. Fish v. Chapman, 2 Ga. 349, 46 Am. Dec. 393.

[6] It has been universally held that a bailee's general liability may be increased by

a special contract and that if his contract so provides he may become an insurer of redelivery of the property bailed. "While the rights and duties of a bailee must be determined from the contract and from the statutes and principles of law governing such contracts, a bailee may enlarge, and to a certain extent limit, his legal responsibilities. He may make his obligation to redeliver the bailed property absolute, putting himself in somewhat the same position as an insurer. Thus, a contract under which the bailee undertakes to redeliver the property 'damage by the elements excepted' creates an absolute liability to return it unless prevented by act of God. Under such circumstances it is not required to be shown that the bailee was negligent, absence of negligence on his part being no defense because of the absolute nature of the liability incurred. So, if the bailee contracts to deliver goods at a certain time or to deliver them to a certain person at a certain time, without any reservation whatever for contingencies, his liability is absolute, and he can be held accountable for their value if they are accidentally destroyed. In such a case the failure of the bailee to do as he contracted must be considered the proximate cause of the damage." 4 Cal. Jur. 16.

To the same effect are the cases of Barrere v. Somps, 113 Cal. 97, 45 P. 177, 572, and Beall v. Bekins Van & Storage Co., 33 Cal. App. 652, 166 P. 370. In the Beall Case the court indicated that its decision would have been the same had the Bekins Van & Storage Company been acting either as a warehouse keeper or as a carrier of goods.

[7] The business of a private carrier of goods is obtained by, and is dependent upon, his contract with the shipper. We can see no reason why his contract may not impose upon him a greater duty than the ordinary care which the law imposes on him. His compensation is also fixed by contract, and if he imposes upon himself the contractual obligation of delivering the goods to their point of destination we see no reason why he should not be held to it. We can assume, in the absence of evidence to the contrary, that in his charges he included compensation for the added liability which he imposed upon himself. If he elects to become an insurer of the delivery of the goods at their destination he should be bound by his contract and his responsibility should be measured by its terms.

Appellant maintains that the amount of the judgment is not supported by the evidence. It is alleged in the complaint that the total value of the goods shipped was $10,500. The answer denies that this value was in excess of $3,500. The evidence shows that a small part of the property was not destroyed by fire but was delivered to the Kleins by appellant in Hollywood. Appellant fixed the value of the property delivered at $500. Klein testified that its value was $250. As the court did not find the value of the goods so delivered, appellant maintains that the judgment should be reversed or at least reduced by $500. An examination of the evidence discloses that there is testimony in the record which would support the conclusion that the value of the goods destroyed by fire was equal to or in excess of the amount of the judgment. Therefore the trial court did not have to rely upon the admission in the pleadings as the sole measure of their value. The evidence supports the judgment as to the amount of the loss.

Judgment affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

112 Cal. App. 248

SEABOARD SURETY CORPORATION OF AMERICA v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.

Civ. 7684.

District Court of Appeal, Second District, Division 2, California.
Feb. 26, 1931.

1. **Judgment** 🔑244.

Judgment in claim and delivery against "the sureties on" undertaking, without naming surety, *held* not "judgment" against surety (Code Civ. Proc. § 514).

In legal effect, there was no judgment against surety, surety's name appearing neither in title of cause at head of judgment nor anywhere on face of judgment itself.

2. **Judgment** 🔑244.

Judgment against nameless person is not binding, person being "nameless" unless called by appellation or cognomen on face of judgment.

3. **Appeal and error** 🔑1237.

Summary judgment against surety under statute respecting stay of execution on money judgment pending appeal is proper (Code Civ. Proc. § 942).

4. **Certiorari** 🔑5(1).

Surety, against whom is rendered summary judgment on bond under statutes, having right of appeal, writ of review does not lie (Code Civ. Proc. §§ 942, 943).

Application for a writ of review by the Seaboard Surety Corporation of America to

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

review an alleged judgment of the Superior Court in and for the County of Los Angeles, in favor of William J. Garner, as administrator of the estate of George W. Garner, deceased, against petitioner, as surety on the bond, in an action of claim and delivery, and a summary judgment against petitioner on its undertaking in said cause for the purpose of staying execution pending appeal.

Writ of review discharged in so far as it relates to the alleged judgment on the bond given for the return of the personal property. Judgment on the undertaking to stay execution affirmed.

Arthur T. Stollmack, of Los Angeles, for petitioner.

Charles D. Swanner, of Santa Ana, and W. W. Wallace, of Los Angeles, for respondent William J. Garner.

WORKS, P. J.

Respondent William J. Garner, administrator, commenced an action in respondent court against Mary Tipton, A. V. Tipton, and others, petitioner not being a party thereto. The action was for claim and delivery and involved a certain automobile. Upon due demand respondent Traeger, who is a sheriff, took the car into his possession pursuant to the terms of section 511 of the Code of Civil Procedure, whereupon petitioner, acting under the provisions of section 514 of that Code, executed an undertaking for the redelivery of the car to defendants Tipton, and it was returned to them. A trial of the action was had and findings and judgment went for plaintiff, respondent Garner, administrator. The judgment ran against defendants Tipton, and, while petitioner is not named either in the title of the cause at the head of the judgment or in the body thereof, the document orders, adjudges, and decrees, as shown by the return to the writ of review heretofore issued by this court, that plaintiff do have and recover from defendants Tipton and from "the sureties on the" undertaking the possession of the automobile, certain sums of money, and costs.

[1, 2] It is alleged in the petition for the writ of review that respondent court rendered judgment against petitioner, and the title of the cause appearing at the head of the judgment made part of the petition shows merely, as defendants, "Mary Tipton, et al." The allegation of the petition that respondent court rendered judgment against petitioner is, in legal effect, untrue. There is no such thing as a binding judgment against a nameless person, and it is of the very essence of things that he is nameless unless he be called by some appellation or cognomen on the face of the judgment itself. Whether authority upon this question may be found we do not know. A search for such authority is plainly unnecessary.

Strange to say, the state of the record in respondent court is first made known to us by the briefs in the present proceeding. The copy of the judgment set forth in the return to the writ is no better than the copy attached to the petition for the writ. In the former, also, the defendants are shown to be "Mary Tipton et al."

[3, 4] The petition before us has a double purpose. Having disposed of the first branch of it we now take up a consideration of the second. The defendants Tipton appealed from the judgment rendered against them by respondent court. Petitioner executed an undertaking for the purpose of staying execution pending the appeal. The appeal was dismissed, and, after the going down of the remittitur, respondent court rendered summary judgment against petitioner, by name, for a certain sum of money. It is sought by the present proceeding to have this judgment annulled.

This point turns on the question whether the undertaking was given pursuant to section 942 of the Code of Civil Procedure, relating to the stay of executions on money judgments, or under section 943 of the same Code, relating to such stay on judgments requiring the delivery of personal property, or perhaps under some other section relating to stays of execution. This question is not easy of solution and we find it unnecessary to decide it. If the bond was given under section 942 the summary judgment rendered upon it was entirely proper. If it was given under any other section, petitioner had a right of appeal from the judgment. In neither event can the writ of review properly issue.

The writ of review is discharged in so far as it relates to the alleged judgment on the bond given for the return of the personal property. The judgment on the undertaking to stay execution is affirmed.

We concur: CRAIG, J.; IRA F. THOMPSON, J.

112 Cal. App. 295

Eugenie Bouscal MAILHEBUAU, as Executrix of the Last Will of Camille Mailhebuau, Deceased, Petitioner, v. The SUPERIOR COURT of the State of California, IN AND FOR the CITY AND COUNTY OF SAN FRANCISCO, and Hon. F. H. Dunne, Judge Thereof, Respondents.

Civ. 7832.

District Court of Appeal, First District,
Division 1, California.
March 2, 1931.

Application for certiorari to review an order of the Superior Court, City and County of San Francisco; Frank H. Dunne, Judge.
Writ denied.

J. J. Dunne, of San Francisco, for petitioner.

PER CURIAM.

Writ denied on the ground that the order complained of was one within the discretion of the court to make. 11 Cal. Jur. p. 392.

HADDAD v. McDOWELL et al.

Civ. 6488.

District Court of Appeal, Second District,
Division 2, California.
Feb. 13, 1931.

Rehearing Denied March 13, 1931. Hearing Granted by Supreme Court April 13, 1931.

1. Pleading 🔑225(1).

If amended complaint is good as against general demurrer, sustaining demurrer on special grounds without leave to amend is error.

2. Libel and slander 🔑16, 18.

Landlord's notice to tenant and subtenant to vacate, containing language exposing tenant to contempt and ridicule, as well as having tendency to injure him in occupation, *held* libelous per se (Civ. Code, § 45).

> The landlord's notice to vacate contained a statement that the lease was terminated for the reason that the tenant had persistently and repeatedly refused and failed to pay rent, although the landlord had begged him, run after him many times, written to him, and had urged his attorney to endeavor to induce tenant to comply with his lease, and that the response had been mostly promises which were never kept, excuses and subterfuges.

3. Libel and slander 🔑80.

Complaint in tenant's action against landlord for libel contained in notice to vacate premises which exposed tenant to contempt and ridicule *held* to state cause of action good against general demurrer (Civ. Code, §§ 45, 47).

> The complaint alleged that the defendant as landlord, in notice to plaintiff as tenant to vacate and in the complaint in unlawful detainer action, used certain stated words which were false, libelous, and defamatory, and that defendant maliciously published them to injure plaintiff in his business and occupation, and with intent to expose him to hatred, contempt, ridicule, and obloquy of his friends and business associates, and that such was the result of the publication, to plaintiff's damage.

4. Appeal and error 🔑917(2).

Appellate court cannot assume that trial court erred in rulings on demurrer to complaint.

5. Appeal and error 🔑917(2).

Where demurrer was sustained without leave to amend, appellate court assumed that general demurrer and not special demurrer was sustained.

> The assumption was made on the ground that the trial court would have committed error if it had sustained the special demurrer without leave to amend, and it could not be assumed that trial court committed such error.

6. Libel and slander 🔑93.

In action for libel, plea of privilege is ordinarily defense.

7. Libel and slander 🔑97.

In action for libel, plea of privilege may be raised by demurrer when it appears on face of complaint that publication comes within statute (Civ. Code, § 47, subds. 1, 2).

8. Libel and slander 🔑38(1).

Libelous matters published in judicial proceedings must be relevant and pertinent to inquiry to be privileged (Civ. Code, § 47).

9. Libel and slander 🔑38(1).

Libelous language used in landlord's notice to vacate, exposing tenant to contempt and ridicule, *held* not material to notice; hence not privileged as in judicial proceeding (Code Civ. Proc. § 1160, subd. 2; Civ. Code, § 47).

> This was true, since the scope of such notice is limited to requiring the payment of the amount claimed to be due under the lease or possession of the premises.

*Superseded by opinion of Supreme Court 3 P.2d 550.

10. Libel and slander 🔑38(3).

Language used in landlord's complaint in unlawful detainer *held* material to inquiry, and hence privileged even though defamatory (Code Civ. Proc. §§ 735, and 1160, subd. 2; Civ. Code, §§ 47, 3345).

The statements in the complaint that the tenant was undesirable as tenant of premises for reason that the landlord was informed that tenant was dishonest, tricky, impecunious, also involved in litigation, that dealing with him had involved the premises in legal controversy, and that the tenant was temperamentally unfit for managing the premises, were material to question whether the alleged unlawful detention was willful and as to whether or not, because of the matter in question, the trial court in such unlawful detainer action would treble the damages for detention under Code Civ. Proc. § 735, or the rents under Civ. Code, § 3345.

11. Pleading 🔑225(1).

Where complaint alleged two publications of alleged defamatory matter, though not separately stated, one of which was good as against general demurrer, general demurrer *held* improperly sustained without leave to amend.

Appeal from Superior Court, Los Angeles County; Marshall F. McComb, Judge.

Action by Alexander Haddad against Afue McDowell and another. Judgment for defendants, and plaintiff appeals.

Reversed.

Henry M. Lee, of Los Angeles, for appellant.

Afue McDowell, of Los Angeles, for respondents.

ARCHBALD, Justice pro tem.

This is an appeal on the judgment roll from a judgment rendered after a demurrer to the amended complaint for libel was sustained without leave to amend.

The amended complaint alleges that on or about March 8, 1928, plaintiff and defendant California Escrow & Finance Corporation entered into a lease whereby plaintiff leased from said defendant a certain drive-in or open-air market in the city of Los Angeles; that about the 1st of August, 1928, said lessor and its codefendant, Afue McDowell, the legal counsel for lessor, wrote and caused to be published and delivered to plaintiff and various other persons, particularly the subtenants of said market, a three-day notice to vacate and surrender possession of said market, a copy of which said notice is attached to the complaint and made a part of it by reference, and which notice required the payment of certain sums alleged to be due, within three days after the service of the notice, or the surrender of possession of the premises as required by subdivision 2 of section 1160, Code of Civil Procedure, and which notice also contained the following: "The above mentioned lease is terminated and cancelled and ended, for all purposes, for the reason that said Alexander Haddad has persistently and repeatedly refused and failed to pay said sums, although we have begged him, run after him many times, written to him, and urged his attorney to endeavor to induce him, to comply with his lease. The response has been mostly promises which were never kept, excuses and subterfuges. The rental value is too high for such tactics. Even if by any means you be allowed to remain on the property, a strict compliance with whatever lease is then in effect must be observed by you." The amended complaint further alleges that on the 13th of August, 1928, the defendants caused to be filed with the county clerk of Los Angeles county, and served upon the plaintiff and various other persons generally, and particularly the various subtenants of said market, a complaint in unlawful detainer, which said complaint is attached to and made a part of said amended complaint, and which has among the allegations usual in such a complaint the following: "XV Defendant Haddad is undesirable as a tenant of said premises for the reason that plaintiff fears and is informed and believes and therefore alleges, that he is a dishonest, tricky, impecunious, so involved in litigation, that dealing with him has involved, and will continue to involve, said premises and the conduct and management thereof, in legal controversy between himself and wife; and that he is temperamentally unfit for managing such a market or operating under said lease; for the reasons that he is too nervous to converse coherently long enough peaceably to settle any controversy; he is prone to dodge and evade representatives of plaintiff, and others seeking to adjust the matters of the lease with him; he quarrels quickly and becomes greatly excited and agitated in discussing such matters; and he is so ignorant of business ethics and business generally that he usually postpones decisions on matters relating to business until he can confer with, and get the opinion of, other persons, most of whom are usually as incompetent as he is; and he is inclined to violate and disavow his promises and obligations, regardless to the effect on others." The complaint also alleges that the language quoted was "neither pertinent, material or relevant" to the three-day notice, or to a complaint in unlawful detainer, "and constitutes no part of a judicial proceeding." These last allegations would seem to be merely conclusions of law. Gosewisch

v. Doran, 161 Cal. 511, 119 P. 656, Ann. Cas. 1913D, 442.

The demurrer to the amended complaint was on the grounds (1) of misjoinder; (2) two causes of action not separately stated; (3) insufficient facts stated to constitute a cause of action; and (4) uncertainty in several particulars mentioned. Defendants also filed notice of motions to strike from the files a second undertaking which the court permitted to be filed as well as the amended complaint, and certain parts thereof, and to dismiss the action; the latter motions being principally based on the ground that the complaint showed that the language used was not libelous and was privileged. All of such motions were denied by the court, and the demurrer was sustained without leave to amend.

Appellant contends that the court erred in sustaining said demurrer, for the reason that the privilege attaching to the publication of libelous matters in judicial proceedings is subject to the qualifications that the matters must be relevant and pertinent to the subject of inquiry and that the demurrer on the other grounds is not well taken. Respondents contend that section 47, Civil Code, does not make any such qualification, and, as the complaint shows that the language used occurred in a notice and complaint filed in the judicial proceeding, it is privileged, that the matter is material and relevant, and that the demurrer was properly sustained on the other grounds.

[1-5] If the complaint is good as against the general demurrer, it would be error to have sustained the demurrer on the special grounds without leave to amend, even though the complaint was an amendment of the original filed (Schaake v. Eagle Automatic Can Co., 135 Cal. 472, 63 P. 1025, 67 P. 759), and in our opinion the language used being of a nature that would expose the party it referred to to contempt, ridicule, and obloquy, as well as having a tendency to injure him in his occupation, it is libelous per se (section 45, Civ. Code) and actionable unless it is privileged under section 47, Civil Code. The complaint alleges that the words used were false, libelous, and defamatory, and that defendants maliciously published them to injure plaintiff in his business and occupation, and with intent to expose him to hatred, contempt, ridicule, and obloquy of his friends and business associates and the public generally, and that such was the result of the publication, to plaintiff's humiliation, embarrassment, and damage, and in our opinion it states a cause of action good as against the general demurrer, unless respondent's contention is sound, and, as we cannot assume that the trial court erred, which could be the case if it sustained the special demurrer without leave to amend, we must conclude that it sustained the demurrer on the general ground, holding that on the face of the complaint the language was either privileged because used in a judicial proceeding, or, if the privilege was not absolute, that it showed on the face of the complaint that it was material and pertinent.

[6, 7] While the plea of privilege is ordinarily a defense, it may be raised by demurrer when it appears on the face of the complaint that the publication comes within subdivisions 1 or 2 of section 47 of the Civil Code. Stevens v. Snow, 191 Cal. 58, 64, 214 P. 968.

[8-11] As we read the later decisions of the Supreme Court, we must conclude that the rule laid down in the case of Munster v. Lamb, 11 Q. B. Div. 588, that the privilege of an advocate, in the course of a judicial inquiry, extends to words used by the solicitor maliciously, and without any justification or excuse, and even though irrelevant to every issue before the court, has been superseded in this state by the general American doctrine requiring that they be relevant and pertinent to the inquiry. The leading case in this state is that of Carpenter v. Ashley, 148 Cal. 422, 83 P. 444, 7 Ann. Cas. 601, in which the facts showed that, in a prosecution for larceny, the district attorney had charged opposing counsel with having committed perjury and subornation of perjury, which the complaint in the Carpenter Case charged as slander. On the question of instructions given by the trial court, the court says on page 424 of 148 Cal., 83 P. 444: "The following instruction asked by plaintiff was refused: 'The jury are instructed that the question of whether the plaintiff had committed perjury or subornation of perjury was not under consideration in the case of People v. Arthur Ennis, wherein the slanderous words are alleged to have been spoken by the defendant herein, and therefore anything that the defendant in this case may have said at that trial, in the presence of others in relation to whether the plaintiff had committed perjury or subornation of perjury would not be privileged.' The court also instructed the jury, at the request of defendant, as follows: 'No action will lie against a public officer for any words spoken or published by him in the proper discharge of his official duty. No action will lie against a district attorney for any words spoken or published by him during the proper discharge of his official duties as district attorney and in the course of a judicial proceeding in which he in his official capacity is engaged.' There were other instructions and refusals to instruct on the same lines as the above; but the foregoing references are sufficient to show that the court left to the jury the whole question whether or not the alleged defamatory words were privileged." The case was reversed because the trial court refused to determine whether or not the publication was privileged, but, in speaking of the

language used, the court says (page 425 of 148 Cal., 83 P. 444, 445): "And it is quite clear that in the case at bar the defamatory words alleged to have been spoken by the defendant of plaintiff, who was simply an opposing attorney in the case at hand, had no pertinency, relevancy, or reference, to the charge of larceny in the pending action of People v. Ennis, which was the subject-matter of inquiry in that action; he had no more privilege to use the defamatory words alleged than he would had had to charge plaintiff with robbery, rape, or murder."

Having decided that the contention of appellant is supported by the decisions of the Supreme Court, we are faced with two questions: Was the publication of the words complained of in the three-day notice a part of a judicial proceeding, and, if so, was the matter published therein and in the complaint in unlawful detainer material to the inquiry? Both counsel assume that the notice is a part of the judicial proceeding, and without so deciding we will make the same assumption. The complaint in the case at bar alleges the service of the notice as a publication of the defamatory matter contained in it, and it does not allege that any republication was used in the complaint in unlawful detainer by making it a part thereof. The scope of such a notice is limited to requiring the payment of the amount claimed to be due under the lease, or possession of the premises, and by no stretch of the imagination could any such language as was inserted in the notice in the case at bar be material to such a notice, or the purpose for which it is used; so we are forced to hold that it is not pertinent or material, even in the very broad sense that our Supreme Court has approved by denying a hearing in that court of the case of Irwin v. Newby, 102 Cal. App. 110, 114, 282 P. 810, 812, 283 P. 370, which opinion says: "The mere fact that the alleged defamatory matter is irrelevant as a matter of law or that it is insufficient as a defense does not bring it within the exception contended for by appellant. It must go further. As stated in Carpenter v. Ashley, supra, it must have no reasonable pertinency to the matter involved in the subject-matter of the pending action and have no relation or reference to the cause in hand." As to the kind of relevancy meant by the rule laid down, the same court quotes the following from the case of Taylor v. Iowa Park G. Co. (Tex. Civ. App.) 199 S. W. 853, at page 855: "The matter to which the privilege does not extend must be so palpably wanting in relation to the subject-matter of the controversy that no reasonable man can doubt its irrelevancy and impropriety. In order that matter alleged in a pleading may be privileged, it need not be in every case material to the issues presented by the pleadings. It must, however, be legitimately related thereto, or so pertinent to the subject of the controversy that it may become the subject of inquiry in the course of the trial." Even though weighed on that liberal scale, we fail to see how the language used in the three-day notice could be material. So far as the language used in the complaint in unlawful detainer is concerned (while we deplore the form in which it is introduced into the complaint) when weighed by the same rule, the words used, though undoubtedly subject to a motion to strike, as was the case of the language in the Taylor Case, still we cannot say that they do not have some "legitimate relation" to the question of whether or not the alleged unlawful detention was willful and as to whether or not because of the matter in question the trial court in such unlawful detainer action would or would not treble the damages for detention under section 735, Code of Civil Procedure, or the rents under section 3345, Civil Code, and, as the language used seems to be even more material to such inquiry than the words complained of in the Taylor Case were to the proceeding in which they were used, we feel compelled to hold that they were and are material within the rule laid down. There being two publications of alleged defamatory matter set up in the complaint, though not separately stated, one of which seems to be good as against the general demurrer, the demurrer should not have been sustained without leave to amend.

Judgment reversed.

We concur: WORKS, P. J.; IRA F. THOMPSON, J.

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112 Cal. App. 251

NICHOLSON v. VEGHTE et al.

Civ. 7554.

District Court of Appeal, First District, Division 1, California.

Feb. 27, 1931.

Fraud 🔑58(1).

Evidence *held* to sustain finding for defendants, in action for damages for fraud in exchange of property.

> The evidence disclosed that plaintiff traded certain flats for an apartment house, and the preponderance of the evidence showed that the apartment house property was worth the amount defendants claimed. Also the record showed that plaintiff acted freely in concluding the agreement, and made a full and independent investigation.

Appeal from Superior Court, City and County of San Francisco; Michael J. Roche, Judge.

Action by Anna E. Nicholson against Mabel J. Veghte and another. Judgment for defendants, and plaintiff appeals.

Affirmed.

Charles McLaughlin and Joseph H. Mayer, both of San Francisco, for appellant.

Manson & Allan, of San Francisco, for respondents.

TYLER, P. J.

Action to recover damages for fraud in the exchange of certain parcels of real property.

Plaintiff and appellant alleged that she was the owner of certain flats located on Leavenworth street in San Francisco which she agreed to exchange for an apartment house located on Sacramento street in the same city upon the following terms: Said flats to go in at a valuation of $16,000, subject to a mortgage of $2,000, the net value being $14,000; the apartment house, valued at $22,500, was subject to a mortgage of $11,000, the net value being $11,500; defendant Veghte to pay to plaintiff $2,500 in cash, and plaintiff to pay the broker who negotiated the exchange the sum of $650 for his services. Plaintiff charged that she was induced to enter into the agreement of exchange by fraudulent misrepresentations as to the value of the apartment house, its income, the amount of taxes to which it was subject, and the character of the mortgage with which it was impressed. She prayed for damages in the sum of $7,500.

The lower court found in favor of defendants upon all the issues, and rendered judgment in their favor. Plaintiff relies for reversal of the judgment on the ground that there is no substantial evidence to support the findings, and that such findings are contrary thereto. There is absolutely no merit in the appeal. While there was a conflict in the evidence as to the value of the apartments, the preponderance of such evidence shows that the property was worth the full amount that defendants claimed it to be worth. The same is true as to the other alleged misrepresentations. Moreover, the record shows that plaintiff acted freely and of her own volition in entering into the agreement of exchange and concluding the same; that she made a full and independent investigation of all the matters in connection with, and in consummation of, the transaction, and acted upon her own judgment. The appeal is entirely lacking in merit.

The judgment is affirmed.

We concur: KNIGHT, J.; CASHIN, J.

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112 Cal. App. 326

PEOPLE v. BRAZIL.

Cr. 113.

District Court of Appeal, Fourth District, California.

March 3, 1931.

1. Bastards 🔑**17½.**

On conflicting evidence, right to determine whether testimony for people or for defendant should be accepted belongs to jury.

2. Bastards 🔑**17½.**

In prosecution for failure to support child, testimony of acts of sexual intercourse between defendant and complaining witness before probable time of conception *held* admissible.

Appeal from Superior Court, Tulare County; Frank Lamberson, Judge.

Joe Brazil was convicted for failing without lawful excuse to furnish necessary support for his minor child, and he appeals.

Affirmed.

Bradley & Bradley, of Visalia, for appellant.

U. S. Webb, Atty. Gen., W. R. Augustine, Deputy Atty. Gen., and Walter C. Haight, Asst. Dist. Atty., of Visalia, for the People.

JENNINGS, J.

Appellant was convicted of the crime of failing, without lawful excuse, to furnish necessary support for his minor child and was sentenced to be punished therefor by imprisonment in the county jail for a term of two years and to pay a fine of $1,000. He appeals from the judgment.

During the course of the trial it was admitted by the appellant that he had not, during the time stated in the information, furnished support for the child of whom he was alleged to be the father. The sole question at issue therefore was whether the appellant was the father of the child.

[1] In support of his appeal appellant makes two contentions: First, that the evidence presented during the trial of the action was insufficient to justify the verdict of conviction; and, second, that the trial court erred in allowing certain evidence, alleged to be highly prejudicial to the appellant, to be introduced. As to the first of these contentions it is apparent that the evidence which was presented on behalf of the appellant was in some important respects in direct conflict with that which was introduced by the respondent. It was, of course, entirely within the province of the jury to determine whether the testimony introduced by the re-

spondent should be accepted or whether the testimony presented by the appellant should be believed. The jury having chosen to accept respondent's testimony which is sufficient to support the verdict, appellant's contention in this regard may not be maintained. People v. Russell, 73 Cal. App. 492, 238 P. 1051.

[2] It is, however, strenuously contended by the appellant that the trial court erred in permitting the respondent to introduce evidence of acts of sexual intercourse between appellant and the complaining witness prior to the time when the conception may have taken place. It is said that the only effect of testimony of this character was to degrade the appellant in the eyes of the jury and that the reception of such testimony was therefore highly prejudicial to the appellant. With this contention we are compelled to disagree. In bastardy proceedings it is quite generally held that acts of intercourse and undue familiarity before the alleged act resulting in conception are admissible as bearing on the probability of the intercourse alleged to have taken place between the parties. 7 Cor. Jur. 992; State v. Hammond, 46 Utah, 249, 148 P. 420; Wise v. State, 19 Ala. App. 245, 96 So. 724; People v. Dupounce, 133 Mich. 1, 94 N. W. 388, 103 Am. St. Rep. 435, 2 Ann. Cas. 246.

In Estate of Gird, 157 Cal. 534, 108 P. 499, 137 Am. St. Rep. 131, it was held that evidence was admissible to show that a witness discovered an act of sexual intercourse between the mother and alleged father of the children, whether it took place before or after the birth of a daughter, as tending to show the extent of the intimacy between them and to corroborate the testimony of the mother as to the paternity of the children and the nature of the relations existing between the mother and the alleged father. In its decision the Supreme Court refers to the case of People v. Jamieson, 124 Mich. 164, 82 N. W. 835, a bastardy case, where it was held that acts of intercourse and undue familiarity, both before and after the alleged act resulting in conception, are admissible as bearing upon the probability of the intercourse at the time stated in the complaint. The court also refers to 5 Cyc. 662, wherein it is stated that evidence of the intimate relations existing between the mother and alleged father is admissible and that evidence of previous or subsequent intercourse is competent to show the probability of the particular act having occurred. In People v. Koller, 142 Cal. 621, 76 P. 500, 502, it was held that in a prosecution for the crime of incest, evidence of incestuous acts that occurred both prior and subsequent to the particular act selected as the basis of prosecution, were admissible for the purpose of showing a disposition on the part of the defendant to commit such offenses and as corroborative of testimony introduced to prove the specific act charged. In its decision the Supreme Court quotes from the case of People v. Castro, 133 Cal. 12, 65 P. 13, as follows: "'The doctrine appears to be fairly well settled that in actions of adultery, seduction, etc., evidence of sexual intercourse between the parties, both before and after the particular act charged, may be introduced in evidence, as tending to sustain the main allegation.'" And thereupon makes the following pertinent comment: "We think this is a correct statement of the prevailing rule, and in principle applies not only in prosecutions for adultery, but in prosecutions for all cognate offenses involving sexual intercourse by consent, including incest."

We are of the opinion that no error was committed by the trial court in permitting the reception of the evidence complained of by appellant.

The judgment is affirmed.

We concur: BARNARD, P. J.; MARKS, J.

112 Cal. App. 312

PEOPLE v. MURRAY.

Cr. 1149.

District Court of Appeal, Third District, California.

March 2, 1931.

Criminal law 🔑1130(4).

No brief being filed for appellant, and appellant having failed to appear at hearing, judgment was affirmed (Pen. Code, § 1253).

Appeal from Superior Court, Stanislaus County; J. C. Needham, Judge.

George Murray was convicted of a violation of the State Poison Law, and he appeals.

Affirmed.

Hugo McKinley, of Modesto, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

PER CURIAM.

The defendant was convicted in the superior court of Stanislaus county of a felony, to wit: Violating of "An act to regulate the sale of poisons in the State of California and providing a penalty for the violation thereof." (St. 1907, p. 124, as amended.)

The transcript on appeal was filed in this court January 17, 1931. No brief has been filed in behalf of appellant. The cause was regularly placed on the calendar for oral argument on March 2, 1931. No appearance was made for appellant at the time the case was called for hearing. Pursuant to the provisions of section 1253 of the Penal Code, the judgment is affirmed.

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112 Cal. App. 359

SHERWIN v. BOGOSIAN et al.

Civ. 283.

District Court of Appeal, Fourth District, California.

March 6, 1931.

1. Landlord and tenant 🔑80½.

That instrument was denominated lease was some evidence parties intended it should so operate, on question whether execution thereof violated covenant against subletting.

2. Landlord and tenant 🔑76(2).

Instrument transferring premises for one year for rental of half of crop *held* "sublease" within covenant against subletting.

> The instrument involved, designated a lease, recited that party of first part leased to party of second part for one year the property described, on share rental of half of cotton and cotton seed produced, delivered at gin agreed upon; party of first part to furnish horses, feed for same, tools now on land, and pay all power bills for power used in irrigating land; party of second part to prepare land for planting and properly care for crop while growing and when ready for harvest, to harvest and deliver whole crop at gin, at own expense and to properly care for pumping plant on premises, and all tools and improvements, and keep farming implements in good repair.
>
> [Ed. Note.—For other definitions of "Sublease," see Words and Phrases.]

Appeal from Superior Court, Tulare County; J. A. Allen, Judge.

Action by A. B. Sherwin against S. K. Bogosian and another. From a judgment for plaintiff, defendants appeal.

Affirmed.

G. W. Zartman, of Tulare, and Bradley & Bradley, of Visalia, for appellants.

Ward G. Rush, of Tulare, for respondent.

JENNINGS, J.

This is an action in unlawful detainer to recover possession of certain real property leased by plaintiff to defendants for a term of years. The written instrument of lease contained covenants by the lessees that they would not commit any waste on the premises and that they would not, without the written consent of the lessor, sublet the leased premises or any part thereof. At the conclusion of the trial the court ordered that the lease be forfeited and canceled and that the plaintiff, respondent herein, be restored to possession of the premises. From this judgment defendants have appealed.

Appellants object to certain findings of the trial court wherein the court found that appellants had violated certain covenants contained in the lease agreement, particularly the covenant not to sublet the leased premises without the written consent of respondent.

During the trial of the action a certain instrument executed by appellant S. K. Bogosian and F. B. Cotton on December 27, 1928, was admitted in evidence. It is the contention of appellants that this instrument amounted to no more than what is generally denominated a cropping contract, under the provisions of which F. B. Cotton agreed to farm the premises for a share of the crop to be grown thereon. Respondent, on the other hand, contends that the instrument is an agreement for the leasing of the premises and that its execution was in violation of the covenant on the part of appellants not to sublet the premises, which warranted the forfeiture and termination of the lease agreement between respondent and appellants. There is, then, here involved the construction of this instrument. The instrument is in the following form:

"This Lease made the 27th day of December, 1928, between S. K. Bogosian of Tulare, Cal., party of the first part and F. B. Cotton, of said place, party of the second part,

"Witnesseth: that the said party of the first part hereby leases to the party of the second part for the term of one year, the real property situate in the County of Tulare, State of California, and described as follows, to-wit:

"The N. W. ¼ of S. W. ¼ of Section 27, Township 20 South, Range 24 E. M. D. B. & M., to be farmed to cotton during the season of 1929 on share rental of one-half of all cotton and cotton seed produced, delivered at Gin agreed upon.

"The party of the first part is to furnish horses, feed for same, tools now on the land, and pay all power bills for power used in irrigating said land.

"The party of the second part agrees to properly prepare the land for planting to cotton and properly care for the crop while growing and when ready for harvest, to harvest the same and deliver the whole of said crop at Gin, all at his own expense; to properly care for the pumping plant on said premises, and all tools and improvements on said land, and keep the farming implements in good order and repair at his own costs.

"The party of the second part also agrees to advance one-half the cost for electric power for said land, the same to be repaid to him by the party of the first part when the crop is harvested.

"Upon the failure of the party of the second part to do and perform all the things and matters herein agreed to be done and performed, in good and proper season, it shall be optional with the party of the first part to do such things and charge the expense therefor to the party of the second part.

"The party of the second part further agrees to deposit with G. W. Zartman, the sum of three hundred dollars as security for the carrying out of this agreement on the part of the party of the second part.

"The party of the second part agrees to furnish the cotton seed to be sown on said land, but he shall be repaid in seed from the cotton seed harvested from said land, and the balance of the seed at the Gin shall belong one-half to each of said parties.

"Witness the hands of said parties the day and year first above written.

"S. K. Bogosian.
"F. B. Cotton."

In support of the contention that this agreement entered into between appellant S. K. Bogosian and F. B. Cotton was a mere cropping contract, whose execution did not violate the covenant not to sublet, appellants have cited a number of decisions of the Supreme Court of California. The earliest of these cases is the case of Bernal v. Hovious, 17 Cal. 541, 79 Am. Dec. 147, where it was held that an oral agreement, by whose terms one party was to have the land for three years to farm it and give the owner for its use one-third of the grain raised after it was sacked, the owner to furnish the farming implements, wagon, horses, and his share of sacks for the grain, was not a lease, although the parties termed it a lease, but that it was a contract for the working of the farm upon shares and that the parties were tenants in common of the undivided grain. In Walls v. Preston, 25 Cal. 59, the Supreme Court held that an agreement, wherein the party who is given possession of the premises for 22 months under an agreement to cultivate the land at his own cost and to deliver to the other party to the contract on the premises one-sixth of all crops harvested, was a lease. In its decision, the court points out that the question before the court in Bernal v. Hovious, supra, was merely who was entitled to the possession of the crop, not whether the owner or occupant was in possession of the land, and not whether the relation of landlord and tenant existed between the parties, although, as the court pointed out, that question was incidentally discussed. It is, however, strenuously contended by appellants that the Supreme Court of California has unequivocally announced the rule for the construction of agreements of the sort we have before us for consideration in the recent case of In re Okahara, 191 Cal. 353, 216 P. 614. This decision, therefore, merits our careful analysis. The question before the court in the Okahara Case was the construction of a certain instrument executed by the petitioner Okahara, designated as the contractor, and an individual who was termed the employer. Under the provisions of the agreement, the contractor, who was stated to be an independent contractor, agreed to clear all of the land and make it ready for plowing and planting within a period of two years from the date of the execution of the agreement, one-half of the land to be cleared during the first year of the agreement and the remaining half during the second year, for the performance of which work the contractor was to receive the compensation of $50 per acre. The contractor was to plant the whole of the land to orchard within two years from the date of the agreement, all trees to be furnished by the employer. The contractor also agreed to plant certain designated intercrops. The contractor further agreed to gather and pack all fruits, berries, and vegetables at seasonable times and to make delivery thereof at any fruit house designated by the employer. The contractor also agreed to furnish all labor and all machinery and equipment necessary for the performance of the contract. Tools and implements which were upon the premises were to be used by the contractor and returned at the expiration of the term of the agreement in good condition. The products from the land were to be sold by the employer upon such terms as he should deem best, and the contractor was to receive, as further compensation in addition to the allowance of $50 per acre for clearing the land, one-half of the net proceeds derived from the sale of the products, which share was to be paid to him in cash by the employer. It was further provided that the contractor should have access to the land at all convenient times for the purpose of doing the work, that all crops to be grown on the land should be the property of the employer, in which the contractor should have no interest, and that the employer should have no control over the contractor, his employees and equipment, but the contractor agreed that he, and all persons employed by him, should be diligent in the prosecution of the work, which was to be done in good workmanlike manner. It was further agreed that, if at any time the employer should be dissatisfied with the work done by the contractor or the progress of the work, he might immediately terminate the contract on paying to the contractor compensation in the form of the usual wages paid for similar work in the same neighborhood, up to the time of the termination of the contract. It was held by the Supreme Court that the instrument could not be characterized as a lease or transfer of any interest in real property, but that it had all the characteristics of an agreement of hiring, and could not, under any rule of construction, be held to be any more than a cropping contract. In arriving at this conclusion, the court analyzed the instrument and pointed out the following pertinent facts: First, that but few of the formal phrases ordinarily found in leasehold instruments appear in the agreement; second, that there was no surrender of possession of the premises to the so-called contractor; third, that a division of the net proceeds of the crops to be grown on the premises did not work a transfer of any interest in the soil; fourth, that the contractor was expressly limited to the planting of certain specified fruit trees, berries, and vegetables; fifth, that all products grown on the premises were to be the property of the employer and that the contractor should have no interest in them.

[1] A comparison of the instrument which the Supreme Court had under consideration in the Okahara Case and that which we have presented for our analysis in the instant case discloses that the two instruments differ in many material and important respects. In the first place we find in the agreement in the instant case certain phraseology generally appearing in agreements of lease. The instrument is denominated a lease. There is a statement that the party of the first part leases the premises for the definite term of one year. The compensation to be paid for the land is denominated a share rental. It is, to be sure, not of controlling importance that the instrument characterizes itself as a lease. Nevertheless, this fact is some evidence that the parties intended that it should so operate. Harrelson v. Miller & Lux, Inc., 182 Cal. 408, 188 P. 800; Morris v. Iden, 23 Cal. App. 388, 138 P. 120. It is also significant that the delivery by the occupant to appellant S. K. Bogosian of his share of the cotton crop was to be made off the premises. In Harrelson v. Miller & Lux, Inc., supra, it was said that such a fact is strong evidence that the instrument constitutes a lease. It is also significant that, so far as appears from the instrument, there was a transfer of possession of the premises to the occupant, who agreed to take proper care of the pumping plant on the premises and all tools and improvements on the land and to keep the farming implements in good order and repair at his own expense.

[2] It is our opinion that the agreement entered into between appellant S. K. Bogosian and F. B. Cotton, by whose provisions possession of the premises therein described was transferred for the definite term of one year on a share rental of one-half of the cotton crop produced on the premises, constituted a lease agreement and that the finding of the trial court that appellants had violated the covenant not to sublet the premises is supported by evidence of the execution of the instrument hereinabove considered.

Since we are of the opinion that the court's finding with respect to the violation of the covenant not to sublet is justified, it is not necessary to consider the propriety of other findings of the trial court with respect to the commission of waste by appellants and the failure of appellants to furnish alfalfa seed.

In arriving at the conclusion hereinabove stated, we have assumed that the record of certain evidence which was introduced at the trial is properly before us. The appeal was taken under the alternative method. Included in the Clerk's Transcript on Appeal is a copy of a document denominated "Stipulation as to Statements of the Case." This instrument obviously purports to set out in narrative form the substantial testimony of certain witnesses. It also contains a copy of the agreement whose construction presents the main problem in the action. The instrument purports to be signed by counsel for both parties, and bears the following indorsement: "The foregoing statement is allowed. J. A. Allen, Judge." It appears that no phonographic reporter was present during the trial and that the reporter's transcript contemplated by section 953a of the Code of Civil Procedure could not for this reason be prepared. It is at least open to serious doubt whether the so-called statement of the case is properly before this court. Pierce v. Works, 171 Cal. 684, 154 P. 852; Jeffords v. Young, 197 Cal. 224, 239 P. 1054; Koeberle v. Coit, 46 Cal. App. 641, 189 P. 727. However, as we have decided for the reasons herein stated, that the judgment of the trial court should be affirmed, the determination of whether this court has properly before it anything other than the judgment roll need not be made.

The judgment is affirmed.

We concur: BARNARD, P. J.; MARKS, J.

PEOPLE v. WILLISON.*

Cr. 2038.

District Court of Appeal, Second District, Division 1, California.

March 2, 1931.

Criminal law 🔑1178.

Where appeal was abandoned, judgment of conviction and order denying motion for a new trial were affirmed (Pen. Code, § 1253).

> Defendant on appeal from conviction for burglary and from an order denying a new trial filed no brief, and time for filing such brief had expired. Record further showed that cause was duly and regularly called for hearing in open court, but that no one appeared on behalf of defendant.

Appeals from Superior Court of Los Angeles County; Wm. T. Aggeler, Judge.

James J. Willison was convicted of burglary, and he appeals.

Affirmed.

John F. Groene, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., for the People.

PER CURIAM.

From the record it appears that no brief for appellant has been filed, and the time for filing such brief has expired. The record further shows that this cause was duly and regularly called for hearing in open court, and that on such call no one appeared on behalf of appellant.

The appeals having been thus abandoned, it is ordered that the judgments of conviction, and the order denying defendant's motion for a new trial, be and the same are affirmed. Pen. Code, § 1253; 2 Cal. Jur. p. 723.

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112 Cal. App. 313

Ex parte PURMEL.

Cr. 1623.

District Court of Appeal, First District, Division 1, California.

March 3, 1931.

Habeas corpus 🔑29.

That no evidence was taken in contempt proceedings of defendant's ability to pay sums ordered in divorce action *held* immaterial, where affidavit on which citation was based and order adjudging defendant guilty showed ability to pay.

Application by Jacob Purmel, also known as Jake Purmel, also know as Yadel Purmel, also known as Jacob Purlmal, for a writ of habeas corpus and for a writ of review in aid thereof to secure the release of petitioner from custody under a commitment for contempt.

Writ denied.

Walter E. Dorn, of San Francisco, for petitioner.

PER CURIAM.

Application for writ of habeas corpus.

The record shows that petitioner was ordered to pay certain sums of money in a divorce action. Having failed to comply with the order, he was commanded to show cause why he should not be punished for contempt. On the hearing he was adjudged guilty. It is here claimed that no testimony was taken as to the ability of petitioner to comply with the order. There is no merit in the contention. It appears from the affidavit upon which the citation was based, and also the order adjudging petitioner guilty of contempt, that he had the ability to pay but failed to do so.

The petition is denied.

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112 Cal. App. 216

ABRAMS v. HILLMAN et al.

Civ. 7411.

District Court of Appeal, First District, Division 1, California.

Feb. 26, 1931.

1. Master and servant 🔑70(2).

Under contract salesman *held* entitled to 10 per cent. commission on merchandise sold other than rayon or silk.

> The contract read, in part, that commission would be 10 per cent. for all articles except for rayon, where commission would be 6 per cent., on prices contained in price list, and that in cases of real large orders for which considerable reduction was necessary to get the business commission would be specially determined. The articles sold by plaintiff upon which claim for commission was based consisted of merchandise other than rayon or silk.

2. Appeal and error 🔑933(4).

Where court reduced judgment as result of stipulation, appellate court would presume in support of judgment that new trial was denied on condition plaintiff file stipulation consenting to modification.

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*Superseded by opinion 2 P.(2d) 543.

Appeal from Superior Court, City and County of San Francisco; C. J. Luttrell, Judge.

Action by Harry Abrams against A. M. Hillman, individually and as Mercantile Export-Import Company, and as Mercantile Silk Company, and others. From a judgment for plaintiff and from an order denying a new trial and modification of judgment, defendants appeal.

Affirmed.

Irvin W. Ayres, of San Francisco, for appellants.

Clarence W. Morris, of San Francisco, for respondent.

TYLER, P. J.

Action to recover the sum of $478.25 as commissions for the sale of certain personal property.

[1] The answer denied the indebtedness and alleged a set-off and counterclaim of $390. The court found for plaintiff and against the counterclaim and entered judgment for plaintiff in the full amount prayed for. Motion for new trial was made and denied, but the judgment was modified by changing the amount from $478.25 to $404.50. The appeal is from the original judgment, from the order denying a new trial and modification of judgment. The main point relied upon for a reversal is that the trial court improperly interpreted the commission agreement. So much of the instrument as is necessary for a discussion of the case reads as follows: "Your commission will be 10 per cent for all articles except for rayon where your commission will be 6 per cent., on the prices contained in my price-list. If you attain higher prices than those given to you you are entitled to 50 per cent of the difference. In this connection I wish to inform you, that I am getting here locally for 450 & 3/3 twist from the milliners and dressmakers, in some cases, as high as $3.50 per lb. and never less than $3.00. I think that this is the trade in which we both are mostly interested. In case of real large orders, for which, a considerable reduction will be necessary to get the business, your commission will have to be specially determined." The articles sold by plaintiff and upon which his claim for commissions was based consisted of merchandise other than rayon or silk. It was contended at the trial, by counsel for defendants, that the provision for the special determination of commissions in case of real large orders with reduction in price, applied to all such orders irrespective of the particular class of merchandise sold and therefore applied to the articles sold by plaintiff. Aside from the contract itself, a letter written by defendants was introduced in evidence which recited that the particular portion of the contract relating to the special determination of commissions referred solely to silk orders.

[2] The trial court found, and we think correctly, that plaintiff was entitled under the contract to the 10 per cent. commission for the character of merchandise he had sold. Complaint is also made that the findings are indefinite in certain particulars. We have examined the same and we find no merit in this objection. Appellants further complain that the trial court erred in reducing the judgment from $478.25 to $404.50. Respondent insists that as appellants are benefited by the action of the court, they have no cause for complaint. The reduction in the amount of the judgment was the result of a stipulation filed by the attorney for plaintiff consenting to such modification. It will be presumed in support of the judgment that a new trial was denied on condition that plaintiff file a stipulation consenting to the said modification. 2 Cal. Jur. p. 860.

The judgment and order are affirmed.

We concur: KNIGHT, J.; CASHIN, J.

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112 Cal. App. 7

QUALLS v. ATCHISON, T. & S. F. RY. CO.

Civ. 4242.

District Court of Appeal, Third District, California.

Feb. 16, 1931.

Rehearing Denied March 18, 1931. Hearing Denied by Supreme Court April 16, 1931.

1. Master and servant 🔑278(6, 18).

Evidence sustained finding of railroad's negligence in supplying freight car with defective brake, and causing collision during switching operations, justifying brakeman's recovery (Federal Safety Appliance Act § 2 [45 USCA § 11]; Federal Employers' Liability Act [45 USCA §§ 51–59]).

Evidence disclosed that freight cars were allowed to reach their places on various sidetracks under their own momentum; that plaintiff's duties as brakeman were to ascend moving cars and set brakes; that certain cars, which had already been stopped, started to move downgrade due to improper brakes when struck by other cars; that plaintiff, after giving signal to stop train and prevent other cars from being switched, ascended moving cars in question; that notwithstanding his signal, other cars were sent forward in such manner as to cause collision; and that plaintiff, believing cars were about to turn over, jumped to ground and was injured.

2. Master and servant 🔑111(1).

Interstate railroad has absolute duty to maintain efficient brakes to hold cars securely under ordinary circumstances (Federal Safety Appliance Act § 2 [45 USCA § 11]; Federal Employers' Liability Act [45 USCA §§ 51–59]).

3. Master and servant 🔑285(7).

Whether railroad's negligence in supplying freight car with defective brake, and causing collision when switching cars, proximately caused injuries to brakeman who jumped, believing car would overturn, *held* for jury (Federal Safety Appliance Act § 2 [45 USCA § 11]; Federal Employers' Liability Act [45 USCA §§ 51–59]).

4. Master and servant 🔑289(38).

Whether brakemen, believing car would overturn, was contributorily negligent in jumping when cars collided during switching operations, *held* for jury (Federal Safety Appliance Act § 2 [45 USCA § 11]; Federal Employers' Liability Act [45 USCA §§ 51–59]).

5. Master and servant 🔑246(1).

If reasonably prudent person would believe freight car might overturn, and would have jumped when cars collided during switching operations, brakeman was not contributorily negligent in so doing (Federal Safety Appliance Act § 2 [45 USCA § 11]; Federal Employers' Liability Act [45 USCA §§ 51–59]).

6. Master and servant 🔑228(2).

Railroad's violating statute by supplying freight car with defective brake precluded defense of contributory negligence, unless brakeman's negligence was sole cause of injuries (Federal Safety Appliance Act § 2 [45 USCA § 11]; Federal Employers' Liability Act § 3 [45 USCA § 53]).

7. Master and servant 🔑289(39).

Whether alleged negligence of brakeman who, believing car would overturn, jumped when cars collided during switching operations, was sole cause of injury, *held* for jury (Federal Safety Appliance Act § 2 [45 USCA § 11]; Federal Employers' Liability Act [45 USCA §§ 51–59]).

8. Master and servant 🔑204(1).

Brakeman did not assume risk of railroad's negligence in causing collision by switching cars on to side track when other cars were visibly moving out from adjacent tracks (Federal Safety Appliance Act § 2 [45 USCA § 11]; Federal Employers' Liability Act [45 USCA §§ 51–59]).

9. Master and servant 🔑204(2).

Employee does not assume risk of collision resulting from defective brake on freight car in violation of statute (Federal Safety Appliance Act, § 2 [45 USCA § 11]; Federal Employers' Liability Act [45 USCA §§ 51–59]).

10. Master and servant 🔑88(1).

Injured brakeman's misrepresentation that, preceding his employment, he worked on brother's farm three years instead of one, *held* an immaterial matter, not precluding recovery (Federal Employers' Liability Act [45 USCA §§ 51–59]).

> Brakeman testified that he made misrepresentation in question because, if it were known that an applicant for employment had gone out on a strike when previously employed by another railroad, he might not be hired, but there was no evidence that brakeman had in fact gone out on a strike, or that defendant railroad had any rule against employing persons who had done so.

11. Master and servant 🔑264(1).

Railroad, relying on injured brakeman's alleged misrepresentation and fraud in procuring employment, must plead and prove facts.

12. Trial 🔑260(1).

Refusing part of correct requested instruction *held* harmless, where principle therein was contained in part of charge given.

13. Trial 🔑260(1).

Refusing correct charge reiterating principle fully included in charge given was not error.

Appeal from Superior Court, Los Angeles County; Walton J. Wood, Judge.

Action by Harry H. Qualls against the Atchison, Topeka & Santa Fé Railway Company. Judgment for plaintiff, and defendant appeals.

Affirmed.

Robert Brennan, M. W. Reed, E. T. Lucey, Leo E. Sievert, and H. K. Lockwood, all of Los Angeles, for appellant.

Paul Blackwood, of Los Angeles, for respondent.

R. L. THOMPSON, J.

This is an appeal from a judgment for the plaintiff rendered upon the verdict of a jury for damages for personal injuries sustained in the course of his employment as a brakeman. The action was maintained under the

Federal Employers' Liability Act (45 USCA §§ 51–59).

The defendant owns and operates an interstate railroad system extending into California. Among its properties is a freight depot and yard consisting of side tracks for the distribution of cars in the city of Los Angeles. The main track leading to the freight yard passes under an overhead bridge, past the depot, thence in a semicircle northerly to a switch communicating with side tracks Nos. 6 and 7. These tracks extend in a parallel course, and are separated just a sufficient distance to permit boxcars to pass. Northerly from this switch these side tracks ascend a slight grade. The making up of trains and the distribution of cars in this freight yard was in charge of a crew employed for that particular purpose. J. D. Lodgson was foreman of this crew. W. H. Mooney had charge of the switch. It was his duty to see that cars which had been run upon a side track were stationary before he gave the signal to kick other cars on to the siding. D. J. Gallagher was the front brakeman, whose duties required him to attend the switch engine and relay all signals for the operation of the engine when the engineer was not in sight of the switch. The plaintiff, Qualls, was an able-bodied man, thirty-eight years of age. He had experienced twelve years' service as a switchman. Three and a half or four years of this period were spent in that capacity with the defendant railroad company at Los Angeles.

[1] The accident which resulted in the injuries sustained by the plaintiff occurred June 17, 1926, about 5 o'clock in the afternoon. The atmosphere was clear. It was then perfectly light. The engine was coupled to the southerly end of a string of some twenty box cars which the yard crew were then engaged in distributing upon the side tracks. The switch was located at the sharpest point in the curve of the track, about 1,000 feet from the overhead bridge. The plaintiff was out in the yard four or five hundred feet northerly from this switch, in the neighborhood of tracks Nos. 6 and 7. It was his duty to catch the box cars as they were uncoupled from the train and run onto the various side tracks, ride them down the siding to the desired location and set their brakes.

He had performed this service with respect to one car which had been run on to siding No. 6 and for two cars which were run on to the adjoining side track No. 7. During this operation the switch engine with its train of cars was running back and forth beyond the switch to give the cars the necessary momentum to carry them to their desired location on the side tracks. A string of three other cars was run on to siding No. 7 while the plaintiff was engaged in riding a single car up track No. 6. These three cars struck the two cars already stationed on track No. 7, upon the nearest one of which the brake had been previously set. The cars were automatically coupled by means of the contact. The brake which had been previously firmly set by the plaintiff on one of these cars was evidently defective and failed to hold the five cars. This string of five cars began to slowly roll down the slight grade toward the switch. When the head car of this string reached a point about three hundred feet from the switch, the plaintiff observed the train to which the engine was attached, stationary, several car lengths south of the switch. Out of precaution he motioned the switchman, Mooney, to hold the train. The plaintiff was not then in sight of the engine, which was around the curve, but he saw Gallagher, the front brakeman, relay the proper signal to the engineer. Assuming that the brake which he had set on the second car of this runaway string was defective, because it failed to hold the cars, he mounted the second car from the head toward the switch, for the purpose of setting the brake on that car. By the time he reached the running board on top of the car, the head car had nearly reached the junction of the two side tracks. In spite of his former signals, he observed other cars from the freight train about to be switched on to side track No. 6. It appeared to the plaintiff that a collision was inevitable. As the cars rolled by on to siding No. 6, the head car of the string upon which the plaintiff was riding struck or "sideswiped" them. The plaintiff said in this regard:

> "I got on the north end of the car. Just as I got on top of the car I saw the car ahead of the car I was on rear up as though it was going to turn over, and I thought the cars were going to turn over and I jumped off.
>
> "Q. What made the cars rear up? A. The cars coming in on (number) 6 side-swiped it. * * * I thought all the cars were going to turn over."

The anticipated danger of the cars toppling over as a result of the collision was corroborated by other witnesses. Mr. Mooney, the switchman, testified: "Mr. Lodgson (the foreman) hollered to me and told me to look out, the car was turning over. * * * The first thing I knew, Lodgson said, look out, it is turning over. The car was leaning a little bit towards me." In the emergency, believing that the string of cars which he was riding would overturn, the plaintiff jumped to the ground. The bones of both heels were crushed. The tarsal and metatarsal bones of both feet were fractured, and his spine was seriously injured. There is evidence that the injuries to his feet will result in permanent ankylosis; that he may never be able to walk without crutches, and that certainly he cannot do so without great pain; that he will never be able to do heavy work requiring him to stand upon his feet. The spine, also, is permanently injured. There is a separation of the sacroiliac joint, which will cause great pain and inconvenience and which is likely to be incurable. Dr. Edwards testified: "I think he will remain totally disabled."

The jury found a verdict in favor of the plaintiff for the sum of $20,000, for which sum a judgment was rendered. From this judgment the defendant has appealed.

It is contended the evidence will not support a finding of negligence on the part of the railroad company; that the proximate cause of plaintiff's injuries was not the negligence of the defendant; that plaintiff's injuries were due to his own contributory negligence; that he assumed the risk of his employment; that the court erred in refusing certain instructions which were offered by the defendant; that the plaintiff is barred from recovering damages because his employment with the railroad company was obtained by means of fraud, in violation of the provisions of the Federal Employers' Liability Act (45 USCA §§ 51–59).

The evidence sustains the implied findings of negligence on the part of the defendant and its agents in supplying a freight car with a defective brake, and in carelessly running a string of cars from the main line upon track No. 6 so as to collide with the cars upon which the plaintiff rode which were rolling back down track No. 7. Both of these acts concurred to proximately cause the collision which resulted in the injuries sustained by the plaintiff. On account of the defective brake, the five cars which were run up along track seven, rolled back to the switch, in spite of plaintiff's efforts to board them and set another brake. The switchman, Mooney, operated in plain view of this string of cars on track No. 7. It was his duty to hold the train on the main track, and run no more cars upon these sidings until the last cars kicked up on No. 7 were stationary. Just before mounting these runaway cars, the plaintiff had signaled him to hold the train. This signal was relayed by the head brakeman to the engineer. Under such dangerous circumstances, the train was nevertheless backed up and other cars were shoved on to track No. 6 just in time to cause the collision. These two acts of negligence combined to proximately cause the accident resulting in the plaintiff's injuries.

Section 2 of the Federal Safety Appliance Act, title 45, U. S. Code Annotations (Railroads), page 59, § 11, provides in part: "It shall be unlawful for any common carrier subject to the provisions of this chapter to haul, or permit to be hauled or used on its line any car * * * not equipped * * * with secure * * * and efficient hand brakes."

[2] It is the absolute duty of an interstate railroad company to equip and maintain efficient brakes so as to securely hold cars under ordinary circumstances. Chicago, B. & Q. Ry. Co. v. U. S., 220 U. S. 559, 570, 31 S. Ct. 612, 56 L. Ed. 582; Norfolk & W. Ry. Co. v. U. S., 177 F. 623, 101 C. C. A. 249; Didinger v. Penn. Ry. Co. (C. C. A.) 39 F.(2d) 798; Altman v. Atl. Coast Line Ry. Co. (C. C. A.) 18 F.(2d) 405.

The evidence in the present case shows that the brake on the second car which was run on to track 7 was securely set. The plaintiff testified in this regard: "I set the brake. I used my brake club to set it. I set it as tight as I could." Mr. Lodgson, the foreman, testified, "I saw him set that brake. The car was standing after he set the brake." Mr. Mooney, the switchman, said, "Qualls set the brake on that car and it stayed there." There was but a slight grade from the point where this car stood on track No. 7 southerly to the intersection with track No. 6 near the switch. There is substantial evidence to indicate that a good brake should have firmly held this string of five cars. The plaintiff testified in this regard: "I know it had defective brakes on it. * * * If it had not been a defective brake it would have held them. * * * It happened to be a defective brake and let them roll back." Mr. Lodgson, the foreman, testified in this regard: "I have been a brakeman, switchman, for about 25 years. I know how brakes operate on cars. * * * When I kicked two cars in * * * on (track number) 7, and they came to a joint with that car on 7, I expected that to stop that car; hold those cars back. * * * If that brake had been efficient, had not been a defective brake on that car, * * * (it) would have been sufficient to hold those five cars on that slight grade there." Mr. Mooney also testified, "It should have held the three cars."

[3] The question as to whether the acts of negligence complained of became the proximate cause of the injuries sustained is a problem for the determination of the jury. Milwaukee, etc., Ry. Co. v. Kellogg, 94 U. S. 469, 474; Erie Ry. Co. v. Schleenbaker (C. C. A.) 257 F. 667, 669.

Indeed, it is the established rule of the federal courts, that when the negligence consists of a failure to comply with the Safety Appliance Act, the question as to the proximate cause of injury is thereby eliminated, and no longer furnishes a defense. Spokane & I. E. Ry. Co. v. Campbell, 241 U. S. 497, 510, 36 S. Ct. 683, 689, 60 L. Ed. 1125; Philadelphia & R. Ry. Co. v. Auchenbach (C. C. A.) 16 F.(2d) 550, 551, certiorari denied 273 U. S. 761, 47 S. Ct. 476, 71 L. Ed. 878; Payne v. Connor (C. C. A.) 274 F. 497.

In the Spokane Case, above cited, it is said: "It is too plain for argument that under this legislation the violation of the safety appliance act [45 USCA § 1 et seq.] need not be the sole efficient cause, in order that an action may lie. The circuit court of appeals (133 C. C. A. 370, 217 F. 524) held that the element of proximate cause is eliminated where concurring acts of the employer and employee contribute to the injury or death of the employee. * * * Where, as in this case, plaintiff's contributory negligence and defendant's violation of a provision of the safety appliance act are concurring proximate causes, it is plain that the employers' liability act [45 USCA §§ 51–59] requires the former to be disregarded."

[4] Moreover, the question as to whether the plaintiff's act of jumping from the top of the moving freight car constituted contributory negligence on his part was also a problem for the jury to decide. Potter v. Los Angeles, etc., Ry. Co., 42 Nev. 370, 177 P. 933.

[5] It was the duty of the plaintiff to board these cars which were rolling back toward the switch, and stop them, if possible, by setting the brakes. He was attempting to perform this very duty when the collision occurred. When he saw the head car strike the cars which were rolling in upon track No. 6, and observed the head car "rear up" and "tip slightly," he thought the entire string of cars upon which he rode, would overturn. This was not an unreasonable conclusion under the circumstances. In this emergency, anticipating a wreck, he jumped from the top of the freight car to the ground and was injured. The question as to whether this act constitutes contributory negligence was for the jury to determine. If a reasonably prudent person would have been warranted in concluding that it was wise to jump from a car under similar circumstances to save himself from imminent peril, then that act would not constitute contributory negligence. The jury was fully and correctly instructed regarding this issue.

[6] Moreover, since the implied finding of the jury is to the effect that a proximate cause of the accident was the maintenance of the defective brake, the defendant's violation of the Safety Appliance Act became a bar to the defense of contributory negligence, unless the negligence of the plaintiff was the sole cause of the injuries which he received.

The Federal Employers' Liability Act, chapter 149, section 3, 35 Stats., page 66, U. S. Code Ann., title 45, § 53, page 379, provides in part: "No such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

In the case of Potter v. Los Angeles, etc., Ry. Co., 42 Nev. 370, 177 P. 933, it was held that a brakeman who was injured in jumping from a moving freight car in the process of switching, to escape imminent danger proximately caused from losing control of the train on account of a defective coupling device, was not barred from recovering damages, provided he was reasonably warranted in apprehending imminent danger.

When the injuries of the employee are sustained as a result of failure to equip the cars with efficient hand brakes, contributory negligence is not a bar to the recovery of damages unless the employee's negligence is the sole cause of his injuries. Marcone v. New York Central Ry. Co., 105 N. J. Law, 466, 144 A. 635, affirmed 281 U. S. 345, 50 S. Ct. 294, 74 L. Ed. 892.

[7] The question as to whether the plaintiff's negligence was the sole cause of the injuries which he sustained as a result of jumping from the car is for the jury to determine. Missouri Pac. Ry. Co. v. Jones (Tex. Com. App.) 24 S.W.(2d) 32; Lusk v. Osborn, 127 Ark. 170, 191 S. W. 944. This question was resolved against the defendant.

[8, 9] It may not reasonably be said the plaintiff assumed the risk of such unwarranted negligence as running a string of cars into a siding just in time to collide with other cars visibly rolling out upon the switch at that very time. Nor does an employee assume the risk of a collision which occurs as the result of violating an act requiring all cars to be supplied with efficient brakes.

The Federal Employers' Liability Act, chapter 149, section 4, 35 Stats., page 66, U. S. Code Ann., title 45, § 54, page 434, provides: "In any action brought against any common carrier * * * to recover damages for injuries * * * such employee shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

In the case of Union Pac. Ry. Co. v. Huxoll, 245 U. S. 535, 38 S. Ct. 187, 62 L. Ed. 455, it is held that the doctrine of an employee's assumption of risk is not a defense to an action for damages resulting from a failure to keep a power brake in efficient working condition.

It is uniformly held by a multitude of authorities that a servant assumes all the normal risks incident to his employment which are known to him, or which, in the exercise of ordinary care on the part of a person of reasonable prudence and intelligence, should be ascertained. U. S. Code Ann., title 45, note 24, p. 448. The doctrine of the assumption of risk on the part of a brakeman does not apply when a switchman negligently runs a string of cars on to a siding so as to collide with another string of cars, which in the exercise of ordinary care, he should have seen rolling down toward the switch. The brakeman is not presumed to anticipate such reckless conduct. Reed v. Director Gen. of Railroads, 258 U. S. 92, 42 S. Ct. 191, 66 L. Ed. 480.

[10] The appellant contends that the plaintiff is barred from recovering damages in this action because he procured his employment by means of fraud and misrepresentation.

In applying for his position with the defendant, the plaintiff signed an application in which he made the statement that during three years prior thereto he had been working on his brother's farm. At the trial he admitted this was not true and that he was employed on his brother's farm only one year. When asked why he had made this misstatement of facts, he said that if it were known that an applicant for a position with a railroad company had been out on a strike, he might not get a job. The plaintiff had worked as a brakeman for other railroad companies for some twelve years. The inference is that he may have previously gone out on a strike with the employees of some other company. There is no evidence that this is true. But even though it were true, it would not impair his ability to work as a brakeman, or his loyalty to the company with which he was employed. It does not even appear that the defendant railroad company had a rule against employing railroad hands who had formerly participated in a strike, or that knowledge on its part of his having done so, would make any difference regarding his employment.

We are of the opinion the misrepresentation regarding his former employment was upon an immaterial matter, and that it therefore does not bar his right of recovery.

[11] Moreover, the defendant pleaded no bar to recovery in the present action on the ground of misrepresentation and fraud. The effect of obtaining employment by means of fraud would render a contract of employment void. It is a cardinal rule of law that one who relies upon fraud as an affirmative cause of action, or as a defense, must ordinarily allege and prove the facts constituting such fraud.

The appellant relies upon the case of Minneapolis, St. Paul & S. M. Ry. Co. v. Rock, 279 U. S. 410, 49 S. Ct. 363, 73 L. Ed. 766. In that case the plaintiff was physically disqualified from passing the necessary examination to entitle him to employment with the railroad company. He had been previously examined and rejected by the same company. He then sent another man, who impersonated Rock and represented himself to be the plaintiff in whose name he successfully passed the physical examination and was accepted as an employee. Armed with this card of employment, the plaintiff Rock presented himself and worked for the company for some time until he was injured in an accident. It was there properly held the plaintiff had never himself passed the physical examination required of applicants, and that he was not the individual who was actually employed. For this reason it was held his fraud barred him from recovering damages.

This case may be reasonably distinguished from the case at bar. In the Rock Case the plaintiff was never really employed by the company. In the present case the plaintiff was employed. At most he merely exaggerated the length of time he was actually employed on his brother's farm. There is no evidence in the record indicating that this misstatement was material, or that a rule existed which would have prevented his employment even if he had admitted that he had once participated in a railroad strike while he was employed with some other company. Moreover, the defendant waived its defense on the ground of fraudulent employment by failing to plead the facts.

[12] The appellant charges error in the refusal of the court to give a portion of its instruction No. 26. The portion which was given reads as follows: "You are instructed that you may not speculate as to whether the defendant was negligent with respect to any matters shown in connection with the alleged injury, but such negligence, if any, must be established by the plaintiff by a preponderance of the evidence." Following the preceding language there was a paragraph elaborating or applying the principle which is there declared to the facts of the present case, which was omitted in the court's charge. The refusal to give this explanatory clause is charged as error. It read: "And if the evidence leaves the real cause of the injury to the plaintiff, Harry H. Qualls, as a matter of conjecture or doubt, then your verdict must be for the defendant." The last-mentioned paragraph might properly have been given in the charge. The omission, however, does not constitute prejudicial error. The same principle is contained in both portions of the instruction. The first part informs the jury they may not base a verdict upon speculation as to existing facts, but the negligence of the defendant must be established by a preponderance of evidence. The omitted part merely reinforces the same idea by saying in the event the evidence leaves the question of negligence in doubt or furnishes a mere conjecture as to its solution, the verdict must be rendered in favor of the defendant. The jury had been previously clearly instructed the burden was on the plaintiff to establish the negligence of the defendant by a preponderance of the evidence. There was no error in omitting the last portion of the foregoing instruction.

[13] The same observations are equally applicable to defendant's instruction No. 6, which was rejected. This instruction also reiterated the principles formerly and fully given to the jury to the effect that the burden rested on the plaintiff to establish the charge of defendant's negligence by competent evidence and that the question of negligence could not be left to mere conjecture or doubt.

There was no prejudicial error in omitting this charge.

The judgment is affirmed.

All concur.

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112 Cal. App. 219

BECKER v. HIGHBOY COASTER TRUST et al. (two cases).

Civ. 7582.

District Court of Appeal, Second District, Division 2, California.

Feb. 26, 1931.

1. Assignments 🔑90.

Assignee can acquire no greater or better title than that of assignor.

2. Quieting title 🔑16.

Assignees of right to certain shares in common-law trust could not maintain action to quiet title against trustees holding legal title.

3. Quieting title 🔑17.

Suit to quiet title cannot be maintained against holder of legal title.

Appeal from Superior Court, Los Angeles County; C. P. Vicini, Judge.

Separate actions by F. W. Becker and by Lena Becker against the Highboy Coaster Trust and others. Judgment for plaintiffs, and defendants appeal.

Reversed.

Howard F. Shepherd, of Los Angeles, for appellants.

Samuel J. Crawford, of Santa Monica, for respondent.

CRAIG, J.

Two actions were brought in the superior court of Los Angeles county, praying that the plaintiffs' title to certain shares in a common-law trust be quieted as against the trustees thereof; judgments were rendered in favor of the plaintiffs, and the defendants appealed.

A common-law trust, designating F. L. Stineman, Charles Paige, L. H. Hendricks, F. W. Kasl, and S. F. Woody, as trustees, was created for the purposes of financing, constructing, and operating an amusement enterprise, to be capitalized at $100,000, represented by certificates of shares of the value of $100 each. Said trustees Paige and Stineman were also named among the beneficiaries, and recorded in the declaration of trust as the owners of 150 shares and 250 shares, respectively, subject to conditions and covenants of the parties hereinafter mentioned. Stineman transferred to the trust a leasehold interest in the premises upon which the structure was to be erected, together with his interest in a contract with Paige wherein the later agreed to construct and deliver to Stineman "fully equipped and ready for operation, with all bills checked and approved, and free from all liens, incumbrances and liabilities, except as shown by said approved bills," the structure in question, and that for the performance of said contract Stineman would pay all bills for material and labor, and would transfer to Paige a 3/20 interest in the business trust heretofore mentioned. It was also agreed in the contract between these two parties that, if the cost of construction should exceed the sum of $40,000, the difference should be paid by Paige, said 3/20 interest was expressly pledged as security for any such excess, to "be sold if necessary and so much of the sale price as is necessary shall be applied to the performance of this agreement." By the terms of the declaration of trust it was provided that "the title to every several item of the property constituting the trust estate shall have no legal or equitable right, title or interest in or to any several item thereof. The right of the beneficiaries shall relate only to the distributable proceeds of the trust"; and, further, that "the interests represented by the certificates may be transferred on the books of the trustees by the person named therein or his legal representative, upon the surrender of the certificate, and a new certificate shall be issued to the transferee, who shall then become a beneficiary." Each such certificate was made "subject to provisions of the declaration of trust" deposited in escrow with a named bank, and "transferable only subject to the provisions of said declaration of trust, hereby referred to and made a part of this certificate." Pursuant to a recital in writing of the foregoing facts and a petition that a certain number of shares be issued to Stineman, Paige, and other trustees and beneficiaries, certificates were issued by permission of the corporation commissioner and by his direction were placed in escrow under instructions which expressly stated that the same were issued, and should be held, by the bank, as escrow holder, subject to the commissioner's order. It is conceded that certificates representing such issued shares are still in escrow, as well as in trust. It appears that, following the commencement of construction work, a dispute arose as to the right of either Stineman or Paige to their shares, on account of certain asserted irregularities; that thereafter, acting upon information that Becker, respondent herein, contemplated the purchase of the shares of these two directors, certain other trustees informed Becker of the facts and of their contention that the consideration therefor had failed, that the purported beneficial interests of Stineman and Paige were void, and that the trustees would contest any claim of either, or of their assignees, to such interests. Subsequently, however, Stineman and Paige each executed a "transfer of certificates on the declaration of trust," "subject to the terms and conditions of escrow * * * under which said certificates are held" to the Beckers, and the same were accepted by them "subject to all the terms and conditions of the said escrow." At a still later date the trustees declared these certificates to be voided and canceled, and passed a resolution to that effect, copies of which resolution were forwarded to the escrow holder, to the corporation commissioner, and to Stineman, Paige, and Becker. As grounds for such action it was recited that the two assignors had "not assisted in the promotion of the enterprise represented by this trust in the good faith with which they agreed to aid in this matter, but on the contrary wrongfully used and diverted in violation of their trust property to the value of many thousands of dollars; and * * * the consideration for the agreement to issue said stock and the issuance of the same was that the said Stineman and Paige would carry out certain agreements and would devote their best efforts to the welfare of this trust * * * all of which they have failed to do." From the foregoing it is apparent that the subject-matter of the attempted assignments, if any existed, was legally in possession of the trust estate, which in turn placed it in trust with an escrow holder, to be delivered to the purchasers under certain conditions specified by the commissioner of corporations, when earned, and which conditions the trustees contended had not been performed. It is insisted by respondents that the diverted moneys of the trust were refunded and that this constituted a sufficient compliance with all conditions precedent to the transfer and delivery of the disputed interests; and, by agreement in writing which was introduced in evidence, the trustees agreed to transfer to Stineman certificates of the value of $1,500 in consideration of such refund. However, appellants do not concede that all of the conditions were performed. In fact said agreement expressly states that its execution does not preclude the trustees from asserting any claim or claims that they may believe they have against Stineman and Paige, or either of them, and that in the event of such claims the latter shall receive proportionate credits for the amount so refunded.

[1, 2] Thus there is presented a grave doubt as to respondents' right to an equitable interest in said shares, the legal title to which is unquestionably in the trustees, under escrow conditions which may never be fulfilled. It is too elementary to require the citation of authority that an assignee can acquire no greater or better title than that of his assignor. It is equally certain that the record before us entitles neither Stineman nor Paige to assert the right to possession or ownership of the beneficial interests in question. Yet their assignees appearing in equity attempt not to remove a cloud upon or quiet their title thereto, but to contest the legal title upon a mere claim of equitable title which is disputed, and thereby to acquire possession. Harrigan v. Mowry, 84 Cal. 456, 22 P. 658, 660, 24 P. 48, presented a similar suit by one whose equitable title was unchallenged. It was there said of the plaintiff in the opinion of the court in bank:

> "Her object was not to declare the title as it really was, which is the effect of a successful action to quiet title; her purpose was to change the title, and vest in herself the legal title that was outstanding in her trustee. This could not be done by an action to quiet title. The proper action would have been one to close up the trust, or to show that it had been closed, and to compel a conveyance of the legal title. It can make no difference that the reasons of the defendant for withholding a conveyance were insufficient or even unreasonable, as claimed. The court below could not, nor can we, declare that she has no title because she should, in justice, have conveyed it to the plaintiff."

Observations of the Supreme Court in a previous department decision of the same case are here appropriate:

> "The finding that the plaintiff was owner of the lots is not justified by the evidence. Conceding that plaintiff was in possession, and that possession is prima facie evidence of ownership, yet such prima facie evidence was rebutted and entirely overcome by the trust-deed, and other evidence introduced by the plaintiff showing that defendant and Haskell held the legal title. * * *
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> "For the same reasons the finding that the 'defendant has not any estate, right, title, or interest whatever in said land or premises, or any part thereof,' is unsupported by the evidence. Nor is there any evidence that the defendant claimed any interest in the land adverse to the title of plaintiff. It appears that the defendant rightfully claimed that she and Haskell held the legal title as trustees for the plaintiff; but their legal title, as such trustees, was not adverse to the title of the plaintiff as sole beneficiary,—the only title proved in her.
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> "But conceding, without deciding, that the plaintiff was entitled to a conveyance of the legal title, and that defendant wrongfully refused to convey it, an action to quiet title under section 738 of the Code of Civil Pro-

cedure was not appropriate, nor even permissible."

[3] Assuming for present purposes only, and not deciding, that the respondents' assignors had fully complied with all precedent requirements to the issuance and delivery to them or to their assignees of certificates representing the shares which they claim, the instant proceeding would not entitle them to such relief. "In an action to quiet title, the relief sought in the case at bar could not be so obtained. This action, being to enforce a trust and compel a conveyance, proceeds on the theory that the legal title is in the defendant, whereas a suit to quiet title ordinarily proceeds upon a contrary theory, and cannot be maintained against the holder of the legal title." S. San Bernardino Co. v. San Bernardino Nat. Bank, 127 Cal. 245, 59 P. 699, 700.

Holding as above indicated, it is unnecessary to consider other questions presented.

The judgments are reversed.

We concur: WORKS, P. J.; IRA F. THOMPSON, J.

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112 Cal. App. 293

PEOPLE et al. v. NEW AMSTERDAM CASUALTY CO.

Civ. 7664.

District Court of Appeal, First District, Division 1, California.

March 2, 1931.

1. Bail 🔑77(2).

Municipal court may order bail forfeited where defendant fails to appear therein for trial (Pen. Code, §§ 1043, 1434).

2. Bail 🔑55.

Bail bond conditioned on accused's failure to perform either of conditions, "orders or process of court" in action, *held* not more onerous than statute required (Pen. Code, § 1278).

> Pen. Code, § 1278, requires an undertaking that the defendant "will appear and answer the charge * * * in whatever court it may be prosecuted, and will at all times hold himself amenable to the orders and process of the court, and if convicted, will appear for judgment and render himself in execution thereof. * * *"

Appeal from Superior Court, Los Angeles County; James H. Pope, Judge.

Action by the People of the State of California and another against the New Amsterdam Casualty Company. From the judgment, defendant appeals.

Affirmed.

Arthur T. Stollmack, of Los Angeles, for appellant.

E. J. Lickley, City Pros. Atty., and Joe W. Matherly and F. W. Fellows, Deputy City Pros. Attys., all of Los Angeles, for respondents.

DOOLING, Justice pro tem.

Appeal from a judgment against the surety on a bail bond. The bail bond was furnished in the municipal court of the city of Los Angeles in a prosecution for a misdemeanor. The defendant failed to appear for trial and the bail bond was ordered forfeited.

[1] Appellant contends that under section 1043 of the Penal Code the trial for a misdemeanor may be had in the absence of the defendant and hence the forfeiture was unwarranted. Since the taking of this appeal, however, it has been settled that Penal Code, § 1043 applies only to trials in the superior court, and that under Penal Code, § 1434, the municipal court may order the bail forfeited where a defendant fails to appear therein for trial. Pacific Indemnity Co. v. Superior Court, 102 Cal. App. 566, 569, 283 P. 345; People v. Aymar, 98 Cal. App. 1, 276 P. 595.

[2] Appellant's other point that the bond is more onerous than the requirements of section 1278 of the Penal Code is not borne out by the language of the bond. That section requires an undertaking that the defendant "will appear and answer the charge above mentioned, in whatever court it may be prosecuted, and will at all times hold himself amenable to the orders and process of the court, and if convicted, will appear for judgment and render himself in execution thereof, or if he fails to perform either of these conditions, that we will pay," etc. The bond given followed the language of the section, except that it provided "or, if the said defendant fails to perform either of the conditions, orders or process of the court in said action, that we will pay," etc. The addition of the words "orders or process of the court" added nothing to the obligation of the bond, since among the enumerated conditions of the bond are those that defendant "will at all times hold himself amenable to the orders and process of the court."

Judgment affirmed.

We concur: TYLER, P. J.; CASHIN, J.

🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Ex parte JOHANNES.*

Cr. 1614.

District Court of Appeal, First District,
Division 2, California.
March 4, 1931.

Rehearing Denied March 16, 1931. Hearing Denied by Supreme Court March 4, 1931.

1. Judgment 🔑518.

Application for habeas corpus to secure release of prisoner was collateral attack on judgments rendered in criminal action.

2. Judgment 🔑203.

Where two judgments have been entered, judgment last in point of time must be deemed true final judgment on collateral attack.

3. Judgment 🔑499.

On collateral attack on judgment in criminal case, no other evidence may be received than judgment roll (Pen. Code, § 1207).

By the terms of Pen. Code, § 1207, the indictment, a copy of the minutes of the plea or demurrer, all rulings thereon, and a copy of the judgment constitute the judgment roll.

4. Criminal law 🔑1083.

Trial court's power to amend judgment was not suspended or impeded by appeal, where amendment did not affect substantial rights of appellant.

5. Judgment 🔑470.

On collateral attack on judgment in criminal case, court must presume that amendment to judgment was regular.

6. Habeas corpus 🔑85(1).

In habeas corpus proceeding brought by one relying on amended judgment in criminal case, burden of showing first judgments were not wrong rested on respondent.

7. Habeas corpus 🔑25(1).

Habeas corpus will issue to secure release of prisoner where time has arrived when he is entitled to parole as ordered by board of state prison directors.

In the matter of the application of Gladys Johannes for a writ of habeas corpus on behalf of Jacob Johannes prayed to be directed to the Warden of San Quentin State Prison to secure release of prisoner on ground of unlawful detention.

Writ granted.

Bodkin & Lucas, of Los Angeles, for petitioner.

U. S. Webb, Atty. Gen., and Lionel Browne, Deputy Atty. Gen., for respondent.

STURTEVANT, J.

This is an application for a writ of habeas corpus. The petitioner, the wife of Jacob I. Johannes, filed a petition in which she set forth very fully the facts. The warden of the state prison at San Quentin has filed a return in which he sets forth certified copies of the judgments under which he holds Jacob I. Johannes as prisoner. He has also filed a general demurrer to the petition. On the hearing it was stipulated that the petition stands as a traverse to the return.

Jacob I. Johannes was convicted on June 22, 1928, in Los Angeles on the charge of grand theft. The indictment pleaded several counts, and he was convicted on counts 1, 2, 3, and 5, and also on another count in another action. He made a motion for a new trial, the motion was denied, and on July 5, 1928, the trial court pronounced the judgments that are set forth in the return. On July 6, 1928, the prisoner served a notice of appeal. On July 13, 1928, the prisoner, his attorney, and the district attorney appeared in open court, and the prisoner personally waived and abandoned his right of appeal, and thereafter the trial court entered an order vacating and setting aside the judgments set forth in the return, and imposed certain amended judgments. Some of the judgments pronounced July 5, 1928, ran consecutively. Those pronounced July 13, 1928, ran concurrently. By inadvertence the clerk delivered to the sheriff, and the sheriff delivered to the prison, copies of the judgments dated July 5, 1928. On September 21, 1928, the trial court made an order that commitment based on the judgment rendered July 13, 1928, be delivered to the warden at San Quentin. Thereafter such papers were prepared and delivered, but the record does not show on what date. As to the judgments running consecutively, the board of state prison directors has fixed the term at seven years, and, as to those running concurrently, it has fixed the term at five years and one year on the concurrent judgments, and it has ordered that the prisoner be discharged on parol when he shall have served one-half of his term. No question of good conduct is presented by the pleadings or otherwise.

[1-3] As this is an application for a writ of habeas corpus, it is a collateral attack on the judgments rendered in the criminal action. 13 Cal. Jur. 240; 29 C. J. 51. If two judgments have been entered in a cause, and the record—the judgment roll—is silent with reference to the reason therefor, in a collateral attack the judgment last in point of time must be deemed the true and final judgment in the case. Galvin v. Palmer, 134 Cal. 426, 66 P. 572. In a criminal action the judgment

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*Superseded by opinion of Supreme Court 1 P.2d 984.

roll is defined by section 1207 of the Penal Code. By the terms of that section the indictment, a copy of the minutes of the plea or demurrer, all rulings thereon, and a copy of the judgment constitute the judgment roll. On a collateral attack, no other evidence may be received. 15 Cal. Jur. 50. We will confine our attention to those documents which are part of the judgment roll. To the return of the warden are attached the first judgments which show some of the judgments to run consecutively. The warden's return is supplemented by a stipulated exhibit containing documents marked "amended commitments" which show all sentences to run concurrently. The commitments attached to the original return were certified by the county clerk on July 5, 1928, and those contained in the exhibit were certified by the county clerk on September 21, 1928. The prison therefore holds two sets of judgments, under which it holds the prisoner.

[4-6] Under the order of the board of prison directors, as to the judgments providing that some of them will run consecutively, the term has been fixed at seven years, and the prisoner will be entitled to be paroled when the term has been one-half served; that is, January 5, 1932. Under the amended judgments, if valid, the term has been fixed at five years, and the prisoner was entitled to be paroled January 5, 1931. These facts are not controverted by the respondent, but he contends that the amended judgments are not valid. In this connection he makes the point that, when on July 6, 1928, the prisoner filed a notice of appeal, the trial court lost jurisdiction and had no power to enter the amended judgments. He cites several authorities. We need not pause to discuss each one, because of what is said in Lauchere v. Lambert (Cal. Sup.) 291 P. 412. At page 414 the court said: "The rule in this regard was stated by this court in the case of Fay v. Stubenrauch, 141 Cal. 573, 75 P. 174, as follows: 'Nor is the right of the lower court to amend suspended or impeded by an appeal where an amendment does not affect any substantial rights of the appellant, and consists of the correction of a clerical mistake appearing upon the face of the record. It is true that the court by the appeal loses jurisdiction of the cause for the purpose of the appeal, but it does not lose jurisdiction of its records. * * * Black on Judgments, § 162; Freeman on Judgments, § 73; People v. Murback, 64 Cal. 372, 30 P. 608.' The exercise of this power on the part of the trial court has been frequently upheld by this and by the appellate tribunals ever since the decision of the early case of Wiggin v. Superior Court, 68 Cal. 398, 9 P. 646, and down to the decision by this court of the case of Robson v. Superior Court, 171 Cal. 588, 154 P. 8—citing cases. From what has been said above it is clear the amended judgment did not prejudice any right of the prisoner; therefore his case is squarely within the rule stated. Again, the point is made that the amended commitments are in fact new commitments and not amendments. The record does not show such to be the fact. When the fact does not so appear, in a collateral attack, we are bound to presume that the amendment was regular. Lauchere v. Lambert, supra. The burden of showing that the first judgments were not wrong rests on the respondents. Ex parte Williams, 89 Cal. 421, 425, 26 P. 887; Matter of Long, 30 Cal. App. 442, 447–448, 158 P. 1056.

[7] If the amended commitments are valid, the time has arrived when the prisoner is entitled to be released on parole, as ordered by the board of state prison directors. Therefore the writ is granted, and the prisoner is discharged on parole as so ordered by the said board.

We concur: NOURSE, P. J.; SPENCE, J.

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112 Cal. App. 187

KNAPP v. B. NICOLL & CO. et al.

Civ. 6163.

District Court of Appeal, Second District, Division 2, California.

Feb. 25, 1931.

Rehearing Denied March 27, 1931. Hearing Denied by Supreme Court April 23, 1931.

1. **Dismissal and nonsuit** ⚷80.

After plaintiff is nonsuited, cross-complainant is entitled to determination of issues raised by cross-complaint and reply thereto.

2. **Interpleader** ⚷24.

In interpleader action, answer is in nature of cross-complaint.

3. **Interpleader** ⚷30.

In action to recover fund in which rival claimants were joined as defendants and amount deposited in court under stipulation, court, after granting motion for nonsuit, could enter judgment on defendants' cross-complaint and affirmative answer.

4. **Interpleader** ⚷12.

Where all parties come in and without objections litigate their claims to fund, all consent to remedy and to payment into court.

5. **Garnishment** ⚷223.

Judgment for persons claiming fund under garnishment *held* supported by finding that person depositing fund in court was indebted to claimants' judgment debtor.

6. Pleading ⚷236(3).

Refusal to permit trial amendment to pleadings *held* not abuse of discretion, where no good reason was shown for delay.

7. Pleading ⚷244.

Amendment of complaint to allege that plaintiff acquired contract right by assignment was unnecessary and therefore properly denied, where original complaint alleged generally that defendants had become indebted to plaintiff.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by M. C. Knapp against B. Nicoll & Co., and others, in which certain defendants filed a cross-complaint and affirmative defense. From a judgment nonsuiting plaintiff and granting recovery on the cross-complaint and affirmative defense, plaintiff appeals.

Affirmed.

D. A. Knapp, of Los Angeles, for appellant.

Sherman & Sherman, of Los Angeles, for respondent Epperson.

Raphael Dechter, of Los Angeles, for respondent Guaranty Liquidation Co.

IRA F. THOMPSON, J.

It seems proper to direct attention at the outset to the incorrectness of the title of this appeal in order that our opinion may not be misread and misapplied. The plaintiff commenced an action against the defendants named in the caption, alleging that the corporate defendant B. Nicoll & Co. had become indebted to her in the sum of $1,338.80 for general hauling, which sum it had not paid either in whole or in part, that the other defendants, without right, claimed some interest in the account, and prayed judgment accordingly. The defendant corporation, B. Nicoll & Co., answered, admitting that it became indebted to Western States Transport Company in the sum of $1,282.43, and alleging that a controversy had arisen concerning the one to whom payment of that amount should be made; that it was not interested in that question; and that all of the parties had stipulated that the fund might be deposited in court and the answering defendant dismissed from the action. The stipulation was filed and the money deposited pending the outcome of the action. The defendant Epperson answered denying that the defendant B. Nicoll & Co. had become indebted to plaintiff and alleging that said claimed sum was the property of the Western States Transport Company; that he had recovered a judgment against the Western States Transport Company in the sum of $1,379.76 including costs; and that prior to the rendition of the judgment all moneys in the hands of B. Nicoll & Co. and due the Western States Transport Company had been garnished by him. The defendant Epperson also filed a cross-complaint in which he set up the same claim to the fund arising by reason of the garnishment and judgment and also alleging that, if the account was assigned to plaintiff by the Western States Transport Company, it was without consideration and was made for the purpose of defrauding creditors and in particular of defeating cross-complainant's judgment lien. The defendant Guaranty Liquidation Company also filed an answer substantially the same as that of defendant Epperson and setting up a garnishment of the fund and a judgment in the sum of $689.77, and by way of an affirmative defense again set forth its claim to the money, alleging that the assignment to plaintiff, if one, was made, was an attempt to hinder, delay, and defraud creditors, and asked that its judgment be satisfied out of the fund.

Prior to the introduction of any testimony, it was stipulated by all the parties that the cross-complainant had levied a garnishment upon B. Nicoll & Co. for all moneys due the Western States Transport Company on February 9, 1928, and that thereafter and on February 20, 1928, in the identical action, had recovered a judgment against Western States Transport Company in the sum of $1,379.76, no part of which had been paid. It was likewise stipulated that the Guaranty Liquidation Company had garnished all moneys due or owing from B. Nicoll & Co. to the Western States Transport Company on February 10, 1928, in an action which had subsequently gone to judgment in the sum of $689.77. The bill of exceptions shows that plaintiff attempted to introduce some evidence, the materiality of which the trial court could not see (nor can we), and then asked leave to amend her complaint alleging an assignment of a contract between the Western States Transport Company and B. Nicoll & Co. to the plaintiff on November 1, 1927, which request the court below denied. Thereupon the defendants moved for a nonsuit, which was granted, and also asked for judgment upon the cross-complaint of cross-complainant Epperson and the affirmative defense of defendant Guaranty Liquidation Company, which was also granted, the court apportioning the fund to these two upon their judgments. The appeal is from the judgment so rendered.

[1-4] It is the contention of appellant that the court was without right to enter a judgment in favor of cross-complainant Epperson and defendant Guaranty Liquidation Company after motion for nonsuit as to plaintiff's complaint was granted. She bases her assertion in this particular upon the authority of

City and County of San Francisco v. Brown, 153 Cal. 644, 96 P. 281, 282. That case was one in ejectment, to the complaint in which the defendants responded by an answer alleging "the statute of limitations and adverse possession for the requisite statutory period." After plaintiff rested its case, the defendants moved for a nonsuit, which was granted. Some time thereafter, the clerk, without any instructions from the judge, entered a judgment, pursuant to the instruction of defendant's counsel, decreeing the defendant Brown to be the owner and entitled to possession of the property. The Supreme Court said: "* * * [I]t is apparent that the judgment which was entered was not the judgment rendered by the court. The judgment, as rendered, was one of nonsuit only, the effect of which was simply to declare that the plaintiff had failed to make proof of material allegations necessary to sustain his cause of action. It decided nothing on the merits of the controversy, and necessarily could not, as its effect was to virtually put the plaintiff out of court. It operated simply as a dismissal of the case. Wood v. Ramond, 42 Cal. 643." Here, however, we are confronted with an entirely different situation. Epperson had filed a cross-complaint in reply to which an answer had been filed by the plaintiff. Cross-complainant was clearly entitled to have the issues thus raised tried and determined. Warner v. Darrow, 91 Cal. 309, 27 P. 737. All of the parties had stipulated, on account of the allegations of the various pleadings concerning the claims of plaintiff and defendants to a particular fund, that the amount of $1,282.43 should be deposited with the clerk pending the outcome of the action. Claim was also made to the fund by the affirmative defense of the respondent Guaranty Liquidation Company. The stipulation also dismissed the defendant B. Nicoll & Co. from the action. After the filing of this stipulation, the action took on the complexion of one in interpleader. 14 Cal. Jur. 701. In actions of this character, the answer is "in the nature of a cross complaint, and should be served upon each defendant, who may answer the same." S. F. Savings Union v. Long, 123 Cal. 107, 55 P. 708, 709. See, also, interlocking Stone Co. v. Scribner, 19 Cal. App. 344, 126 P. 178. It should be borne in mind that plaintiff haled the respondents into court by an allegation that they claimed some interest in the account which claims she denied. She had no other reason for making them parties defendant. Under these circumstances the reasoning of the following language in S. F. Savings Union v. Long, supra, is pertinent: "But when, as here, all parties come in, and, without objection, make up their pleadings and litigate their claims, we feel warranted in holding that all consent to the remedy sought, and to the payment into court and consequent dismissal as to plaintiff." This further feature of the case should be noted. The court was, under the special circumstances of this case, bound to try and determine the issues tendered by the cross-complaint of the respondent Epperson and the affirmative answer, which was but a cross-complaint, of the respondent Guaranty Liquidation Company.

[5] The record comes to us by means of a bill of exceptions, and it is stipulated that it is not intended by the specifications of error to assign the insufficiency of the evidence to support the judgment, and therefore we need not concern ourselves with that question somewhat argued in appellant's brief. With one exception hereafter to be mentioned the assignments of error relate to the sufficiency of the findings to support the judgment. Under this heading, in addition to the problem we have already solved, we read this specification: "That no issue was raised by the complaint as to any right or interest of the Western States Transport Company in the $1,282.43; that the sole issue raised by the complaint was in the right of the plaintiff to said money or to defendants by reason of a dispute as to plaintiff's therefor as an original contractor, and that the court had no right under said pleadings to render any judgment out of the independent contract of the Western States Transport Co." In so far as plaintiff is concerned, regardless of whether the Western States Transport Company might complain (that is hardly conceivable, inasmuch as that company was the judgment debtor), it would seem that the stipulation into which all the parties entered providing for the money to be held by the court pending the outcome of the action, would conclude the argument. But, whether it does, it is patent that appellant's argument directed to her specification cannot be sustained. The quoted assignment is a subhead under the general one that the findings do not support the judgment. A portion of the findings responsive to the pleadings is to the effect that B. Nicoll & Co. became indebted to the Western Transport Company and that the respondents had obtained judgment liens thereon. Therefore the findings support the judgment.

[6, 7] The exception we said would be mentioned is that the court erred in refusing to permit plaintiff after the trial had commenced, to amend her complaint to allege, instead of a direct indebtedness to M. C. Knapp by the defendant B. Nicoll & Co., an assignment by the Western States Transport Company of its right and interest in a contract then existing between B. Nicoll & Co. to the plaintiff. The court denied her leave to amend. It appears from the record that there were two Western States Transport Companies, one tagged "of California" and the

other "of Nevada." The further assertion is made that plaintiff was the wife of the attorney for plaintiff and that counsel was also an officer of and counsel for the Western States Transport Company. Whether these things were mentioned at the time leave was asked to amend does not appear in the record. Likewise the bill of exceptions is void of any excuse offered by plaintiff to explain her delay in asking such an amendment. The facts we have recited are set forth only as indicating what may possibly have been before the trial judge which caused him to exercise his judicial discretion in the manner he did. We cannot say, in the absence of a good reason why the application was not earlier made, that the court abused its discretion. This further fact, however, establishes beyond question that the court did not err. The proposed amendment sought to allege, not an assignment of an account, but an assignment to the plaintiff of a contract on November 1, 1927. Had an executory contract been assigned to her on that date, the indebtedness thereunder and accruing thereafter would have been to her, which was the ultimate fact alleged in her complaint in these words: "That the said defendant B. Nicoll & Co. since November 1st, 1927, and until February 13, 1928, has become indebted to plaintiff in the sum of $1,338.80, for general hauling." The proposed amendment added nothing to the complaint as originally drafted.

Judgment affirmed.

We concur: WORKS, P. J.; CRAIG, J.

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112 Cal. App. 218

Ex Parte GOUGH.

Cr. 1621.

District Court of Appeal, First District,
Division 1, California.
Feb. 26, 1931.

Constitutional law 🔑250.

Criminal law 🔑1206(1).

Under statute conferring discretion on prison directors, 10-year term for grand larceny *held* not unconstitutionally arbitrary or discriminatory (Pen. Code, § 1168; Const. U. S. Amend. 14; Const. Cal. art. 1, § 11).

Petition by James W. Gough for a writ of habeas corpus against the Warden of San Quentin State Prison.

Petition denied.

Thomas T. Califro, of San Francisco, for petitioner.

PER CURIAM.

Petition for writ of habeas corpus. Petitioner claims that he is unlawfully detained of his liberty at San Quentin State Prison. It appears from the petition that petitioner is held by virtue of a commitment issued out of the superior court in and for the county of Alameda pursuant to a judgment rendered upon a plea of "guilty" to a charge of grand larceny. The board of prison directors determined that the term to be served by petitioner is ten years. It is claimed that the act of the board in fixing said sentence to ten years was arbitrary, discriminatory, and in abuse of the authority and discretion vested in it, for the reason that others convicted of a like offense have been determined to suffer imprisonment for a much less time than that imposed on petitioner, for which reason the act of said board contravenes the Fourteenth Amendment of the United States Constitution and likewise contravenes the provisions of article 1, section 11 of the Constitution of the state of California. There is no merit in the contention. Section 1168 of the Penal Code gives to the state board of prison directors a discretion in fixing the term of punishment of persons convicted of crimes, taking into consideration the character of the prisoner.

The application is denied.

McCLORY v. DODGE et al.★

Civ. 4243.

District Court of Appeal, Third District,
California.
Feb. 26, 1931.

1. Fraud 🔑58(1).

In action for value of corporate stock, alleged to have been obtained by misrepresentation that stock of other corporation would be delivered to plaintiff, finding that defendants were stockholders and directors of other corporation at all times covered by complaint *held* unsupported.

2. Fraud 🔑58(4).

Finding that defendants published prospectus containing fraudulent statements inducing plaintiff to turn over corporate stock *held* unsupported.

3. Evidence 🔑97.

In action to recover value of corporate stock, burden was on plaintiff to prove value of stock.

🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

★Rehearing granted 4 P.(2d) 223

4. Appeal and error ⚷1010(1).

Findings not being sustained by evidence, judgment must be reversed.

Appeal from Superior Court, Los Angeles County; Hugh J. Crawford, Judge.

Action by N. E. McClory against Jonathan S. Dodge, Hyman Harrison, James M. Welch, Harry H. Hunter, Frank S. Griffis, and others. Judgment for plaintiff, and the named defendants appeal.

Reversed.

H. L. Carnahan, Harry Povey, Person & Rodgers, Edmund H. Hinshaw, Howard R. Hinshaw, and Raymond Tremaine, all of Los Angeles, for appellants.

Joseph S. Campbell, of San Diego, for respondent.

JAMISON, Justice pro tem.

Respondent brought this action to recover the value of certain shares of stock which he claims had been secured from him by fraud. Judgment was rendered in his favor against all of the defendants and from this judgment Dodge, Harrison, Welch, Hunter, and Griffis have appealed.

All of the defendants, except Boyd, were stockholders and directors of a corporation known as the Federal Securities Corporation, Hool being its president. How much of the capital stock of this corporation had been issued and to whom it was issued is not shown, except that Welch was the owner of one share.

Commencing in June, 1923, and continuing from time to time until April, 1924, respondent had purchased through Boyd and other agents of the Federal Securities Corporation 13,000 shares of the preferred capital stock of the Union Mortgage Company of California, for which he had paid $13,000. About the 1st of May, 1924, under an appointment made by Hool, respondent met Boyd, who was then a salesman of the Federal Securities Corporation. At this meeting, according to respondent, Boyd made a proposition to him to give him a certain number of shares of the preferred and common stock of the Federal Securities Corporation, the number not being stated, for the 13,000 shares of the Union Mortgage Company owned by respondent, informing him that the stock of the Federal Securities Corporation would be delivered to him as soon as a permit for its issuance could be secured from the corporation commissioner, for which an application had been made, and that this permit would be issued in a short time.

Respondent claims that he was induced to accept Boyd's proposition and to deliver to him the 13,000 shares of stock of the Union Mortgage Company by reason of certain representations made to him by Boyd.

Appellants insist that the findings of the court are not sustained by the evidence.

We have examined the evidence and find that in many instances this is true.

[1] The finding of the court that at all times mentioned in the complaint the defendants were stockholders and directors of the Federal Securities Corporation is not only not supported by the evidence, but is contrary to it. The allegations of the complaint cover a period of time and of alleged transactions between respondent and the Federal Securities Corporation beginning in June, 1923, and continuing to October, 1924, whereas the undisputed evidence is that Welch became a stockholder and director of the Federal Securities Corporation about May 1, 1924, and Dodge and Harrison about May 9, 1924, there being no evidence as to the time Hunter became a director or stockholder.

The finding that during all the times mentioned in the complaint, each and all of the defendants, except Boyd, had agreed among themselves, had confederated and were in agreement together, and had formed and were carrying out the deliberate design and purpose of selling various persons, including respondent, the capital stock of the Federal Securities Corporation for their profit is not sustained by the evidence.

[2] The finding that defendants caused to be printed and published and delivered to the public, including respondent, a certain prospectus, called the Federal Investment Guide, by means of which defendants made to respondent fraudulent and misleading statements, namely, "that if he invested in the Federal Securities Corporation his principal would be safe with absolutely no chance of loss; that the directors of said corporation were noted for their ability and integrity; that the assets of said corporation were liquid and convertible into cash on short notice; that money could be borrowed on said assets in case of emergency; that the business was a profitable one; that the investment therein would earn more than ten per cent per year; that he would not be required to pay a fictitious price for his stock, and that the Federal Securities Corporation complied with each and every one of the foregoing statements," is not sustained by evidence.

It appears from the evidence that the Federal Securities Corporation was the fiscal agent of the Union Mortgage Company, engaged in negotiating the sale of and selling shares of the capital stock of that company; that prior to June, 1923, it had caused to be printed and circulated a pamphlet known as the Federal Investment Guide, among prospective purchasers of the stock of the Union

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Mortgage Company. This pamphlet sets forth ten questions and answers to be considered by purchasers of stock. It was not represented therein that these questions and answers applied to the capital stock of the Federal Securities Corporation, but on the contrary, they were a generalization of those things which should be taken into consideration by a person contemplating an investment in stocks.

The findings that defendants represented to respondent that by investing in the capital stock of the Federal Securities Corporation he would be enabled to reap enormous profits, that said corporation owned assets of the value of several hundred thousand dollars, and that said stock had a value in excess of the par value of $10 per share, are not supported by evidence.

The finding of the court that defendants, at the time of the attempted sale of the Union Mortgage stock, represented to respondent that the 13,000 shares of that stock was of the full market value of $13,000 and that at the time of said sale, agreed that said stock was of the value of $13,000 is not sustained by the evidence.

[3] There is no evidence of the market value, or any value, of the 13,000 shares of preferred stock of the Union Mortgage Company, owned by respondent, at the time of its alleged sale and delivery on May 1, 1924. The burden was on the respondent to prove the value of said stock. Parke v. Frank, 75 Cal. 364, 17 P. 427; Peek v. Steinberg, 163 Cal. 127, 124 P. 834; Smith v. Calley, 103 Cal. App. 735, 284 P. 974; 8 Cal. Jur. 895.

Respondent alleged in his complaint that defendants represented to him, at the time he purchased the 13,000 shares of the Union Mortgage Company that these shares were of the full market value of $13,000; that about one year afterward he discovered that on or about the 1st of May, 1924, and also at the time of their purchase, they had an actual value of only $7,000. Each of the defendants, in their answers, denied this allegation of the complaint, except Boyd, who filed no answer, and no evidence was offered in its support.

Respondent calls attention in his brief and cites authorities in support thereof, to the effect that where the evidence shows that an individual is the owner of the corporate capital stock, or where several individuals own all of such stock and use the corporation merely as an instrumentality through which they transact business, the separate entities will be disregarded when necessary to prevent fraud and protect the rights of third parties. Clark v. Millsap, 197 Cal. 765, 242 P. 918.

However, in the case now under consideration, the initial step toward invoking this law is wanting. There was no evidence offered indicating who were the owners of the issued capital stock of the Federal Securities Corporation, except the one share of said stock which was issued to Welch.

[4] Where the findings are not sustained by the evidence, the judgment must be reversed. People's Lumber Co. v. McIntyre & Peters, 179 Cal. 780, 178 P. 954; Fidelity, etc., Co. v. Fresno Flume, etc., Co., 161 Cal. 466, 119 P. 646, 37 L. R. A. (N. S.) 322.

The judgment is reversed.

All concur.

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112 Cal. App. 53

BENNER et al. v. HOOPER.

SAME v. HOOPER et ux.

Civ. 7167.

District Court of Appeal, First District, Division 2, California.

Feb. 19, 1931.

1. Fraud ⚷58(2).

In fraud action, evidence supported finding that vendor's agent knew that house sold to purchasers stood on filled-in land over creek bed.

2. Fraud ⚷58(2).

Evidence *held* to show fraud of vendor's agent in misrepresenting to purchasers that house was not built over filled-in creek bed.

3. Fraud ⚷18.

Misrepresentation that house was not over creek bed, where purchasers would not purchase house if they knew truth, was misrepresentation of material fact.

4. Fraud ⚷4.

Law supplies fraudulent intent, where evidence shows false representation knowingly made.

5. Appeal and error ⚷931(1).

Where finding that vendor's agent intended to deceive purchasers might fairly be inferred from findings made, such inference was deemed made to support judgment for purchasers suing for fraud.

6. Appeal and error ⚷1071(1).

Where finding, if made, would have been adverse to defendants, failure to so find would not require reversal of judgment for plaintiffs.

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

7. Appeal and error ⚷1050(3).

In fraud action, admitting cumulative proof of vendor's agent's knowledge of falsity of agent's representations, even if improper, was not prejudicial.

8. Husband and wife ⚷138(9).

That wife told husband to put up sign and see if he could sell house and ratified sale made by husband established agency in fact.

9. Husband and wife ⚷138(9).

Wife would be liable for husband's alleged fraud in sale of her property, though not knowing of fraud where she executed deed to purchasers and received purchase price of property.

10. Evidence ⚷571(7).

Trier of facts can adopt or reject evidence of expert witnesses as to actual value of fraudulently represented realty and value as represented, in awarding damages for fraud.

11. Principal and agent ⚷177(1).

Agent's knowledge is imputed to principal (Civ. Code, § 2332).

12. Principal and agent ⚷171(4).

Principal is liable for agent's fraud committed in course of employment and in principal's interest, where principal retains benefits of fraudulent act.

Appeals from Superior Court of Alameda County; John J. Allen, Judge.

Actions by Joseph P. Benner and another against W. H. Hooper, and by the same plaintiffs against W. H. Hooper and Dorothy G. Hooper, his wife. From a judgment against him, W. H. Hooper appeals, and from a judgment in favor of Dorothy G. Hooper, and from the amount of the judgment rendered, plaintiffs appeal.

Judgment as to W. H. Hooper affirmed. Judgment as to Dorothy G. Hooper reversed, with directions.

Davis & Melby, of Oakland, for appellant W. H. Hooper.

H. C. Kelsey and Clare S. Johnston, both of Oakland, for respondents and appellants Joseph P. Benner and Freda H. Benner.

BURROUGHS, Justice pro tem.

Since the submission of this cause Freda H. Benner, one of the plaintiffs, has died, and Anson Bilger, as administrator of the estate of said Freda H. Benner, deceased, has been substituted as a party to this action.

W. H. Hooper, one of the defendants in this action, built a house for his wife, Dorothy G. Hooper, also a defendant in this action. The house was built on a lot purchased by Mrs. Hooper, and it was intended for her own use and occupation. The house was built on filled-in land over a creek bed. Mrs. Hooper told her husband to put up a sign and try to sell it. Mr. and Mrs. Benner, the plaintiffs, visited the place. Mr. Hooper was there and asked them if they were looking for a home and they told him yes; that the place looked nice and high and that they did not desire to buy a home over a creek. Mr. Hooper replied that he did not blame them, that he would not either. Mr. and Mrs. Benner bought the house and received a deed from Dorothy G. Hooper and W. H. Hooper. Mrs. Hooper received the purchase price. The purchase was made July 15, 1926. The house was damaged by settling and sinking.

This action was brought to recover damages sustained by reason of fraudulent misrepresentations made by defendants, which misrepresentations induced plaintiffs to purchase the property.

Judgment was for plaintiff against defendant W. H. Hooper in the sum of $2,000. The court found that Dorothy G. Hooper had not given W. H. Hooper any written authority to act as her agent and that she had no knowledge of the false representations and in accordance gave judgment that plaintiffs take nothing from defendant Dorothy G. Hooper.

Defendant W. H. Hooper appeals from the judgment against him, and plaintiffs Benner appeal from the judgment in favor of Dorothy G. Hooper and from the amount of the judgment rendered.

The findings of the court relative to fraud are as follows:

"That plaintiffs entered said property, and W. H. Hooper asked them if they were looking for a home, and plaintiff Freda H. Benner said she liked the Hooper place, and that it was on high ground and no creek there, and plaintiff, Joseph P. Benner said they did not want property over a creek like some they had looked at, to which W. H. Hooper replied that he did not blame them for not wanting to get on a creek, that he would not want to buy on a creek himself, and that he guaranteed his houses for five years; that contrary to his knowledge that said house was built on a creek bed, said W. H. Hooper intended to and did, by his aforesaid statements to plaintiffs, intend to and did represent to them that said house was not on a creek bed that had been filled in;

"That said plaintiffs, in purchasing said property, relied on said statement and representations of W. H. Hooper and were deceived by them, and believed therefrom that they were buying property that was not on a creek, and which property they would not have purchased if it had been correctly represented to them."

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Appellant Hooper, while admitting that the evidence was substantially as given in the findings, contends that there was no representation made relative to a filled-in creek bed, and defendant Hooper did not intend to represent to plaintiff that the house was not on a creek bed that had been filled in, that defendant Hooper had no knowledge of a creek bed.

As to the knowledge of defendant W. H. Hooper the evidence shows that Mr. Hooper had been a builder of houses "intermittently about twenty-eight years—actively for three years before building the Benner house."

Defendant Hooper testified that he knew that the property was filled ground on a creek bed and further stated: "I knew it was filled ground. I didn't know where the creek went through there exactly. I knew it was filled though." He further testified that he never told the Benners that it was filled ground. He also testified that before starting to build the house he made tests in different places around where the house was built and back in the lot "we made a test pit here about three and one-half feet square and went down to the sewer and stood on the sewer proper. We went down a little over sixteen feet then we made eleven other six-inch borings at different places around this house and back in the lot." the evidence shows that the test pits were of varying depths; that Hooper knew of the large sewer pipe or culvert laid in the bed of the creek under the house, that he took the trouble to dig down to it before building.

[1] In their first conversation Mr. Hooper told the Benners that "he had built numerous houses around in that vicinity." We think the evidence amply supports the finding of the court that defendant Hooper knew that the land on which the house stood was filled-in land over a creek bed.

The evidence of other witnesses is clear and positive that such was the nature of the land and no attempt is made to dispute the fact.

"The correctness of the findings of fact is to be determined upon a consideration of the entire evidence in the case, together with such inferences of fact as the trial court might properly draw therefrom. * * *" Rose v. Doe, 4 Cal. App. 680, 684, 89 P. 135, 137.

As to the fact of misrepresentation and intent to misrepresent, Mr. Benner in his cross-examination said: "My statement was we did not want to buy over a creek bed, that apparently this was a high ground; that we had looked at other houses on Cavanaugh road and they were over a creek, too, and we did not want to buy over a creek bed." "Q. And you assumed that this was not over a creek bed? A. Certainly. And Mr. Hooper said he did not blame us for not wanting to buy a house over a creek, that he would not either." Mr. Benner testified that Cavanaugh road was in that vicinity, and that Mr. Hooper said that "he had built numerous houses around in that vicinity, right across the street." "He showed us the house next door, he told us he built the house on either side."

A careful reading of the whole evidence shows that the extreme fill, even though lower here than in other parts of the tract, gave the appearance of high ground and put the Benners off their guard. It is obvious that they had assumed it to be naturally high land and not over a filled-in creek bed—the one character of land they were guarding against.

Defendant Hooper, having knowledge that this was filled-in land over a creek bed, could not fail to understand by the remarks of the Benners that they had assumed otherwise, and that his answer that "he did not blame them for not wanting to buy a house over a creek, that he would not either," would tend to confirm them in their mistake and lead them away from inquiry. By the statement made and his further silence defendant Hooper misrepresented the fact.

[2] "A purchaser has a right to rely on the representations of the vendor as to facts not within the purchaser's knowledge, and the vendor cannot escape responsibility by showing that the purchaser might have ascertained upon inquiry that the representations were untrue." Sullivan v. Helbing, 66 Cal. App. 478, 483, 226 P. 803, 805; Zwart v. Landfield, 93 Cal. App. 328, 333, 269 P. 740; 26 Cor. Jur. 1066. "* * * But a representation need not to be a direct lie in order to constitute remediable fraud; the false representation may consist in a deceptive answer, or any other indirect but misleading language. No hard and fast rule can be laid down as to what constitutes a fraudulent representation in any given case, since this depends upon the peculiar circumstances and conditions involved." See, also, 12 R. C. L., § 71: "Even though one may be under no duty to speak as to a matter, if he undertakes to do so, either voluntarily or in response to inquiries, he is bound not only to state truly what he tells, but also not to suppress or conceal any facts within his knowledge which will materially qualify those stated. If he speaks at all he must make a full and fair disclosure." Hill v. Associated Almond Growers, 90 Cal. App. 291, 265 P. 873; Ferguson v. Koch, 204 Cal. 342, 268 P. 342, 58 A. L. R. 1176; 12 Cal. Jur. 740; Sullivan v. Helbing, 66 Cal. App. 478, 483, 226 P. 803. Sections 1709, 1710, Civ. Code. Section 1710, Civil Code, reads as follows: "A deceit, within the meaning of the last section, is either: 1. The suggestion, as a fact, of that which is not true, by one who does not believe it to be true." Andrew v. Bankers & Shippers Ins. Co., 101 Cal. App. 566, et seq., 281 P. 1091. All the necessary elements of fraud are established in this case by direct evidence and the inferences necessarily following therefrom.

The representation that this house was not built over a filled-in creek bed is shown by the evidence to have been false. Knowledge of the falsity of the representation is shown by direct evidence of defendant W. H. Hooper and the inferences following his evidence.

[3] The intent to deceive was necessarily involved in the conduct of defendant Hooper. Defendant knew that plaintiffs did not want to buy land over a filled-in creek bed, and that, if they knew the truth, they would not purchase. Therefore, this was a material fact.

[4] When the evidence shows a false representation, and that the person making such representation knew it was false, the law supplies the fraudulent intent. 12 Cal. Jur., p. 826, § 75.

The misrepresentation is clearly an inducement of sale, as plaintiff had made known that he did not want to purchase that character of land.

[5, 6] We think that the finding of the court, supra, contains the essential element of intent to deceive. Such finding is inherent and necessarily inferred from the express findings and conclusions of the trial court. The inference could be made from the findings of the court; therefore, such inference will be deemed to have been made.

"Whenever from facts found other facts may be inferred which will support the judgment, such inference will be deemed to have been made." Hamberger-Polhemus Co. v. Lewin, 101 Cal. App. 704, 708, 282 P. 425, 427; Hulen v. Stuart, 191 Cal. 562, 217 P. 750.

In this case it may be fairly inferred from the facts shown by the record that, had the finding been made more specifically, such finding would have been adverse to defendant, and, therefore, the failure to find specifically that defendant did intend to deceive is not a ground for reversal of the judgment.

The findings are supported by the evidence and are sufficient to support the judgment against W. H. Hooper. Hamberger-Polhemus Co. v. Lewin, 101 Cal. App. 704, 282 P. 425; Beeman v. Richardson, 185 Cal. 280, 196 P. 774; Hulen v. Stuart, 191 Cal. 562, 217 P. 750; Krasky v. Wollpert, 134 Cal. 338, 66 P. 309. Appellant also cites the case of Hall v. Mitchell, 59 Cal. App. 743, 211 P. 853. In the case last cited both pleadings and findings were so indefinite that the appellate court was compelled to reverse the judgment and allow the pleadings to be amended. We think that a careful reading of this case supports our conclusions aforesaid.

Appellant Hooper contends that the court's finding of guaranty does not support the conclusions of law.

There is no allegation of guaranty in the complaint, and the action is not predicated upon a guaranty. The allegation of fraud is not sustained by proof of guaranty, but the evidence of fraudulent misrepresentation is strengthened by the statement: "You need not be alarmed, I guarantee my houses for five years," in answer to the plaintiff's statement: "I am a little scared of the plaster in the house." During the same conversation while they were looking over the house, plaintiff expressed fear of the plaster and defendant answered: "You need not be alarmed, I guarantee my houses for five years." This is not such a guaranty as alone could be sued upon. It is merely a statement of assurance that the house was properly built on a proper foundation on firm land. "The house must be properly built or I would not guarantee it," is the inference the court might reasonably put upon the evidence. This is not a finding of guaranty.

[7] Appellant Hooper further contends that the court erred in admitting in evidence the contract of sale of the property between the Lakeshore Highlands Company and the vendee William Hooper on the back of which contract occurs the clause: "Purchaser is also fully advised that a portion of said real property consists of filled ground and that adequate foundations should be provided for any building or buildings erected or placed on any portion of said real property."

In view of the fact that the defendant Hooper admitted and stipulated that the locus in quo was filled-in ground, and in view of defendant Hooper's testimony that he knew it was filled-in ground, and that he knew it was over a creek, the evidence of the contract was cumulative to show his knowledge.

It was not material as going to the question of defendants' good faith and the absence of cause or necessity apparent to him, or in any manner misrepresenting the situation. Since plaintiff had said that he would not buy over a creek, plaintiff had apprised the defendants of the thing necessary to be misrepresented.

It was this knowledge alone that needed suppression—the knowledge of the filled-in land over a creek bed.

There is sufficient evidence to sustain the findings and judgment as to fraud without the clause in the contract being put into evidence.

Therefore, conceding the evidence as improperly admitted, it was not prejudicial to defendant's case. It was merely cumulative proof as to his knowledge, and as such we think it was properly admitted in evidence.

[8] Plaintiffs appeal from the judgment in favor of Dorothy G. Hooper and contend that the following finding and conclusion is erroneous:

"That Dorothy G. Hooper had not given to W. H. Hooper any written authority to sell said property or to act as her agent in the sale thereof, and that she had no knowledge of any representations made by W. H. Hooper in said sale, and had not authorized the same."

"That plaintiffs take nothing from Dorothy G. Hooper."

[9] We think the evidence shows that W. H. Hooper was the agent of Dorothy G. Hooper. It is not disputed that the property was owned by Dorothy G. Hooper, and that she transferred the title to the plaintiff and received the consideration therefor. The evidence shows that she told W. H. Hooper to "Put up a sign and see if you can sell it." There is no evidence of written authority, but the fact that she told him to put up a sign and try to sell it, then ratified the sale that he made by signing the deed and receiving the money, does establish that W. H. Hooper was the agent in fact of Dorothy G. Hooper. We find no evidence that Dorothy G. Hooper knew of the false representations made by her husband, that the house was not built upon a filled-in creek bed. However, it is a well-established rule that (12 Cal. Jur. § 46, p. 775): "The principal is held liable to third parties for the frauds committed by his agent in the transaction of the business of the agency."

In Bogart v. Crosby & Van Haren, 80 Cal. 195, 22 P. 84, plaintiff brought an action to recover the sum of $300 alleged in the complaint to have been received by the defendants from the plaintiff "as the agent of said plaintiff * * *, to the use of the said plaintiff." It appears that the defendants were real estate agents and as such received from the plaintiff the sum of $300 as a payment on the purchase price of certain real estate belonging to a third party for whom they were acting as agents. The agents paid the said money to the third parties. Thereafter the plaintiff notified the owner that he did not want to complete the purchase and demanded the return of the $300; the owner, when notified, said he did not care whether plaintiff took the property or not and turned the $300 back to the defendants. The defendants refused to return the money to plaintiff, and hence the suit to recover the same. The court held that whatever cause of action existed was against the owners of the property and not their agents. Judgment was for the defendants. On appeal by plaintiff it was contended by him: "That as it appears from the evidence that the appellants were only authorized, verbally, to sell, they were not the agents of the owners of the property, and therefore he was bound to look to them individually." On this subject the court said: "But the evidence of the owners themselves shows that they verbally authorized the appellants to sell the property; that they ratified their acts by accepting the cash payment, and were willing to carry out their part of the contract. This being the case, they would be estopped to deny the agency, as against the respondent's claim for the return of the money paid by him, and actually received by them, if he was entitled to recover the same."

Comparing this case with the one at bar, it appears that Mrs. Hooper told her codefendant, W. H. Hooper, to "Put up a sign and see if you can sell it." Upon the sale being made in accordance with said authorization, the defendant Dorothy G. Hooper executed a deed to the plaintiffs and received the purchase price therefor. Other cases in point are Quarg v. Scher, 136 Cal. 406, 69 P. 96; Willey v. Clements, 146 Cal. 91, 79 P. 850; Hamilton v. French, 78 Cal. App. 289, 248 P. 281; Blair v. Guarantee Co. of Long Beach (Cal. App.) 284 P. 719; Bonnarjee v. Pike, 43 Cal. App. 502, 185 P. 479; Powell v. Oak Ridge Orchards Co., 84 Cal. App. 714, 258 P. 636; Shopbell v. Boyd, 9 Cal. App. 136, 98 P. 69.

We are of the opinion that the court was in error in finding that the plaintiff was not entitled to a judgment against Dorothy G. Hooper.

[10] The next question involved is that of damage. It is not claimed that the correct rule was not followed when the witnesses were being examined. Hines v. Brode, 168 Cal. 507, 143 P. 729. However, witnesses called and examined pursuant to the rule stated, and the case cited gave evidence as to the value of the property as represented and gave evidence as to its actual value. The evidence given by those witnesses was expert evidence. The trier of facts can adopt it or reject it. Linforth v. S. F. Gas & Elec. Co., 156 Cal. 58, 63, 103 P. 320, 19 Ann. Cas. 1230; Zimmer v. Kilborn, 165 Cal. 523, 525, 132 P. 1026, Ann. Cas. 1914D, 368. The record discloses nothing showing that the trial court abused its discretion as to the amount of damages awarded.

[11, 12] Upon the appeal of plaintiffs from the judgment in favor of Mrs. Hooper the evidence is undisputed that Mrs. Hooper owned the property, that she orally authorized and directed W. H. Hooper to sell it, that she ratified the sale, executed the deed to plaintiffs, accepted the purchase price from them, and retained the fruits of the sale. Under these circumstances the trial court's finding that Mrs. Hooper had no knowledge of misrepresentations and did not authorize them is insufficient to sustain the judgment in her favor. Upon both principle and authority an agent's knowledge is imputed to his principal (section 2332, Civ. Code; 1 Cal. Jur. 847), and the principal is charged with the fraud of his agent committed in the course of his employment and in the interest of the principal (12 Cal. Jur. 775; Powell v. Oak Ridge Co., 84 Cal. App. 714, 719, 258 P. 636). This rule is uniformly applied when the principal is shown to have accepted and retained the benefits of the agent's fraudulent act. Hamilton v. French, 78 Cal. App. 289, 291, 248 P. 281.

However, we are unable to say that, from our examination of the record, the defendant Mrs. Hooper could not on a retrial "make a substantial showing in support of her cause" (Tupman v. Haberkern, 208 Cal. 256, 270, 280 P. 970, 976), and hence the judgment as to her must be reversed, with directions to the trial court to retry the sole issue of the amount of Mrs. Hooper's liability for the damages to which the plaintiffs have been found to be entitled to recover.

Judgment as to W. H. Hooper affirmed.

Judgment as to Mrs. Dorothy Hooper reversed, with directions.

We concur: NOURSE, P. J., STURTEVANT, J.

HERNANDEZ v. SOUTHERN CALIFORNIA GAS CO. ★

Civ. 7746.

District Court of Appeal, First District, Division 2, California.

Feb. 26, 1931.

Rehearing Denied March 28, 1931. Hearing Granted by Supreme Court April 28, 1931.

1. **Gas 🔑20(2).**

Workman, burned by explosion while working in sewer, was required to introduce evidence, showing not only that defendant's gas was allowed to escape, but also that it entered and accumulated in sewer pipe (Code Civ. Proc. § 1960).

2. **Gas 🔑20(2).**

Inference that defendant gas company's gas was in sewer where explosion injuring workman occurred must be founded on fact legally proved and on such deduction from that fact as consideration of course of nature warrants (Code Civ. Proc. § 1960).

3. **Gas 🔑20(2).**

In suit against gas company for injuries from explosion, until it was shown that defendant's gas caused injury, res ipsa loquitur did not apply.

4. **Gas 🔑20(2).**

In action against gas company for injuries from explosion in sewer, evidence failed to show defendant was responsible for explosion.

> There was some evidence that there were leaks in the pipes of the gas company, but no evidence was introduced showing that any of those leaks led to the sewer in which employee was working when the explosion occurred, and there was uncontradicted evidence that escaping gas would rise and not fall, and that it could not fall below the water level down into the sewer which was lower than the top of the water.

5. **Gas 🔑20(4).**

In action for injuries received in sewer explosion, evidence of defendant's negligence *held* for jury.

Appeal from Superior Court, Los Angeles County; Marshall F. McComb, Judge.

Action by Joe Hernandez against Southern California Gas Company. Judgment for plaintiff, and defendant appeals.

Reversed.

Thos. J. Reynolds, of Los Angeles, for appellant.

George L. Greer, of Los Angeles, for respondent.

STURTEVANT, J.

Action for personal injuries. The verdict was in favor of the plaintiff, and, from the judgment entered thereon, the defendant has appealed. For some months prior to the happening of the accident the Los Angeles county sanitation district had been engaged in laying a sewer along the west side of Atlantic boulevard in the city of Los Angeles. In the immediate neighborhood of where the work was being done the ground is marshy. The water level is within six or seven feet of the surface of the ground. The sewer trench was dug, and at the same time the water was pumped out and the pipe was so laid that the bottom of it was about ten feet below the surface of the ground. The pipe was about three feet in diameter and was made in joints of reinforced concrete. North of Tweedy boulevard the sewer had been laid. Manholes had been installed, and some of them had been covered, but the joints of the pipe had not been caulked. The dirt and rock had been thrown back into the trench and the ground had been leveled up. The evidence does not show that any apertures, channels, or pipes of any kind led to, or into, the sewer from any direction except as they may have been created by or arisen out of the conditions we have noted. On the afternoon of the 22d day of February, 1927, the plaintiff took a coal oil lantern, tools, and materials, and entered the sewer to caulk the joints. He had worked about two hours and was inside of the sewer at a point approximately one hundred and fifty feet from the manhole he entered when an explosion occurred and he was seriously burned. He commenced this action to recover damages for his injuries. In his complaint he alleged that the defendant maintained gas pipes in Atlantic boulevard near the intersection of the two streets named above; that the pipes were negligently and carelessly maintained, and that gas escaped therefrom in large quantities and exploded and injured him. In its answer the defendant denied specifically the allegations of the complaint. In presenting his case the

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

★Superseded by opinion of Supreme Court 2 P.(2d) 360.

plaintiff introduced evidence showing that he entered the sewer as above stated; that an explosion occurred; that he was injured; and the nature and extent of the injuries. He also introduced evidence to the effect that one or two days after the explosion the defendant sent its employees into the neighborhood of the explosion and there made excavations and examinations and alterations. Some of the witnesses saw certain leaks. No one of those leaks was described as being closer than one hundred feet from where the plaintiff was at the time of the explosion. After the explosion had occurred no gas pipe was shown to be so broken as to allow gas to escape in large quantities. When the explosion occurred some of the witnesses stated that the flame was blue. At least one of the witnesses testified that the explosion was of such force as to shake the buildings and windows. The defendant's gas pipes contain natural gas and extend along the east side of Atlantic boulevard, and, from the main pipes, service pipes are led at right angles to the west over the sewer, or to the east to the properties of the defendant's customers. The pipes were so laid that they were from two to three feet under the surface of the ground. At the end of the plaintiff's case the defendant moved for a nonsuit. The court denied the motion, and thereupon the defendant proceeded to introduce its case. It called to the stand the employees who did the work and the employees who directed the work of making the above-mentioned excavations, alterations, and examinations of the gas pipes. Each one of those witnesses was examined and cross-examined as to what leaks, if any, were located. One leak, located about one hundred feet from where the plaintiff was working, was on the east side of the defendant's pipes and in a service pipe serving one of the customers residing on the east side of Atlantic boulevard. The witness testified that, when he located it and applied the soapsuds test, there were small bubbles, and the extent of the leak would be one or two cubic feet in ten or twelve hours. It was twenty feet east of the sewer and one hundred feet south of the manhole. One witness testified that there were two other small leaks at a distance of a few hundred feet from the place where the explosion occurred. The defendant's witnesses testified that, applying their pressure tests, they found no major leaks in any of the pipes at any place. They further testified that gas will not sink through water at all; that it is only about seven-tenths as heavy as air, and that it will rise from, but not sink into, trenches or pits. Neither party introduced any evidence showing that defendant's escaping gas flowed to, or into, the sewer.

[1-4] At all times the defendant claimed that there was no evidence that the gas which exploded was defendant's gas. It also claimed that the explosion was caused by the explosion of the plaintiff's coal oil lantern. It also contended that the explosion might have occurred from gasoline which those who were constructing the sewer had spilled from time to time. Furthermore, they claimed that the explosion might have been marsh gas instead of the defendant's gas. It cites and relies on Union, etc., Co. v. S. F. Gas, etc., Co., 168 Cal. 58, 141 P. 807. In reply, the plaintiff quotes evidence showing the explosion lifted the lids on the manholes. He argues that the explosion could not have been merely the explosion of a single lantern. He then contends that the surface soil of the street may have been packed and hardened, and that the defendant's gas leaked out of the pipes, approached the surface of the street, and was forced to pass under the surface of the street and across to, down to, and into the sewer. The answer is not sufficient. The plaintiff was bound to introduce some evidence, direct or indirect, showing, not only that defendant's gas was allowed to escape, but also that it entered and accumulated in the sewer pipe. Of course it is not contended that there is any direct evidence in the record that defendant's gas was in the sewer. Furthermore, an inference to that effect must be founded on a fact legally proved and on such a deduction from that fact as is warranted by a consideration of the course of nature. Code Civ. Proc., § 1960. But the direct positive proof in this record is that from "a consideration of the course of nature" natural gas will rise and not sink, and that it will not pass down into water. The plaintiff also makes the contention that the doctrine of res ipsa loquitur applied, and he cites Smith v. Southern Counties Gas Co., 89 Cal. App. 81, 264 P. 532. But in that case the injured person at the time of the injury was standing in a pit in which the gas company had its pipes located. Both the plaintiff and the defendant in the case at bar concede that Judson v. Giant Powder Co., 107 Cal. 549, 40 P. 1020, 1021, 29 L. R. A. 718, 48 Am. St. Rep. 146, states the rule correctly when the court quotes from Shearman and Redfield on Negligence as follows: "*When a thing which causes injury* is shown to be under the management of the defendant, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from a want of care." The italicized words present the very question before us, to wit, What caused the injury, defendant's gas or some other explosive? Not until it is shown that the defendant's gas caused the injury can the doctrine of res ipsa loquitur be relied on. 19 Cal. Jur. 708, § 125. Assuming that the defendant was negligent in having some leaks in its pipes, no evidence was introduced showing that any of those leaks led to the sewer, and the uncontradicted evidence is that the escaping gas

would rise and not fall, and that it could not fall below the water level down into the sewer which was lower than the top of the water. It thus appears that there was no evidence showing that *"the thing which caused the injury"* was under the management of the defendant or that it belonged to the defendant, or that the defendant was in any way responsible for injuries caused by it.

[5] The defendant claims that it was not negligent. Hereinabove we have shown to what extent there were any leaks. Evidence was introduced by the defendant showing that it had a large corps of inspectors and repairers who diligently examined. All of these facts were for the consideration of the jury. They were properly submitted, and this court may not say as a matter of law that no negligence was shown. However, it is clear that the defendant's negligence was not shown to have been the cause of the injury.

In view of what we have said above, we need not discuss other points made by the defendant.

The judgment is reversed.

We concur: NOURSE, P. J.; SPENCE, J.

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112 Cal. App. 150

MURRAY v. SOUTHERN PAC. CO.

Civ. 6547.

District Court of Appeal, Second District, Division 2, California.

Feb. 24, 1931.

Rehearing Denied March 26, 1931. Hearing Denied by Supreme Court April 23, 1931.

1. Carriers 🔑228(3).

In action against carrier for injuries to cattle testimony respecting value based on value of dairy cattle *held* admissible.

> It was the contention of the railroad that use of the cows as dairy cows could be said to be a "special use" within the exception in the bill of lading that would make them "other than ordinary live stock" and subject to special provision as to rates, dependent on the valuation.

2. Carriers 🔑230(12).

In action against carrier for damage to live stock, instruction on measure of damages *held* not error.

> The court instructed the jury as follows: "Where goods intrusted to a common carrier for shipment are injured through causes for which the carrier alone is responsible, the owner of the goods is entitled to recover, as damages, the difference between the value of the goods at the time and place of delivery in an uninjured condition and their value in the depreciated condition in which they were delivered to the owner, if any."

3. Carriers 🔑229(2).

Measure of damages for carrier's injury to live stock, unless limited by contract, is depreciation of market value of animals at time and place of delivery.

4. Carriers 🔑229(1).

Value of animals at private sale at destination was erroneous basis for damages for carrier's injury to live stock.

5. Appeal and error 🔑1050(1).

In action for carrier's injury to live stock, testimony respecting value of animals at private sale at destination, though erroneous, *held* harmless (Code Civ. Proc. § 475).

> While objection should have been sustained to the question, witness' answer was in harmony with the other witnesses testifying as to market value, and jury apparently did not adopt even the lowest figure given by him in arriving at their verdict, and the substantial rights of the defendant were not affected by the error.

6. Carriers 🔑228(2).

That limitation of value of live stock on bill of lading was in writing did not make presumption of consideration against showing on face of record that there was none.

> Since the rate was not being fixed on value, the carrier suffered no detriment, and apparently gave nothing, and certainly the shipper received nothing, by having such a provision in the contract.

7. Carriers 🔑218(5).

Shipper did not accept contract of carriage with knowledge of terms creating assent to limitation on value, in view of uncertainty of contract (Civ. Code, § 2176).

> Carrier contended that figures "50/100" appearing under heading "Shipper's declared value" fixed limit of $50.00 per head, as value of live stock. No evidence was introduced as to how the characters relied upon got into the contract or to explain their meaning. Civ. Code, § 2176, provides that consignor accepting contract for carriage with knowledge of its terms assents to rate of hire, time, place, and manner of delivery therein stated, and also to limitation stated therein to carrier's liability for loss or injury to live animals carried.

Appeal from Superior Court, Los Angeles County; Carl Stutsman, Judge.

Action by Rex B. Murray against Southern Pacific Company for damages to livestock. Judgment for plaintiff, and defendant appeals.

Affirmed.

W. I. Gilbert, of Los Angeles, for appellant.

Glensor, Clewe, Van Dine & Turcotte, of Los Angeles, for respondent.

ARCHBALD, Justice pro tem.

Plaintiff brought this action to recover damages for injuries alleged to have been sustained by certain live stock of his shipped over the lines of defendant from Gordon, Cal., to Hynes, Cal. The case was tried before a jury, which returned a verdict in favor of the plaintiff for the sum of $1,250, and, from the judgment entered thereon, the defendant appealed.

The complaint alleges and the amended answer admits that the plaintiff delivered to defendant as common carrier, and defendant so received at Gordon, Cal., "certain ordinary live stock known as stock cattle, more particularly described as thirty-five cows." The contract used for the shipment was the form provided by the Interstate Commerce Commission and adopted by carriers in official southern and western classification territories, March 15, 1922, and known as the "Uniform Live Stock Contract," and is used for the shipment of live stock and wild animals instead of the uniform bill of lading, and it provides in part that: "Whereas, the classification and tariffs under which the agreement is made require that for the purpose of applying the lawful rate of freight the shipper must declare the shipment to be 'ordinary live stock,' specifying the kind or kinds of animals, or if not 'ordinary live stock' he must declare the kind and value of each animal, space for such declaration being printed below." Then under the heading "Ordinary Live Stock" appears the following:

"Ordinary live stock means all cattle, swine, sheep, goats, horses, and mules, except such as are chiefly valuable for breeding, racing, show purposes, or other special uses. On shipments of ordinary live stock no declaration of value shall be made by the shipper, nor shall any values be entered on the bill of lading.

"I (we) declare the shipment covered on this bill of lading to be ordinary live stock. ——— Shipper."

Following the above is another heading, "Other than ordinary live stock," under which appears the following:

"On shipments of live stock chiefly valuable for breeding, racing, show purposes, or other special uses different rates of freight are in effect dependent on the valuation placed thereon by the shipper, which valuation may be the basic valuation as stated in the classification, at which the lowest freight rate applies, or it may be any higher valuation up to actual value, in which event the freight rate will be higher by the amount prescribed in the tariffs or classification. Such declared or agreed values shall be entered in the column provided therefor in this bill of lading, and in no event shall the carrier be liable for any amount in excess of such valuation.

"I (we) declare the shipment covered by this bill of lading to be other than ordinary live stock, and of the value herein declared, or agreed upon, and entered. ——— Shipper."

The plaintiff as shipper did not sign his name to either of such declarations in the contract involved here. There are other headings in the contract of interest here as follows: "Number and Description Animals." "Weight (Subject to correction)." "Shippers declared value (If on live stock for breeding racing show purposes or other special purposes)." "Rate of freight." "Per 100 lbs." "Per car."

In the contract before us the following insertions appear to have been made under the heading, number and description of animals, "35 head stock cattle feeders," and under weight, the figures "23600." Under the heading "shippers declared value" appears the following: "$^{50}/_{100}$," and there is no insertion in the blanks under the heading "rate of freight." Testimony was also introduced to the effect that the carload rate for transporting ordinary live stock in a standard 36-foot car (which is the kind used in the shipment here) between Gordon, Cal., and Los Angeles, where plaintiff took delivery and shipped them on to Hynes by truck, was $97. This standard rate is made applicable to all shipments of "ordinary live stock," and is the amount the plaintiff testified that he paid. The plaintiff also testified that he paid $55 per head for the cows shipped, or a total of $1,925. He also testified on cross-examination that he sold the cattle in their damaged condition for $2,188.85, although the total itemized sales as shown by evidence only makes $2,098.50. It was also brought out on cross-examination that his total expense on the trip, some of which was apparently made necessary by reason of the alleged physical condition of the animals, was $723.50.

[1, 2] While appellant has urged several contentions they all revolve around the questions: (1) Did the court apply the proper rule for measuring damages in its admission of evidence and instructions to the jury, and (2) does the contract fix the limit to the damages provable of $50 per head? As we have said, the complaint alleges and the answer admits that the stock shipped in the instant case consisted of "ordinary live stock, known as

stock cattle, more particularly described as thirty-five cows." With regard to the market value of the cows at Hynes, the point of destination, Mr. Rule, a witness for the plaintiff, testified, over the objection of defendant, that the market value of cattle of the same kind and character as the cattle here "at date of arrival was $125 to $130 per head." He also testified that one cow of the shipment was worth $6 or $7, four or five others were worth $10 each and the balance of the shipment about $65 each, all in the condition in which they actually arrived. On cross-examination it developed that he was basing his value on "dairy cattle." Robert Zangle, another witness of plaintiff's, also testified over defendant's objection that the market value of five of the cows observed by him at Hynes about the time of their arrival, in an uninjured condition, was from $125 to $135 per head, and that in their injured condition four of them were worth $10 a head, and one about $7. The witness also testified:

"By Mr. Gilbert:

"Q. Well, you would not have the jury understand for a minute that those cows could be driven down herein the general stock yards and be sold without reference to their dairy value and bring any such value as that—that is what you fix your price on? A. The price I give from $125 to $135 was for dairy cows.

"Q. Yes. Used for a special purpose and chiefly valuable for that? A. Yes; that is what I was quoting on."

There is no evidence that the cows in question were other than ordinary cows. There is no evidence of any value beyond the ordinary for breeding purposes, or for amount or quality of milk produced by them. Not only were the cows shipped admittedly "ordinary live stock," but they seem to come squarely within the meaning of that term as used in the contract of shipment. It defines "ordinary live stock" (so far as we are concerned) as follows: "Ordinary live stock means cattle * * * except such as are chiefly valuable for breeding, racing, show, or other special uses." And while the witnesses Rule and Zangle frankly said the market value given by them was based on their value as dairy cows, still can it be said that is a "special use" within the exception that would make them "other than ordinary live stock"? That is appellant's contention. The Standard Dictionary defines "cattle" as: "Domesticated bovine animals, as oxen, cows, bulls and calves." The very common use of cows is producing milk and reproducing their kind, so we must conclude that ordinary cows are necessarily included in the term "ordinary live stock." There is no evidence in the record here that the cows in the shipment were of any particular value above the ordinary for either use, and in our opinion they did not fall within the exception, as their use for either milk production or breeding was not special within the meaning of such exception. The conductor of the train, a witness for the defendant, gave a very succinct statement of the appearance of the animals, which seems to be borne out by the admissions of the parties, as well as the evidence. He said: "They had the appearance of just common ordinary cattle." On the measure of damages the court instructed the jury as follows: "Where goods intrusted to a common carrier for shipment are injured through causes for which the carrier alone is responsible the owner of the goods is entitled to recover, as damages, the difference between the value of the goods at the time and place of delivery in an uninjured condition and their value in the depreciated condition in which they were delivered to the owner, if any." We see no error in the instruction given, or in the admission of the testimony of the witnesses Rule and Zangle.

[3-5] The plaintiff himself, over the objection of defendant, testified that cows of the same type, grade, character, and ages sold for $125 to $135 each, at private sale, at Hynes, during the months of January, February, and March, 1923. There is no question but what the measure of damages in such a case, unless limited by contract, is the depreciation of the market value of the animals at the time and place of delivery. Olcovich v. Grand Trunk Ry. Co., 179 Cal. 332, 176 P. 459. And the testimony of the witnesses Rule and Zangle was in accord therewith, but value at "private sale" at the destination was an erroneous basis. But while the objection should have been sustained to the question asked plaintiff, his answer is in harmony with the other witnesses testifying as to market value, and the jury apparently did not adopt even the lowest figure given by him in arriving at their verdict, and, as the substantial rights of the defendant do not seem to have been affected by the error, it must be disregarded. Section 475, Code Civ. Proc.

[6, 7] 2. Does the contract fix a limit of $50 per head to any damages sustained? Appellant contends that the figures and character "$^{50}/_{100}$" appearing under the heading "Shipper's declared value" fixes such a limit, and that applying that limit plaintiff's recovery could not exceed $189. Section 2176, Civ. Code, provides as follows: "A passenger, consignor, or consignee, by accepting a ticket, bill of lading, or written contract for carriage, with a knowledge of its terms, assents to the rate of hire, the time, place, and manner of delivery therein stated; * * * and also to the limitation stated therein to the carrier's liability for loss or injury to live animals carried. But his assent to any other modification of the carrier's obligations contained in such instrument can be manifested only by his signature to the same." It would seem that such a limitation may legally be made and particularly where the rate is fixed on the value stated. Donlon Bros. v. Southern Pac. Co., 151 Cal. 763, 91 P. 603, 11 L. R. A. (N. S.) 811, 12 Ann. Cas. 1118. The contract here involved expressly provides that "on shipments of ordinary live stock no declaration of value shall be made by the shipper, nor shall any value be entered in this bill of lading." The shipment made falls in that class and apparently takes the basic rate per car, rates on live stock chiefly valuable for breeding, racing, show purposes, or other special purposes, being based on actual values declared by the shipper. In the latter case there would be a reason for a shipper limiting the value in order to obtain a cheaper rate, which would not seem to apply in the case of a shipment of ordinary live stock. No evidence was introduced as to how the characters relied upon got into the contract, or to explain their meaning, and we are asked to assume that they mean "$50 per head," as the shipper's declared value, and that by their insertion into the contract of shipment it was intended to limit the carrier's liability for loss and injury of the animals to that amount per head. The rate not being fixed on value, as we have seen, it is hard to see, assuming that the characters mean what appellant claims, and further assuming that it was intended as a limitation of plaintiff's liability, where there could be any consideration for the agreement. Defendant suffered no detriment and apparently gave nothing, and certainly plaintiff received nothing by having it in the contract. The fact that it is in writing would make a presumption of consideration ordinarily, but not against the showing on the face of the record that there was none, and in the face of uncertainty as to the meaning we could not presume nor do we see how the jury could find from the face of the contract that the plaintiff accepted the contract of carriage "with a knowledge of its terms" which would seem to be a necessary condition of his "assent" to the limitation. Section 2176, Civ. Code.

In view of the foregoing we see no error in the action of the trial court in refusing certain instructions as to such alleged limitation of liability or in giving the ones it did relating thereto.

Many exceptions are noted both as to the introduction of evidence and the giving and refusing of instructions as well as the refusal of the court to grant a motion for nonsuit, but plaintiff has not seemed to rely on most of these, so it is sufficient to say that we do not see any prejudicial error therein.

Judgment affirmed.

We concur: WORKS, P. J.; IRA F. THOMPSON, J.

In re FARRELLY'S ESTATE.*

BLAKESLEE et al. v. ALLEN et al.

Civ. 7607.

District Court of Appeal, First District, Division 1, California.
Feb. 26, 1931.

Rehearing Denied March 28, 1931. Hearing Granted by Supreme Court April 28, 1931.

1. Wills ⊶849.

Where trust attempted to be created is void and there are no other apt words in will disposing of property affected thereby, intestacy results (Civ. Code, § 1386, subd. 8).

2. Wills ⊶675.

Precatory words should not be regarded as creating trust unless it appears testator intended to impose imperative obligation.

3. Wills ⊶675.

In determining whether bequest creates precatory trust, question is whether legatee is beneficiary or merely trustee—whether recommendation expressed meant to govern party's conduct or merely to indicate what testator thinks would be reasonable exercise of discretion.

4. Wills ⊶601(8).

Testator's expression of desire regarding legatee's disposition of estate vested in absolute terms is not construed as limitation (Civ. Code, § 1322).

5. Wills ⊶601(8).

Words "direct" and "shall be expended," in connection with disposition of property bequeathed, merely expressed testatrix' desire.

6. Wills ⊶669.

Whether will attempted to create trust was question of intention to be determined from whole will.

7. Wills ⊶601(8).

Will giving residue to testatrix' nieces and directing that it be expended for charitable purposes made absolute gift and did not attempt to create trust.

In residuary paragraph testatrix gave all rest, residue, and remainder of property to two nieces, share and share alike, and directed that residue, if not exceeding one-third of estate, should be expended for charitable or philanthropic purposes in accordance with testatrix' views as expressed. In another paragraph a trust with respect to home place was expressly created, and in a letter to nieces testatrix stated that the charitable purposes mentioned were only suggestions on her part and that they might find a better use for the property.

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*Hearing granted 4 P.2d 948.

Appeal from Superior Court, Alameda County; Lincoln S. Church, Judge.

In the matter of the estate of Henrietta Farrelly, deceased. Proceeding between Elizabeth Blakeslee and others, and Martha C. Allen and another, in which the former appeal from part of a decree of final distribution.

Affirmed.

Stanislaus A. Riley, of San Francisco (Henry F. May, of San Francisco, of counsel), for appellants.

Fitzgerald, Abbott & Beardsley, of Oakland, for respondents.

PER CURIAM.

This is an appeal by the heirs and next of kin of Henrietta Farrelly, deceased, and Robert S. Farrelly, her predeceased husband, from that part of a decree of final distribution entered in the above matter which distributes her residuary estate to her nieces Martha C. Allen and Maude T. Pesante. The question to be determined is the interpretation of the 19th or residuary clause of the will of the deceased.

The pertinent paragraphs of the will are as follows:

"Third. I give to my brother Henry Wilson of Broadmoor, Alameda county, California, $10,000.00, and to my brother Calvin Wilson of San Jose, California, $10,000.00; and I give to my sister Clara J. Jackson of Broadmoor, California, $10,000.00. I give to Maude T. Pesante of Oakland, California, daughter of my deceased sister Rebecca Tuttle, $15,000.00. I give to the other surviving children of said Rebecca Tuttle, who may survive me, $5,000.00 each, and I give to each of the seven children of my brother, the above named Calvin Wilson, who may survive me, $5,000.00 each.

"Fourth. I give, devise, and bequeath to my niece Mattie C. Allen the sum of $200,000.00."

"Nineteenth. All the rest, residue and remainder of my property of every kind and nature wheresoever situate I give, devise and bequeath to my said nieces Mattie C. Allen and Maude T. Pesante, share and share alike. If said residue shall not exceed one-third of my estate I direct that the same shall be expended for charitable or philanthropic purposes and in accordance with my views as expressed. If such residue shall exceed one-third of my estate I direct that said one-third of my estate shall be expended as in this item provided, and the excess thereof shall be expended by them as I may suggest to them hereafter.

"Twentieth. In the event the Home Place, which is that certain tract of land consisting of fifty acres, more or less, and now occupied by me and my late husband as our late residence for many years and fronting on East Fourteenth street near Stanley road, be not sold during the administration of my estate, I give, devise and bequeath the same to Charles H. Hale, but in trust, however, to manage and control the same, and I direct that he sell said property at the earliest possible time consistent with his judgment and discretion, and upon the completion of said sale the net proceeds in cash derived from said sale shall vest in and become the property of my nieces Mattie C. Allen and Maude T. Pesante, share and share alike, but it is my wish that said proceeds from said sale be expended for charitable or philanthropic purposes and in accordance with my views as heretofore expressed, and thereupon said trust herein shall terminate. The creation of this trust on said conditions shall in no way be inconsistent with a sale of said property by my said executors during and pending the administration of my estate."

At the time the will was executed the testatrix also wrote the following letter:

"November 6, 1926.

"Mrs. Mattie C. Allen.

"My Dear Niece:

"In my will I have mentioned that I would leave a letter addressed to you with reference to the disposition of certain property, and this is the letter.

"I would like to have the house and lot on Tenth street near Jefferson street in Oakland, California, used for some charitable or philanthropic purpose. The only purpose that occurs to me now that it might be put to is a place where trained nurses temporarily out of employment might find a home.

"The six-acre piece in San Leandro I should also like to have devoted to some use which generally I should define as being made useful for children and young people, if such use can be found, and provided, of course, that I do not dispose of the same prior to the taking effect of my will.

"You will note that I have left the residue to you and to Maude T. Pesante to carry out the purposes herein set forth. You will discuss and counsel with Maude T. Pesante, I know, in connection with these things.

"The above charitable purposes are only suggestions on my part. After investigation and advising with Maude T. Pesante and others who may be competent to advise with you, you may find a better use for each or all of these properties, but you know my general desire in the matter, and I leave it to your good judgment.

"If other suggestions occur to me I will add them and leave them with this letter.

"Very truly yours,

her
"Henrietta (X) Farrelly.
mark

"Henrietta Farrelly whose name and whose mark is subscribed to the foregoing instrument cannot write, and she made her said mark and signature, and said name was written near it by me, and my name is hereto subscribed as a witness to said mark and signature.

"Girard N. Richardson.

"Witnesses:
"Doris E. Smiley,
"Girard N. Richardson."

The court found that the intention of the testatrix was to make an absolute gift of her residuary estate to her two nieces above named and not to create a trust.

It is claimed by appellants that the testatrix intended and attempted to leave the residuary estate in trust for charitable purposes, to be administered by her two nieces; that the trust, due to the fact that it was not sufficiently specific, was void, and the residuary estate was consequently intestate property distributable under subdivision 8 of section 1386 of the Civil Code.

[1-4] The rule is well settled that where a trust attempted to be created is void, and there are no other apt words in the will disposing of the property affected thereby, intestacy is the result. Estate of Heberle, 153 Cal. 275, 95 P. 41; Estate of Hamilton, 181 Cal. 758, 186 P. 587. But precatory words may or may not create a trust, according to the circumstances of the particular case; and they are not to be regarded as having that effect unless it appear that the testator intended to impose an imperative obligation and to exclude the exercise of discretion or option in reference to the act in question. Estate of Marti, 132 Cal. 666, 61 P. 964, 64 P. 1071. As held in the Estate of Hamilton, supra, in determining whether a bequest creates a precatory trust the question is whether the legatee is the beneficiary or merely a trustee for others—whether the wish or desire or recommendation that is expressed by the testator is meant to govern the conduct of the party to whom it is addressed, or whether it is merely an indication of what he thinks would be a reasonable exercise of the discretion of the party, leaving it however to the party to exercise his own discretion. It has also been held that while the expression of the desire of the testator for the disposition of his estate is to be construed as imperative when addressed to his executor, it will not, when addressed to his legatee, be construed as a limitation upon the estate or interest expressly vested in the latter in absolute terms (Estate of Marti, supra; Estate of Mitchell, 160 Cal. 618, 117 P. 774; Estate of Browne, 175 Cal. 361, 165 P. 960; Estate of Hull, 77 Cal. App. 792, 247 P. 1093), it being the rule that a clear and distinct devise or bequest cannot be affected by any reasons assigned therefor, or by any other words not equally clear and distinct, or by inference or argument from other parts of the will (Civ. Code, § 1322).

[5, 6] In the present case the desires of the testatrix are not directed to her executors but to her legatees, to whom she expressly gives all the residue of her estate share and share alike. While this provision is followed by others in which the word "direct" is used in connection with the words "shall be expended," such use is not conclusive upon the intention of the testatrix, but the same may be construed merely as expression of desire on her part. In re Lynch's Will, 102 Misc. Rep. 650, 169 N. Y. S. 321; In re Jansen, 181 Wis. 83, 193 N. W. 972, 49 A. L. R. 5; Estate of Hull, supra. The question is one of intention, to be determined from the consideration of all the provisions of the will. Alexander, Wills, § 1098; Perry, Trusts and Trustees (7th Ed.) § 114; Spooner v. Lovejoy, 108 Mass. 529; Negro Chase v. Plummer, 17 Md. 165; In re McVeigh's Estate, 181 Mo. App. 566, 164 S. W. 673.

[7] That the testator or the draughtsman of her will knew what were apt words for the creation of a trust is manifest from paragraph 20, wherein a trust with respect to the home place is expressly created; and the fact that such words are not used in paragraph 19 is evidence that it was not her intention to do so with respect to the property in question. Kauffman v. Greis, 141 Cal. 295, 74 P. 846; In re McVeigh's Estate, supra; Williams v. Committee of Baptist Church, 92 Md. 497, 48 A. 930, 54 L. R. A. 427. A contrary intention is further shown by the letter referred to in the will, which contains the only specific expression of her desires respecting the use of her residuary estate, and wherein she states that "the above charitable purposes are only suggestions on my part. After investigation and advising with Maude T. Pesante and others who may be competent to advise you you may find a better use for each or all of these properties; but you know my general desire in the matter, and I leave it to your good judgment."

Other reasons are advanced by respondents in support of the findings of the court below, but the above in our opinion sufficiently supports the conclusion that it was the intention of the testatrix to make an absolute gift to her nieces, and that her desires were not meant to govern their conduct but were, as she stated, only suggestions, the whole matter being left to their discretion.

The portion of the decree appealed from is affirmed.

112 Cal. App. 138

MAKEIG v. UNITED SECURITY BANK & TRUST CO.

Civ. 7302.

District Court of Appeal, First District, Division 1, California.

Feb. 21, 1931.

1. Husband and wife 🔑259.

Husband and wife residing temporarily in different places due to economic or social reasons are not "living separate and apart" within statute (Civ. Code, § 169).

[Ed. Note.—For other definitions of "Living Separate and Apart," see Words and Phrases.]

2. Husband and wife 🔑259.

"Living separate and apart" applies to condition when spouses have come to parting of ways with no present intention of resuming marital relations (Civ. Code, § 169).

3. Husband and wife 🔑259, 264.

Evidence sustained finding that husband and wife were not living "separate and apart" so as to make accumulations of wife her separate property (Civ. Code, § 169).

4. Appeal and error 🔑1056(3).

Exclusion of testimony respecting agreement of deceased wife to live with friend did not warrant reversal of judgment holding husband entitled to wife's accumulations as community property.

Although such evidence was to some extent contradictory of that of husband to effect that he and wife were living apart temporarily with idea of ultimately establishing a common home, it related merely to intention of deceased wife to continue in future to have a separate abode from that of her husband, affording a somewhat weak inference that she had always entertained such intention, but could not overcome positive testimony of mutual desire as soon as convenient to resume common habitation.

5. Husband and wife 🔑264.

Evidence *held* not to establish that accumulated fund of wife was separate property by agreement of parties, or gift from husband.

6. Husband and wife 🔑248½.

Administrator for deceased wife was entitled to amount acquired by her before marriage with accumulated interest as her separate property.

7. Husband and wife 🔑273(1).

Executor of deceased wife was entitled to one-half of fund acquired subsequent to law making community property subject to testamentary disposition (Civ. Code, §§ 1401, 1402; Code Civ. Proc. § 1542).

Although Civ. Code, § 1402, provides that possession and control of community property shall not be transferred to personal representative of wife except to extent necessary to carry will into effect, it appeared that only $10 was bequeathed to husband and entire balance to others, making it necessary for personal representatives of wife to retain possession of amount subject to testamentary disposition in order to carry will into effect.

Appeal from Superior Court, City and County of San Francisco; Thomas F. Graham, Judge.

Action by George O. Makeig against the United Security Bank & Trust Company, as executor of the estate of Annette Netherland, deceased. Judgment for plaintiff, and defendant appeals.

Modified, and, as modified, affirmed.

Keyes & Erskine, of San Francisco, for appellant.

Kington & Cunningham, of San Francisco, for respondent.

PER CURIAM.

The plaintiff recovered judgment against the defendant as executor of the last will and testament of the deceased wife for $10,384.54, and defendant appeals from the judgment and the order denying defendant's motion for a new trial.

Plaintiff and his deceased wife first met at Greenville, Miss., in the month of December, 1910, and afterwards moved to California. Plaintiff is a barber by occupation, and the deceased wife, who had been a manicurist, became a saleswoman at a department store in San Francisco. They were married at Bakersfield, Cal., January 18, 1914, and were never divorced. The wife died June 8, 1928, leaving a will naming the defendant executor, and bequeathing the sum of $10 to her husband and the bulk of her estate to her brother. At the time of her death there was deposited in savings accounts in her name, to wit, Annette Netherland, in three separate banks the total sum of $10,001.64. In addition to this, the sum of $194.36 in interest accrued and became due June 30, 1928. The defendant took possession of this total fund after its regular appointment as executor. The court found that $188.58 in interest became due on the above amount on December

30, 1928, and further found that the total of the above sums was community property of the plaintiff and his deceased wife, and gave judgment for plaintiff on his complaint (which sought recovery of the whole fund on the theory that it was community property) and against the defendant for the aggregate of the said three sums; namely, $10,384.58. It is admitted, and the court found that of the above amount $3,696.84 was acquired after August 17, 1923.

The finding that $188.58 interest became due December 30, 1928, respondent admits is not supported by the evidence. The record also shows clearly that at the time of the marriage the decedent had $83.54 on deposit at interest in one of her three savings accounts, and, so far as the record shows, this was never withdrawn prior to her death, and it appears to be a part of the total judgment.

In the period of fourteen and one-half years between the marriage of the parties and the wife's death, they lived together for a period of about six weeks immediately following the marriage. Then by agreement the wife returned to San Francisco and to her work as a saleswoman in a department store there. In reply to a question as to when she next lived with him, plaintiff replied, "We never did settle down." Three years later she visited for a week in El Paso; but, as plaintiff did not have a steady job, and had been moving from place to place working as a barber three or four weeks in a place, the wife again returned to San Francisco. In December, 1917, plaintiff came to San Francisco and lived in one hotel while his wife lived in another. Plaintiff testified: "We did not live together in San Francisco. She lived in one hotel and I lived in another," but in reply to a question from the judge he testified that during that time they had marital relations. She came to plaintiff's room and he went to her room, but neither remained overnight. Thereafter, and from 1918, plaintiff lived in Bay Point, Cal., off and on, being away about one year in Benicia. All of this time his wife continued to live in San Francisco and worked as a saleswoman in a department store from March, 1914, to December 31, 1926. She never lived with him at Bay Point, but during that time the record discloses the parties visited back and forth, plaintiff sometimes meeting her in San Francisco, and several times she visited him at Bay Point over week-ends, occupying the same room, and where she was introduced as his wife.

The parties corresponded. Several letters are in evidence covering the period from February 27, 1916, to June 1, 1928. Plaintiff testified he wrote once a week, and that sometimes she would not write to him for a period of two months.

After the marriage, the record shows she earned about $14,000, and her total deposits during this time were about $9,000. Plaintiff testified that during all this time he sent her the greater part of his earnings, or from $75 to $100 per month, totaling from $12,000 to $15,000; that he kept no record; the amount was simply an estimate; that he never sent it by check or draft, but only by currency just put in an envelope; and that they never discussed financial matters or what she was doing with the money; that he assumed she used it for living expenses, but never asked her.

The marriage status of the two was practically secret, except to three of plaintiff's friends at Bay Point. The wife's closest friends did not know of it. Plaintiff even addressed all his letters to her under her maiden name. He did not know any of her friends in San Francisco. Plaintiff's explanation of their status was that his wife liked San Francisco, and they were trying to get money together for a home. As he testified: "It was always said, 'Well, just as soon as you can get some money together we will come together.' She was always talking every time I saw her when I was with her about saving money up—was making a home." Plaintiff also testified that his wife said, "It won't be long before we will be able to go housekeeping and get a house," and that their only understanding in regard to money was that as soon as they got money enough together they would make a home; that "Easter Sunday, 1928," was the last conversation he had with her about living together; that he had between three and four hundred dollars, which he considered sufficient for this purpose, but that he got crippled just after that and spent all his money on his legs, and that the only other property that he owned was the furniture in his barber shop and the lease to the shop. His testimony was to the effect that he was to provide the home, that they never did quarrel, and their relationship was always friendly.

Respondent's wife went to a hospital about April 13, 1928, where she remained until her death, June 8, 1928. Defendant offered to prove that she did not believe her illness was serious, and hoped and expected to recover in a short time, and had definitely agreed with a lady friend of some years' standing that as soon as she was able she would give up her room in San Francisco and go and live permanently with her friend at Burlingame. The plaintiff objected that this evidence was hearsay, incompetent, irrelevant, and immaterial, and the court sustained the objection.

Plaintiff contends that the bulk of said savings accounts was derived from the money he sent his wife. Defendant contends that said savings accounts were the accumulations of her own earnings from her steady employment, and made possible by her very frugal living as disclosed by the record.

The issues in the case are briefly these:

Was the money so deposited in the respective banks at the time of the wife's death community property, or was it separate property as the earnings and accumulations of the wife while living separate and apart from her husband within the meaning of section 169 of the Civil Code?

If not separate property for this reason, was it separate property as a gift from the husband, or separate property by tacit or mutual agreement of the parties?

If it was community property, is the wife's executor entitled to retain possession of one-half of that portion thereof acquired after August 17, 1923?

Respondent claims, as there was not an actual rupture of the marital relations of the parties, and as the evidence does not show the separation was final, the parties cannot be said to have been living separate and apart.

In the case of Humphrey v. Pope, 122 Cal. 253, 54 P. 847, in construing section 370 of the Code of Civil Procedure, which authorizes a wife to sue alone "when she is living separate and apart from her husband by reason of his desertion of her," the Supreme Court quoted with approval Tobin v. Galvin, 49 Cal. 34, "that the words 'while living separate and apart from her husband,' do not mean a temporary absence of the wife. There must have been an abandonment on the part of the husband or wife, or a separation which was intended to be final."

In the case of Union Oil Co. v. Stewart, 158 Cal. 149, 110 P. 313, Ann. Cas. 1912A, 567, which involved the question of the right of the wife to acquire title to her husband's land by adverse possession, the court, in construing the provisions of section 169 of the Civil Code, said, at page 157 of 158 Cal., 110 P. 313, 316: "When a husband abandons and deserts his wife, remaining permanently separate from her, and at the same time delivers to her the possession of his land, she may claim title to it, as her separate estate."

In the case of Loring v. Stuart, 79 Cal. 200, 21 P. 651, it was held that, where the wife lived in one city and the husband in another on account of domestic infelicity, which was never reconciled, and the husband testified he did not intend to return to her, but never told her of his intentions, the Supreme Court held that the earnings of the wife while so living were her separate property within the meaning of section 169 of the Civil Code. See Finks v. Thompson, 11 Tex. Civ. App. 538, 32 S. W. 711; Wright v. Bank, etc., 13 Ga. App. 347, 79 S. E. 184, at page 186.

In the case of Spreckels v. Spreckels, 116 Cal. 339, 48 P. 228, 229, 36 L. R. A. 497, 58 Am. St. Rep. 170, the Supreme Court said: "If the wife is living separate and apart from the husband, through her own fault, her earnings and accumulations are her own." It is undoubtedly the law that no matter what the cause of the separation may be, if it is a separation in the legal sense the wife's accumulations are her own.

[1, 2] Living separate and apart, however, as contemplated by said section 169, does not apply to a case where a man and wife are residing temporarily in different places due to economic or social reasons, but applies to a condition where the spouses have come to a parting of the ways and have no present intention of resuming the marital relations and taking up life together under the same roof. Under modern conditions, there is many a man living and working in one place and his wife living and working in another, seeing one another only on week-ends, sometimes not for months at a time, yet they are not living separate and apart within the meaning of the section, for there has been no marital rupture, and there is a present intention to live together as man and wife, and their status is only temporary, although it may happen that the condition might exist for some years.

[3] In the light of the above decisions and the law we must approach this case to determine whether the decision is supported by the evidence.

Plaintiff's case rests almost exclusively on his own evidence.

[4] What we have above set forth shows very clearly that there had been no final rupture of the marital relationship. The parties to the marriage were, and always had been, quite friendly; and while, perhaps, the case is unique in the long and persistent separation of the spouses so far as their actual abode is concerned, such living apart seems to have been regarded by them as temporary and with the idea of ultimately establishing a common home. It is true there was offered on behalf of the defendant the testimony of an intimate friend of the deceased that the latter had agreed with the witness to take up her abode with her if and when she left the hospital. Upon objection, this evidence was excluded, and such exclusion is assigned as error. This evidence, being to some extent contradictory of that of the plaintiff, should have been admitted; but we think its rejection was not of sufficient prejudice to the defendant to warrant a reversal of the judgment. It related merely to the intention of the deceased to continue in the future to have a separate abode from that of her husband. It afforded a somewhat weak inference that she had always entertained such intention; but it could not overcome the positive testimony of the husband that up to that time it had been their mutual desire as soon as convenient to resume common habitation; and, if such excluded testimony merely indicated the future intention of the deceased alone, it could not, if admitted, have changed the community status of the fund involved in the present proceeding, since it was all accumulated prior

to the genesis of this intention of the deceased to make her permanent home with her friend, nor does it appear that such intention was ever disclosed to the husband.

[5] Appellant contends that, if the money in question was not separate property by reason of being the earnings of the wife, it was separate property as a gift from the husband or by tacit or mutual agreement of the parties. There is no evidence whatever to sustain the contention that the money was separate property by tacit or mutual agreement of the parties; and, so far as its being a gift from the husband is concerned, the husband testified that he never intended it as a gift, and there is no evidence in the record by which this court could hold it was a gift. Fanning v. Green, 156 Cal. 279, 104 P. 308; Sprague v. Walton, 145 Cal. 228, 78 P. 645.

[6, 7] The judgment, however, must be modified. The record clearly shows that $83.54 of the amount was acquired by the wife before marriage, and with its accumulated interest thereon since 1912 of $61.15 at the rate allowed by the bank, or a total of $144.69, was the separate property of the wife. There was no evidence to support the finding that $188.58 interest became due December 30, 1928. Moreover, conceding that all the money deposited since the marriage in the banks by the wife, with its accumulated interest, was community property, yet $3,696.84 of that amount was acquired subsequent to August 17, 1923, the effective date of the amendment to section 1401 of the Civil Code, making one-half of the community property subject to the testamentary disposition of the decedent. While section 1402 of said Code provides that the possession and control of the community property shall not be transferred to the personal representative of the wife except to the extent necessary to carry the will into effect, in this case, where only $10 is bequeathed to the husband and the entire balance to others, it is without question necessary for the personal representatives of the wife in this case to retain possession of the amount subject to her testamentary disposition in order to carry her will into effect, not only to pay her debts, but the costs, charges, and expenses of administration as well as the legacies. This executor is entitled to retain possession of one-half of said sum of $3,696.84, to wit, $1,848.42, although it may be community property. 11 Cal. Jur. 1004; Code Civ. Proc., § 1452; Page v. Tucker, 54 Cal. 121.

The judgment must, therefore, be modified by deducting from the amount thereof the total of said sums of $144.69, $188.58, and $1,848.42, namely, the sum of $2,181.69. It is so ordered, and, as thus modified, the judgment is affirmed, appellant to recover its costs of this appeal.

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112 Cal. App. 353

REDD v. WILLIAMS RADIATOR CO.

Civ. 4251.

District Court of Appeal, Third District, California.

March 6, 1931.

Rehearing Denied April 4, 1931. Hearing Denied by Supreme Court May 4, 1931.

1. Master and servant 🔑72.

Letter written by employer to employee expressing dissatisfaction *held* not cancellation of employment contract, even as to bonus clause therein.

Employment contract provided for bonus in case employee fulfilled expectations after three months, and letter written to employee approximately five months thereafter referred to making change in organization on ground that employee was not making sufficient impression on those persons assigned to him and stated that agreement would have to be canceled, but that employer would be willing to continue to pay same salary, but without bonus feature, concluding with statement as to belief that employee could best serve company's interests in different line of work which would be indicated at earliest opportunity.

2. Master and servant 🔑80(9).

Finding that employer waived alleged cancellation notice respecting contract of employment *held* warranted.

Evidence established that president of employer corporation, after writing letter to employee expressing dissatisfaction with work and intimating that different line of work would be provided in future, did not at any time make any other arrangement as to terms of employment, substitution of any different contract, or cancellation, and that employee continued performing his duties as he had done from beginning.

3. Master and servant 🔑72.

Written employment contract *held* supported by sufficient consideration in respect to option providing for bonus.

4. Appeal and error 🔑1011(1).

Finding of trial court on conflicting evidence will be sustained on appeal.

Appeal from Superior Court, Los Angeles County; H. V. Alvarado, Judge.

Action by John B. Redd against the Williams Radiator Company, wherein defendant filed a cross-complaint. From the judgment, defendant appeals.

Affirmed.

Black, Hammack & Black, of Los Angeles, for appellant.

Jacobs & Jacobs, of Stockton, for respondent.

McDANIEL, Justice pro tem.

This is an appeal from a judgment in favor of the plaintiff and against the defendant. The action was upon an employment contract evidenced by the following document:

"Mr. J. B. Redd,
"7342 Jasmine Avenue,
"Palms, California.
"Dear Sir:

"Confirming our conversation of Tuesday, February 19th, 1924, regarding your employment commencing March 15th, 1924:

"1—For and in consideration of your undivided time and services we will pay you a salary of $300.00 per month ($3,600.00 per year).

"2—If after three months you fulfill our expectations, we further agree to pay you a bonus annually and which shall be governed by the billing of the company and computed as follows:

"When billing exceeds $225,000.00 we will credit you with one-half of one per cent (½ of 1%) of the total billing for our fiscal year ending January 31st and payable 50 per cent February 15th, and 50 per cent August 15th.

"Example:

Billing for year 1925—$250,000.00	
½ of 1% of $250,000	$1,250.00
Salary for year	3,600.00
Total compensation	$4,850.00

"3—Bonus for the year 1924 will be computed as above less the time not employed or in other words, if billing equals $250,000 the net bonus would be $1250.00 ($104.20 per month) less $156.25 (1½ months not employed) or $1093.75. Total compensation for the year would be as follows:

10½ months at $300.00	$3,150.00
10½ months bonus at $104.17	1,093.75
Total compensation	$4,243.75

"This agreement is subject to cancellation at any time by giving 30 days notice in advance.

"Yours very truly,
"Williams Radiator Company
"By ———, Assistant Secretary"

Plaintiff entered upon his work under this agreement on the 15th day of March, 1924, and continued in said employment until on or about the 1st day of March, 1925. Subsequently to March 1, 1925, by mutual agreement, plaintiff continued in the employment of the defendant corporation but under a different arrangement. Instead of a bonus and salary, thereafter he worked for a commission on sales, being allowed a checking account of $200. On August 19, 1924, Mr. J. M. Williams, who was president of the defendant corporation, wrote and mailed to plaintiff the following letter:

"Los Angeles, August 19, 1924.
"Mr. Redd:—

"I am going to be away for a few days. I wanted to see you before going but did not arrange it. I will see you on my return the early part of next week.

"It is going to be necessary that we make a change in our organization because it is evident to me that you are not making as much impression on the architects and engineers assigned to you as is necessary for the protection of our interests. I will undertake to give you a different assignment.

"We will have to cancel our agreement that we made last spring, dated March 1st, 1924. I am willing to continue to pay you the same salary of $300.00 per month but without the bonus feature referred to in the letter of March 1st. I feel that there has not been accomplished with the architects and others assigned to you, sufficient to warrant this, either in justice to the company or the other salesmen.

"I am sure that we will all be very busy for the next several months and I believe that you can best serve the company's interests, and in that way your own, by a somewhat different line of work, which will be indicated when I have opportunity to speak to you again.

"J. M. Williams.
"JMW—RF R. F."

It is admitted that under the employment contract plaintiff received a salary of $300 per month regularly until it was fully paid. Plaintiff, however, was not paid any bonus provided for in the contract of employment. Defendant contends that the provision for bonus was canceled by the above-quoted notice and letter of August 19th. The court found that the said contract was not canceled and that finding presents the most important question to be determined on this appeal.

In the cross-complaint the defendant claimed a balance due of $690.21 modified by a supplemental amendment to the sum of $617.66. This so-called cross-complaint, together with the amendment, was duly answered by the plaintiff, who contends that under the commission agreement he was entitled to certain commissions on transactions which had not been allowed by the defendant. There seems to be no serious uncertainty or ambiguity about the written contract. Although it is claimed the second paragraph as to the term of probation is uncertain, it appears to us to be sufficiently definite to indicate the meaning to be that if the plaintiff performed his duties satisfactorily for the first three months the defendant company would pay him a bonus as a part of the consideration for his employment. That bonus was to be ascertained when the amount of the company's business exceeded $225,000 for the fiscal year ending the ensuing 31st day of January. The bonus for the year 1924 under the contract was to cover actually the ten and one-half months from March 15th to the following January 31st, the one and one-half months being the time plaintiff was not employed during that year. The evidence and the pleadings admit that the company during the year did a business of $250,000.

It seems to have been understood by all parties, and no argument to the contrary has been presented, that the word "billing" used in the contract refers to sales of the year billed out and is equivalent to the expression "business for the year."

[1] The letter of August 19th, as will appear upon careful consideration of the language thereof, is uncertain and ambiguous. Appellant contends it manifestly indicates the intention on its part within a reasonable time to abrogate or to cancel at least so much of the employment agreement as relates to the bonus feature; while respondent contends it did not purport to be the thirty days' notice of cancellation, and being expressed with verbs in the future perfect tense that it was merely in effect a threat, at some later time, to cancel the existing contract, which it recognizes as in existence and substitute therefor a new and different line of work under another contract of employment.

It is undoubted that some dissatisfaction is intimated with the employee plaintiff and a different line of work is foreshadowed by the last line or two. Such dissatisfaction was not indicated at the expiration of the first three months of service named as a probationary period in the contract. Appellant waited fully five months, an unreasonable time, to extend the period not authorized in the contract.

[2] It is stated, as will be observed, that a "different line of 'work' will be indicated when I have opportunity to speak to you again." The evidence without serious conflict, if any, shows that the president of the defendant corporation did not at any time make any other arrangement with the plaintiff as to terms of employment, substitution of any different contract, or cancellation. Plaintiff continued performing his duties as he had done for the defendant from the beginning. If it be read into the purported notice that it was to take effect thirty days thereafter it will appear that the defendant had worked six months of the remaining ten and one-half months of the fiscal year. It appears that the amount of business was $25,000 more than the standard established by the contract as the minimum billing, to wit, $225,000, the conditional sum and basis of a bonus allowance. The plaintiff testified that after the date of the letter, the president of company, Mr. Williams, expressed himself as fully satisfied with the plaintiff. The learned judge of the trial court may well have considered that if the alleged notice be regarded as a cancellation notice or one that should be given effect as altering the original contract that under all the circumstances, the notice as such was waived by the defendant. It also was apparent, if given any effect at all, that it was an attempt to declare a forfeiture of the pro tanto earnings of bonus during his work of six months. In Redd v. Garford Motor Truck Co., Inc., 205 Cal. 245, 270 P. 447, 449, it is said: "That the law does not favor forfeitures is well settled by the decisions of this court in numerous cases, and, as was well said in the case of Knarston v. Manhattan L. I. Co., 124 Cal. 74, 77, 56 P. 773, 774: 'Evidence tending to show the waiver of a forfeiture will be looked upon with kindly eyes.'"

The cited case of Knarston v. Manhattan L. I. Co., 124 Cal. 74, 56 P. 773, 774, also holds: "A waiver may be implied by the acts and conduct of the parties." Authorities on this point might be multiplied, but it is unnecessary so to do.

[3] There was sufficient consideration for the written contract relating to the option. Russell v. Johns-Manville Co., 53 Cal. App. 572, 200 P. 668. This is a case which at first glance would appear to hold to the contrary, but in reality is authority supporting option contracts in cases where the extra compensation was a part of the wages promised even though it was only conditionally promised. Other cases supporting bonus contracts will be found in 39 C. J. 159, notes 91, 92, 96.

[4] We are satisfied the employment contract even as to the bonus clause was not canceled and that the plaintiff therefore was entitled to his bonus amounting to $1,093.75. Under the commission arrangement the court found in favor of plaintiff on three separate items, namely, Culver City job No. 1 for $5,376; Culver City job No. 2 for $208.28; and the Jones-Urban Military Academy job for $72.55. The court further found the commissions earned in toto under that commission contract term to be as claimed in the cross-complaint except for the above-named three items and found that the plaintiff was indebted to the defendant, because he had been overpaid as shown by defendant's bill of particulars, in the sum of $617.66. This sum deducted from the four items found to be due to plaintiff which amounted to a total of $1,428.34, left as the balance due plaintiff the net sum of $810.68. There was much testimony adduced upon the trial with reference to all of the business done by the plaintiff under the commission contract during his last year's

service. That evidence was conflicting. The court actually made an accounting reconciling the conflicting testimony as best it could. We need not cite authorities upon the point that in such case the judgment in this court must support the finding of the trial court.

The plaintiff is not appealing from any of the adverse rulings under the cross-complaint. We need not, therefore, discuss the evidence further.

The judgment is affirmed.

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112 Cal. App. 348

FERRY v. NORTH PACIFIC STAGES et al.

Civ. 4041.

District Court of Appeal, Third District, California.

March 6, 1931.

1. Appeal and error ⚷417(2).

Appellant's notice of appeal *held* not fatally defective, under circumstances, although it referred to wrong appellee.

> The notice, stating that appeal was taken from the order of the court dated May 31, 1929, setting aside judgment entered in favor of appellant and against named appellee, was not fatally defective, since there could be no reasonable doubt regarding identity of specific order appealed from, as appellant referred to order of court dated May 31, 1929, and no other order had been entered in the case setting aside a judgment, and furthermore no judgment had been rendered against the appellee named in the notice of appeal.

2. Corporations ⚷507(4).

Where defendant was alleged to be a corporation, and affidavit recited process was served on defendant as association by delivery to member of association, service was not valid if defendant was corporation (Code Civ. Proc. § 411).

3. Associations ⚷20(3).
Partnership ⚷200.

Where complaint alleged individual defendants were associated together and doing business under firm name of certain company, and service of summons was on an individual defendant described as member of association, company as separate entity *held* not party defendant either as association or partnership (Code Civ. Proc. § 388).

Appeal from Superior Court, Colusa County; Ernest Weyand, Judge.

Action by W. J. Ferry against the North Pacific Stages, Seattle-Portland-San Francisco Auto Stage Company, and others. From an order granting a new trial to the Seattle-Portland-San Francisco Auto Stage Company after default judgment, plaintiff appeals.

Affirmed.

Louis Oneal and A. G. Shoup, both of San Jose, and George R. Freeman, of Willows, for appellant.

Downey & Chester, of Sacramento, for respondent.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

This is an appeal from an order granting a new trial after judgment by default had been rendered against the respondent. A motion to dismiss the appeal was also made on the ground of a defective notice.

The plaintiff brought this action for damages for personal injuries alleged to have been sustained while riding as a passenger in an auto stage owned and operated by the defendants. The suit was brought against North Pacific Stages, a corporation; Seattle-Portland-San Francisco Auto Stage Company, a corporation; D. M. Shattuck, John Doe Christie et al., associated together and doing business under the firm name and style of Seattle-Portland-San Francisco Auto Stage Company. Summons was duly issued therein. An affidavit of service of summons was filed reciting that process in said cause was personally served upon "Seattle-Portland-San Francisco Auto Stage Co., an association, * * * by delivering to and leaving with * * * Fred Gordon, a member of said association," a copy of the summons and complaint. Fred Gordon appeared personally and answered the complaint. The defendant Seattle-Portland-San Francisco Auto Stage Company did not appear or answer as a corporation, as an association, or at all. October 14, 1927, upon demand of the plaintiff, the clerk entered default against the Seattle-Portland-San Francisco Auto Stage Company, an association. Subsequently, on motion of the plaintiff, and by consent of the court, the complaint was amended by striking therefrom the term "corporation" as it was used to describe and identify the defendant Seattle-Portland-San Francisco Auto Stage Company, and by substituting therefor the term "an association." A jury was impaneled. Evidence was adduced at the trial, of damages resulting to the plaintiff on account of a collision of the autobus with a certain bridge. A verdict of $10,000 was returned against the Seattle-Portland-San Francisco Auto Stage Company, an association. For this sum a judgment was rendered against the last-mentioned company as an association. Subsequently, on motion of the said Seattle-Portland-San Francisco Auto Stage Company, the judgment against it was set aside May 31, 1929, on the ground that the court had acquired no jurisdiction to render judgment against this company. From this order vacating the judgment, the following notice of appeal was duly served:

"Notice of Appeal.

"To the Clerk of the above entitled Court:

"Please take notice that the plaintiff herein appeals to the Supreme Court of the State of California from the order of this court dated May 31, 1929, setting aside the judgment heretofore entered in said action in favor of plaintiff and against defendant, North Pacific Stages."

[1] The respondent asserts this notice of appeal is defective and ineffectual because of the error of referring to the defendant "North Pacific Stages," instead of Seattle-Portland-San Francisco Auto Stage Company. We are of the opinion the notice of appeal is not fatally defective. In spite of the erroneous reference to the defendant "North Pacific Stages," there can be no reasonable doubt regarding the identity of the specific order from which the plaintiff appealed. He refers to it as "the order of this court dated May 31, 1929, setting aside the judgment heretofore entered." This was the only order setting aside a judgment which was made by the court in this case. No judgment was rendered against the North Pacific Stages Company. Indeed, this default judgment against the respondent Seattle-Portland-San Francisco Auto Stage Company was the only judgment which was rendered in this case against any party to the action. The respondent could not have been deceived regarding the identity of the order from which this appeal was taken.

In Harrelson v. Miller & Lux, Inc., 182 Cal. 408, 414, 188 P. 800, 802, it is said: "Notices of appeal are not strictly construed, and an appeal will not be dismissed because of a misdescription of the judgment or order to which it relates unless it appears that the respondent has been misled by such misdescription."

[2] This brings us to a consideration of the merits of the appeal. It will be observed that, in addition to a reference in the title of the action to the defendant Seattle-Portland-San Francisco Auto Stage Company, as a corporation, the complaint specifically alleges that company was a corporation duly organized under and by virtue of law. It is argued by the appellant this descriptive term "corporation," as it is used in the pleading, is surplusage and may be disregarded. We think not. The pleader is very explicit in describing the exact nature of the organization which he seeks to hold liable for the damages sustained as that of a corporation and not an association. The identity of this defendant as that of a corporation is thereby fixed and certain. Process was never served upon this defendant, as a corporation, in the manner required by section 411 of the Code of Civil Procedure. Process was never served upon any purported officer of this company upon whom the statute authorizes service of summons to be made to bind a corporation. If this company is a corporation, then there was no valid service of process upon it as such.

[3] The remaining question is, Was the Seattle-Portland-San Francisco Auto Stage Company also made a party defendant, as an association or partnership? Did the court have jurisdiction of this company as an association? It is true paragraph III of the complaint further alleges: "D. M. Shattuck, John Doe Christie * * * were at all times * * * and still are associated together and doing business under the firm name and style of Seattle-Portland-San Francisco Auto Stage Co." It is also true the title to the complaint includes these last-mentioned individuals as party defendants. The foregoing language clearly indicates it was the intention of the pleader to constitute these named individuals as party defendants. They are merely identified as doing business in the name of the Seattle-Portland-San Francisco Auto Stage Company. The company as a separate entity is not made a party defendant. To have included this last-mentioned company as a party defendant, independent of the individuals who are alleged to compose the organization, it should have been specifically named as a defendant. This was not done. Our courts have uniformly held, without exception, that similar descriptions of individuals as members of an association or partnership do not constitute the organization itself a party to the action. This is not an action pursuant to the provisions of section 388 of the Code of Civil Procedure against the "common name" under which individuals are associated and doing business. Davidson v. Knox, 67 Cal. 143, 7 P. 413; Feder v. Epstein, 69 Cal. 456, 10 P. 785; Maclay Co. v. Meads, 14 Cal. App. 363, 112 P. 195, 113 P. 364. The case of Davidson v. Knox, supra, is very similar with respect to the parties designated, to the case at bar. In that case the caption of the complaint named the defendants as "Richard F. Knox, Joseph Osborne, Samuel P. Ely, W. T. Robinson, and Philip V. R. Ely, copartners, doing business under the firm name of Knox & Osborne." The allegations of the complaint, similar to those of the present case, described the individual defendants in approximately the same language. Service of summons was made on Robinson, Knox, and Osborne. Robinson defaulted. Judgment was taken against the individual defendants and "the joint property of all of said defendants, partners and associates." The question involved in that ac-

tion was whether the partnership property was bound by the judgment. The court said: "The action was not instituted under section 388. * * * We are of opinion that this is an action against the individual partners doing business under the firm name of Knox & Osborne on partnership contracts, and in such case, under section 414, Code Civil Procedure, the plaintiffs can only proceed against the parties served."

In 47 C. J. 177, § 328, it is said: "Where one sues or is sued in a representative capacity, it must be averred that it is as such representative, and a mere statement of the representative character, following the name of the party, will be treated as only descriptio personæ."

Since the Seattle-Portland-San Francisco Auto Stage Company, as a separate entity, was never made a party defendant in this action, and the service of summons was merely made upon Fred Gordon, who is described as a member of "said association," the court never acquired jurisdiction over the company either as an association or as a partnership. Default was therefore erroneously entered against this company as a separate entity. The judgment was properly set aside.

The order setting aside the judgment is affirmed.

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112 Cal. App. 76

BLATTMAN v. GADD et al.

Civ. 7315.

District Court of Appeal, First District, Division 1, California.

Feb. 20, 1931.

Rehearing Denied March 21, 1931. Hearing Denied by Supreme Court April 20, 1931.

1. Appeal and error 🔑843(2).

Right of taxpayer in reclamation district to sue for cancellation of contract of trustees became moot, where trustees later joined in seeking relief.

2. Attorney and client 🔑134(1).

Evidence as to mistake of trustees of reclamation district concerning their rights, though not of itself warranting cancellation of contract for employment of attorney, was admissible to disclose situation of parties.

3. Attorney and client 🔑143.

Contract of reclamation district for employment of attorney, if void because unconscionable, could not be made effective by ratification.

4. Attorney and client 🔑134(1).

In suit to cancel contract for employment of attorney by reclamation district to prosecute claim against state reclamation board for excess cost of improvement over estimate, consideration of evidence as to reassessment to follow *held* not improper (St. 1913, p. 266, § 7).

> The original estimate of the cost of the particular project in the reclamation district was $40,500, and, when the work was completed, it was found that the cost was in excess of $160,000, so that the district was obliged to obtain reimbursement for the excess over $40,500, the amount obtained by assessment. Upon the evidence as to reassessment, the court found that the surcharge or extra cost would be properly chargeable against the district, and, upon the reassessment, the district and the lands embraced therein would have to bear the additional burden. Irrespective of whether the assessment for the surplus would fall heavily upon the particular district, cost of collection of the district's claim amounting to over $68,000, which was paid the attorney, would always be diverted from reclamation purposes.

5. Levees and flood control 🔑25.

Jurisdiction vested in assessors of reclamation district to levy assessments is conclusive on all questions of fact (St. 1911, p. 831).

6. Contracts 🔑1.

Question whether there has been unconscionable exercise of superior power depends largely on situation of parties.

7. Attorney and client 🔑133.

Relationship of attorney and client may exist without general retainer or express contract.

8. Attorney and client 🔑63.

Attorney must exercise utmost good faith towards clients and must make full and complete disclosure.

9. Attorney and client 🔑147.

Reasonableness of attorney's fee may be inquired into, though contract for payment is contingent.

10. Attorney and client 🔑143.

Status of parties, nature of controversy, and work involved may be considered in determining reasonableness of contract for attorney's fee.

11. Levees and flood control 🔑9.

Power of reclamation district to contract is always limited by reasonableness of contract and soundness of discretion exercised.

12. Attorney and client ⚷147.

Contract of trustees of reclamation district for employment of attorney on contingent fee basis to present claim against state reclamation board for excess expenditures by district *held* void and incapable of ratification under evidence, as unconscionable and contrary to public policy.

> The contract provided for the employment of an attorney who specialized in the branch of law particularly affecting reclamation and reclamation boards and districts, and called for payment to him of 20 per cent. of amount allowed up to $40,000, and 50 per cent. of any excess sums on claim for $160,000, on account of district's expenditures in excess of anticipated needs and original assessment. The evidence disclosed that the attorney engaged to assist him a former member of state reclamation board immediately on such member's resignation, and that such person was pointed out to the trustees as having a pull, and that he received approximately $50,000 out of the total amount allowed of $160,000. It further appeared that the attorney had advised the trustees that the claim would not be allowed for any greater sum than the amount apportioned, namely $40,500.

Appeal from Superior Court, Sacramento County; R. L. Thompson, Judge.

Suit by Joe Blattman, for himself and others similarly situated, against Peter R. Gadd, Charles F. Metteer, and others. From an adverse judgment, defendants named appeal. Affirmed.

Butler, Van Dyke, Desmond & Harris, and C. F. Metteer, all of Sacramento, for appellants.

Downey & Chester, and Theodore W. Chester, all of Sacramento, for respondent.

PARKER, Justice pro tem.

The plaintiff, a landowner and taxpayer within reclamation district No. 1001, brought this action on behalf of himself and others similarly situated. The purpose of the action was to have declared null and void and to rescind a certain contract of employment entered into between the trustees of reclamation district No. 1001, on behalf of said district, and appellant Charles F. Metteer. Further, plaintiff sought, as part of the relief necessarily incident to the cancellation of the contract, the return to the reclamation district of certain outstanding warrants delivered to Metteer, a number of which warrants had been assigned to appellant Gadd.

All of the defendants appeared and answered, and, upon issues joined, trial was had. The reclamation district strenuously contested the claims of plaintiff throughout the trial. However, before decision in the lower court, there seems to have been a readjustment in the affairs of the district, resulting in the election of a new board of directors, or at least the election of sufficient new members to change the policy of the said board. Thereupon the reclamation district, and the directors as well, caused to be filed amended answers, wherein was adopted the theory of the plaintiff, and the district and the directors asked that judgment be entered in conformity with the prayer of the plaintiff. The judgment that followed was in favor of plaintiff, and the defendants Gadd and Metteer prosecute this appeal. Each of the named appellants appears separately and with separate counsel. There is one strange feature of the appeal, and it is that each appellant, in greater or lesser part, urges the arguments advanced by counsel for the remaining defendants at a time when the position of the said defendants had not become unfavorable to the cause of the present appellants. This is mentioned merely in passing. It is perhaps axiomatic that sound law remains sound, irrespective of its source. Many reasons are advanced to overthrow the judgment, and the case has been exhaustively briefed. In intelligent discussion of the points raised, it becomes necessary to review the facts surrounding the entire case.

Reclamation district No. 1001 is one of the agencies created and existing pursuant to the general plan of reclamation and flood control, as outlined in a series of legislative enactments reviewed and cited in the case entitled In re Sutter-Butte By-Pass Assessment No. 6 of the Sacramento and San Joaquin Drainage District, reported in 191 Cal. at pages 650 et seq., 218 P. 27. The case cited is an instructive treatise on the creation, aims, and objects of reclamation districts, as existing under our law, and a reference thereto will serve in lieu of any general or special review here. Reclamation district No. 1001 was created and exists under an act of the Legislature found in Statutes of 1911 at page 831. This district and the lands embraced therein form a portion of the entire territory coming within that assessment district formed by the state reclamation board and designated "Project No. 6," which said project had for its main purpose the building of the Sutter-Butte by-pass. This assessment district embraced within its area some five hundred thousand acres. The details of project No. 6, as well as its general purpose, will be found in the cited case. The west line of district No. 1001 forms a portion of the east line of project No. 6, and, as an integral part of the reclamation and flood control contemplated in the general plan of the said project, it was proposed and found necessary to reconstruct and raise the levees forming the said boundary line. The entire cost of project No. 6 was estimated at some $8,000,000, and the total assessment against the lands embraced within district No. 1001 amounted to $131,154.58. It was estimated in project No. 6 that the cost of reconstructing the levee on the boundary referred to would be $40,500, and in the validation proceedings, subsequently approved by the courts, as noted, said amount was assessed against the lands of district No. 1001 for the contruction of the levee.

There had been negotiations between the state reclamation board and district 1001 over an extended period prior to the adoption of project No. 6 in which negotiations the sole object of concern was the enlargement and alteration of the particular levee of the district. It will suffice the present needs, however, to begin our discussion and consideration at the point when and after project No. 6 had been finally adopted and the assessment thereunder validated. The trustees of the district, as well as the members of the state reclamation board, had determined that the district was better equipped to undertake the work contemplated by the project within the district. Accordingly, it was agreed between the board and the district that the latter should proceed and complete the alteration and rebuilding of this levee under the plans of project No. 6. It is understood that throughout this opinion all reference to the levee is restricted to the work done within the boundaries of district No. 1001. After the work had been commenced it was found that conditions existing required improvements far beyond those contemplated or upon which estimates had been based. Without detail, when the work had been completed, it was found that the cost was in excess of $160,000 as against the original estimate of $40,500. Incidentally, it might be noted that the actual cost of the entire project was far in excess of the original estimates. When the work was completed and the additional cost determined, the question then uppermost was that of reimbursement to the district. Detailed statements were prepared and all expenditures were analyzed and confirmed; this from both an accounting and an engineering standpoint. A complete analysis of the work having been completed, with vouchers and engineering data obtained in support thereof, the district presented to the state board its claim in the amount and sum of $142,634.99.

From this point we begin to turn into the field of disputed fact. It is not our purpose nor is what follows intended to reflect that state of fact upon which all sides concur. Necessarily, however, we confine ourselves to the record and as is usual and compulsory we accept the facts as found or assume that finding, in case of conflict of fact which supports the judgment. It may be further noted that, except in more or less minor details, no real conflict appears. It is at this period, or thereabouts, that defendant and appellant Metteer enters into the transaction. Metteer was and is an attorney at law. While engaged in general practice he has, to a large extent, specialized in that branch of the law peculiarly affecting reclamation and reclamation boards and districts. In this practice he has acquired an extended and intimate acquaintance, not only with the procedure involved but also with the administrative officers engaged in this work. While he has never been under regular or permanent retainer or employment by district 1001, yet the fact is that from time to time, as occasion required, he did attend to such matters as might necessitate the employment of counsel. When it was found that the reclamation board, after presentation of the claim, seemed to be taking no action toward the consideration thereof, the trustees of the district again turned to Metteer for aid and advice. After consultation it was arranged and agreed that Metteer should be retained, and he was retained as counsel for the district to attend to the presentation and collection of the claim then pending before the state board. At the time of this employment it seems conceded that all of the required data, both engineering and accounting, had been gathered and compiled, and that very little, if any, further work was necessary in this connection. Upon review of this data it was decided to amend the claim which had been presented; the amendment being principally in amount. The amended claim was for the sum of $157,356.27, with an additional amount of some $20,000, claimed due as interest upon the moneys advanced. This claim was filed October 11, 1923, and on October 20th of the same year there was filed by the district a supplemental claim for some $7,600, including an item of $1,264.21 alleged to be due as interest. Thus it will be noted that the claim as finally made was for something in excess of $185,000. From the time of the first presentation of the original claim to October of 1923 little, if anything, was done as to urging the claim before the board; the district and its directors and counsel apparently being content with the priority resulting from the date of filing. As will hereinafter appear, however, there seems to have been much personal discussion with individual members of the state board, and, though these discussions were more or less frequent, yet formal action on the claim was deferred and time went on with no indication or promise of early action.

At this juncture we bring defendant and appellant Gadd into the discussion. Gadd, from February up to and including August 22, 1923, was one of the members of the state reclamation board and was at all of these times an active member, being for some portion of the period stated the secretary. From the record before us and the testimony of Gadd it is readily apparent that he was a controlling factor in the board's policies and actions. Prior to his appointment on the board, Gadd had been a civil engineer of extended practice, specializing, to a great degree, in flood control, drainage, and construction. In August, 1923, shortly after Gadd's retirement from the board, there transpired the events going to constitute the controversy here. In the further detail leading up to the present action no effort will be made to attain strict chronological accuracy inasmuch as this detail is useless.

During the pendency of the claim before the board, Metteer was a frequent visitor at the board offices. It seems that Metteer had his office in the same building and was in and out on business with the board or its executives as frequently as twice a week throughout the period. Many informal discussions were had regarding engineering details and other matters. During this period Gadd became quite intimate with the matter of the pending claim, though not acquainted with the detail. Immediately upon Gadd's resignation (and some evidence indicates or at least supports the inference that prior thereto) he took up with Metteer the question of his (Gadd's) employment in presenting the claim for action. At this juncture, in connection with the question of Gadd's employment, there arose, quite in order, the question of compensation, both as to Metteer and Gadd. It developed, after some consultations and discussions between Metteer and the trustees of the district, that the latter did not desire to enter into any contract with Gadd, but thought it more advisable to contract directly with Metteer, leaving the compensation of Gadd to be a matter of contract between himself and Metteer. Accordingly there was drawn up the contract which brought the controversy now before us. The trustees agreed with Metteer that he should present the claim and as compensation for his services should be compensated, contingent upon his success, from the amount recovered. On all sums up to and including $40,000 Metteer was to receive 20 per centum of the amount allowed, and upon all sums over and above that amount he was to receive 50 per centum. Thereupon Metteer contracted with Gadd to pay to the latter 75 per centum of all amounts received by Metteer, out of the amount Metteer received from funds over $40,000, and 50 per centum of the amount received from the funds under that sum. Thereafter a hearing was arranged before the state board for October 23, 1923, which was just twenty-three days after the date of the agreement between the district and Metteer, and the agreement between Metteer and Gadd. On October 24, 1923, the claim was allowed for $160,802.39 and warrants issued for the payment thereof. It is unnecessary to dwell upon the species of warrant. Suffice it to say the warrants were in regular form, drawn upon the state treasurer and payable out of the Sutter-Butte by-pass fund. On October 25, 1923, the district indorsed and turned over to Metteer warrants of the face value of $68,401.19, and Metteer turned over to Gadd a portion of these to the extent of $50,000.

As stated hereinbefore, this action was instituted by the plaintiff as a taxpayer within district 1001 to set aside the transaction, declare the agreement null and void, and have returned to the district the warrants thus delivered to Metteer, and by the latter to Gadd. The trial court rendered judgment as prayed and fixed the value of the Metteer service at $1,500. The foregoing facts will be supplemented as we take up the various contentions presented.

[1] The main theory of the respondent is to the effect that the contract referred to is unreasonable, unconscionable, and in substance amounts to a waste of the funds of the district, and that by reason of this taint it is a contract that the trustees of the district had no power to enter into. Further, that the law governing districts of this character especially enjoins such use of the warrants received. The chief argument of both appellants is an attack upon this theory of respondent, it being evident from the findings and the judgment of the trial court that this issue was the prevailing one at the trial. Before approaching a discussion of this most important feature of the case, there are certain other contentions that may be here taken up and disposition thereof made. It is contended by both appellants that the plaintiff, as a taxpayer within the district, is not competent to maintain the action upon the facts related. This contention is advanced under many theories, including the nature of the contract and the discretion vested in trustees of such a district. However, it appears from the record before us that, prior to judgment, the pleadings were so amended that the defendant district and the defendant trustees thereof, or at least a majority of them, joined with the plaintiff in the relief asked, so that in effect, as the controversy eventuated, the issues joined were between the district and the appellants. True, it is urged, that the cause still remained the same. The plaintiff taxpayer remained the actor throughout, but the condition existing, which gave to the taxpayer his right to maintain the suit at all, was the fact that the trustees of the district refused to act and his status was practically that of a minority stockholder, whose suit was to recover, not for himself, but for the corporation or district whose rights were being lost through neglect of the trustees. Therefore, when the district acquiesced in the claim of the plaintiff, that the district had

been defrauded or its funds dissipated and assumed the duty, properly chargeable to them as trustees, the plaintiff had accomplished the purpose of his suit, namely to have inquiry made and the claim of restoration urged. It would follow then that the question of plaintiff's right to maintain the action has become purely academic and under the changed pleadings has become moot. No further consideration need be given this point.

[2, 3] Other points raised involve the question of mistake, as a ground for rescission, and a ratification after mistake disclosed. These points, too, become more or less beside the main question and not deserving of minute discussion. We might concede that the mistake claimed, as will hereinafter appear, would not of itself be sufficient to declare ineffectual the contract, but evidence concerning the same would be relevant and material, as an aid in disclosing the situation of the parties at the time of contracting. Also the question of ratification requires little notice for the reason that, if the contract is of the character claimed by plaintiff and found by the court, it could not be ratified; if it were free of the taint charged, its validity would not be questioned and ratification would be surplusage. This brings us then to what we deem the essential point in the case, namely, the question of unconscionableness, coupled with the power of the trustees to enter into the contract, if found to be unconscionable and oppressive.

[4, 5] At the trial the court admitted evidence concerning the original assessment of benefits, and likewise the court permitted testimony on the benefits and assessments to follow and as to where the burden would fall for payment of the excess amount over the original estimate of $40,500. Upon the evidence thus received, the court found that the surcharge or extra cost would be properly chargeable against the district, and, upon a reassessment, the district and the lands embraced therein would have to bear the additional burden. It was the trial court's conclusion that upon reassessment the district would have to pay the additional charge of collection, as well as the difference between $40,500 and the claim allowed of some $160,000. Appellants urge this to be error and error of such a serious nature as to vitiate the judgment, in that both the admission of the evidence objected to and the finding of the court thereon operate to the prejudice of appellants and constitute a grave misconception of the law applicable. It is the claim of the appellant that the original assessment and the proceedings validating the same fixed, once and for all, the proportionate liability of each district within project No. 6, and that all future liability or future assessments or reassessments in completion of the project must automatically follow in the same proportion. In other words, and by way of illustration, if the entire cost of project No. 6 was $8,000,000 and the benefits accruing to district 1001 were determined and fixed in the original assessment at $1,000,000, it would be obvious that the proportionate share of the project to be borne by the district would be one-eighth. Applying this theory, appellants contend that the construction or reconstruction of the levee in district 1001 was a part of the general project, and that, while a definite sum was allocated to and assessed against the lands of the district, the sum so named was an allocation proportionate to the entire project, and that, when the cost went above the estimate, the surplus was to be, and by law was required to be, borne by the entire project.

Appellants have diagramed the mathematical conclusions to be drawn from this theory, from which it appears that the liability of the district would be in a small amount, and that, while the amounts paid Metteer might appear gross, yet in reality the cost to the district or the lands therein would be assessed only to a perhaps negligible extent. Urging the importance of this contention, appellants argue that the trial court was guided wholly by the size of the sum paid Metteer in so far as it affected the district, and that, if the trial court had correctly approached the subject and found, as the law compelled the finding, the slight cost to the district, then the trial court would have had no basis from which it could conclude the contract to be unfair or unconscionable. We do not feel that the question is as important as appellants would have it appear. Without reviewing the authorities cited by appellants, it is manifest that the same question has never been before the courts of this jurisdiction. While we do not feel called upon to decide just how any future assessments or reassessments must be allocated or levied we might point out wherein the contentions of appellant would be an independent question for subsequent determination, first by the levying power of the state.

In the validation proceeding hereinbefore referred to and found reported in 191 Cal. 650 et seq., 218 P. 27, the Supreme Court holds that the matter of assessments of the nature here under consideration is essentially a question of fact, and proceedings to that end are purely statutory and almost summary. Without expressly deciding the point, it being unnecessary to this controversy, it could well be that proceedings upon reassessment would permit the charge of the surplus under project No. 6 to the particular units wherein the excess accrued, upon a showing of excess cost in materials or work exclusively for the benefit of such units.

There is in the record before us much evidence to support the claim of respondent, that the levee constructed on the boundary of the district was essentially a part of the reclamation work of the district, as well as being a portion of the general scheme involved in project No. 6. The question of this levee and its reconstruction had been before the state board before the determination to undertake the general project, and was then approached as a distinct district improvement. Much of the work of preparing and enlarging the levee, so as to fit it for the general improvement, embraced repair of the then existing conditions. And the state board, in fixing the benefits accruing, determined not that the amount assessed was the fair proportion, compared with benefits, that should be borne by the district, but that the construction of this particular portion of levee was for the benefit of the district and the cost thereof should be borne by it alone. The benefit determined was not such benefit as would accrue from an expenditure of any sum of money, proportionate or otherwise, but the benefit that would accrue from the reconstruction of the levee, the cost of which was fixed merely by way of estimate. It would seem in keeping with the theory of assessment proportionate to benefit that the benefits should be determined by the improvement made, and the cost at all times determined by the cost of the improvement, otherwise there would be no reason, nor would there be necessity of specifying the portion of the work determined as of benefit. A mere allocation of amount would suffice. We have endeavored simply to point out that the question of reassessment remains an open one with the jurisdiction to levy vested in the assessors, subject to review by the special court provided by the statute. And under the ruling referred to (191 Cal. 650, 218 P. 27), the jurisdiction so conferred is conclusive on all questions of fact.

As a conclusion drawn from the foregoing discussion regarding the reassessment, it was proper for the trial court to consider that there might be, and that there was, even an uncertainty with respect to the reassessment, and that in determining the effect of the contract here involved this feature might well be considered. We do not feel that it is necessary here to determine all of the questions that might arise upon the reassessment, nor to in any wise embarrass or preclude the action of those vested with the authority of allocating the amounts levied, but both of the appellants admit that, if it were properly determined that all of the cost of the levee is chargeable to district 1001, then the contract under discussion would appear to be unquestionably unconscionable. In other words, it seems conceded that the criterion of unconscionableness is not the gain accruing to Metteer, but the loss suffered by the district. Under some set of circumstances this might be true, but here we have present other conditions. It appears that at the outset the district has expended a sum in excess of $160,000, and the claim presented was for reimbursement. Nothing appearing to the contrary, it must be assumed that this original expenditure was from funds of the district or funds for which the district incurred liability. The allowance by the state board was a repayment. Therefore it is apparent that, if the district gets the larger portion of the repayment from the entire area included within project No. 6, and this contract is upheld, there will be restored to the district's fund a sum lessened by some $68,000 paid for collection. Illustrating, if the district had $168,000 in its treasury and expended the same in the construction of the levee, it would make no difference from what source might come the repayment; when the entire sum was repaid there would still have to be deducted the allowance for collection, leaving the net that much short of the sum originally had. But disregarding this entirely and assuming for the present that the assessment for the surplus would fall but lightly upon the district, we are still confronted with the fact that the costs of collection—over $68,000—have been paid to the appellants, and that, whatever methods of assessment or repayment may follow, there will always be diverted from reclamation purposes this amount.

In the case of People v. Sacramento Drainage District, 155 Cal. 373, 379, 103 P. 207, 211, the court says: "* * * It was clearly desirable and beneficial to the state that all of these lands should be reclaimed for purposes of husbandry. This improvement would add great wealth to the state, and * * * would result in a public benefit."

In the General Laws providing for reclamation and the agencies in charge thereof, we find this declaration of legislative purpose and intent: "The State of California and the people thereof are hereby declared to have a primary and supreme interest in having erected, maintained and protected on the banks of the Sacramento and San Joaquin rivers and their tributaries and the by-passes and overflow channels * * * good and sufficient levees and embankments or other works of reclamation, adequately protecting the lands overflowed by said streams, and confining the waters of said rivers, tributaries, by-passes and overflow channels within their respective channels." Stats. 1913, chap. 170, pp. 252, 266, § 7. With the foregoing in mind it would appear to make little difference from what particular fund money was improperly drawn, or upon whom the burden would expressly fall, as long as it was admitted that the charge was imposed upon the reclamation as a whole. When appellants urge the justice of their claim upon the theory that the sums claimed are to be paid by a comparatively large number, admitting, as they do, that, if the burden fell upon a lesser number, the contract could be properly classed as unconscionable, the general policy of the law, as announced, offers them little consolation. Aside then from the particular interest of the district, public policy would enter into the question and require as exact a construction in the premises as would be demanded if the district alone were involved.

[6] This brings us directly to the contract itself. From the facts before it, as hereinbefore detailed and as will hereinafter develop, the trial court concluded that the contract and agreement between reclamation district 1001 and C. F. Metteer, dated October 1, 1923, was and is unreasonable, unconscionable, and void. It is conceded that, if the facts warrant this conclusion, the judgment here appealed from must be affirmed. The term "unconscionable" has often received judicial interpretation, but in each case the definition given reflects the facts of the case then before the court. Where great hardship and oppression have been present, fitting language expressing indignation of the court has been employed, but the exact meaning of the term cannot be embraced within a formulated definition. The determination regarding the conscience, as it were, of a contract does not hinge upon the fitting of the facts to any phraseology. As was said in Colton v. Stanford, 82 Cal. 403, 23 P. 16, 21, 16 Am. St. Rep. 137: "The question whether there has been an undue advantage, an unconscionable exercise of a superior power, depends largely upon the situation of the parties at the time of the negotiations." Instead, then, of announcing the rule to be that a court will not enforce a contract because it appears unconscionable, it would better be stated that, because a court will not enforce an unjust contract or grant relief, the contract is thereby classed as unconscionable. And intermixed among the elements going to constitute a contract unconscionable are the elements of fairness, reasonableness, oppression, and injustice, each and all dependent upon the facts of each particular case.

[7, 8] Completing now the facts sketched at the outset, we may more closely scrutinize the conditions existing at the time of the execution of the contract. The district had a valid claim against the state board. All of the accounting and engineering data had been prepared and the claim presented. Metteer had been the attorney for the district, and without exhaustively covering the entire field of law with reference to the relationship of attorney and client, there is ample evidence to sustain the conclusion that such a relationship did then exist between Metteer and the trustees and the district. It is not necessary to effect that relationship that there should be a general retainer or express contract to that specific end. The questions involved came within a branch of the law characterized by appellant as being highly specialized. Both at the trial and in his brief, appellant Metteer stresses this point even to the extent of complaining, though respectfully, that the honorable trial judge, by reason of lack of experience in this particular field, would be greatly handicapped in arriving at any just solution of the problems presented. Much less, therefore, could we expect familiarity with the legal questions involved on the part of the trustees of the district. When the question of the contract of Metteer was before the trustees for consideration, they were advised many times that the claim would not be allowed for any greater sum than the amount apportioned under project No. 6, namely, $40,500. Being in this state of mind, and being so advised by Metteer, then any question of compensation in so far as it affected any proportion of the amount realized over and above $40,000 meant nothing to the trustees. It is readily deducible that at the very outset the parties were not on an equal footing and that the situation was such that an unfair advantage rested with the attorney, he having a superior knowledge of the true merits of the claim. It was the duty of the attorney in dealing with his clients to exercise the utmost good faith, and before contracting to equalize the advantage by a full and complete disclosure. Citation of authority in support of this proposition is hardly necessary, though the latest expression of the Supreme Court on the subject may be found in the case of Anderson v. Eaton, 293 P. 788, wherein is reaffirmed the basic principle that it is an attorney's duty to protect his client in every possible way, and it is a violation of that duty for an attorney to assume a position adverse or antagonistic to his client without the latter's free and intelligent consent, given after full knowledge of all of the facts and circumstances. Obviously a situation wherein skilled counsel knows, or ought to know, the nature of his client's claim, and leaves the client uninformed or misinformed as to the legal sufficiency thereof, to the end that the former secures benefits greatly out of proportion to the service rendered, does not measure up to this standard. The appellants contend that the law governing attorney and client has always recognized the principle that an attorney is justly entitled to fair and reasonable compensation; that within this principle rests another, namely, that the measure of compensation varies with circumstances. From these premises grows the practice of compensation only upon contingency, referred to generally as contingent fees.

[9, 10] Much has been said by the courts of various jurisdictions on the matter of contingent fees, and the practice of contracting on that basis has been recognized and approved. Yet we cannot conclude, from the authorities reviewed, that the mere circumstance that the fee agreed upon may be contingent upon the outcome precludes any inquiry as to the reasonableness of the amount thereof. The question of the reasonableness of the fee always remains open, though the fact of contingency often determines the con-

troversy. However, other elements may be considered, and among these may be mentioned the status of the parties, the nature of the controversy, and the work involved. It will be borne in mind that the contracting district, in the instant case, is a governmental agency, authorized and empowered to contract for legal services and to pay for the same regardless of outcome. Therefore, the matter of fees is not confined to the outcome, as is usually the case where contingent fees are considered. Further, from the record, there was no actual controversy then existing. The claim of the district had been filed with the state board, and there is not the slightest evidence from which it might be fairly, or otherwise, deduced that the district would be called upon to make other than due and ordinary proof of the items detailed. No question of jurisdiction was involved and no refusal to act had been indicated. And further than this, there remained but little, if anything, in the way of revising the claim or elaborating the detail thereof. This can readily be seen when the fact appears that, within approximately a month after the contract for fees was made, the claim was brought to a hearing and allowed. The work involved can be more readily appreciated from the record, which discloses that the attorney did practically nothing with the claim, and the engineering work found necessary by Gadd to familiarize himself with the claim embraced services of a value, according to his own estimate, of less than $500.

The case of Robinson v. Sharp, 201 Ill. 86, 66 N. E. 299, 301, presents a situation similar to the case at bar. In that case an attorney had entered into a contract with a policyholder to collect the claimed proceeds of a life insurance policy. There, as here, the contract, contingent upon the success of the collection, provided for a fee of 50 per cent. of the recovery. In declaring such a contract void and unreasonable, the court says: "The insurance company did not question liability to pay the policies, but paid them without delay upon presentation of formal proofs of death, etc., and there is nothing in the evidence which tends to prove the company ever contemplated denying liability, or that there was any reason to apprehend there would be any necessity for litigation of any kind in the matter. Nor is there any evidence in the record tending to show that the appellant believed or expected that liability to pay would be denied, or that resort to litigation would be necessary. Under such state of circumstances an agreement requiring his clients to pay one-half of the face of the policies can but be denounced as unfair, and obtained by undue exercise of the influence which the appellant enjoyed as the legal counselor and adviser of the appellees." In the cited case, it might be noted, there was some small showing of anticipated controversy, while in the instant case there is not even a suggestion thereof or a scintilla of evidence from which it might be even inferred that any action would be necessary other than the mere securing of a hearing upon the claim. If the reasoning of the Illinois court just quoted is sound with reference to the contracts of individuals, and we so deem it, then with much greater force would it apply to the case before us wherein one of the parties to the questioned contract is a public agency, itself a trustee. In almost every branch of government we find the subordinate agencies contracting with the government itself, and out of this relationship arise, almost daily, demands and cross-demands, and receipts and expenditures forming the basis of reciprocal claims. If, in the ordinary course, each agency involved were permitted to contract for a dissipation of the claim through contracts similar to the one under discussion, the evils which may readily be anticipated would be destructive of any idea of regulated governmental finance.

[11, 12] Aside from all other questions it is apparent that the power of an agency, such as a reclamation district, to contract, clothed though such a district may be with vast discretion in these matters, is always limited by the reasonableness of the contract and the soundness of the discretion exercised. The trustees of the district had no power to make a contract with Metteer under which he would receive more than the reasonable value of his services, and enough has been said hereinbefore to conclude that the contract before us did provide for payment of an amount grossly unreasonable. Therefore, it follows that the contract was beyond the power of the trustees to enter into, and therefore beyond their power to ratify. Bottoms v. Madera Irrigation District, 74 Cal. App. 681, 242 P. 100; 15 Cor. Jur. 548.

We have, to this point, considered the controversy more in the light in which it affects the parties thereto. There is another aspect of the case which in itself would be of controlling importance, namely, the question of a sound public policy. This phase of the case, strangely enough, seems to be merely hinted at in the court below and in the briefs of counsel before us, yet sufficient appears to indicate that it was constantly in mind. As hereinbefore stated, the appellant Gadd was a member of the state board, before which was pending the claim of the district. It is admitted that on many occasions prior to Gadd's resignation, and while the claim was pending, he and Metteer had sundry minor discussions regarding the claim; that Gadd was familiar with the details thereof and knew the merits of the claim and how little further work was necessary to properly shape it for action by the board. Immediately upon Gadd's resignation, or so soon thereafter that it makes no appreciable difference, we find the appellants Metteer and Gadd negotiating with the trustees on the question of Gadd's employment. It was pointed out to the trustees of the district that Gadd, by reason of his recent membership on the state board, had what was described as a pull or some roundabout influence. According to the record the word "pull" was the exact word used, and this word in its very essence and in its most common usage implies the use of an improper and undue influence. Gadd, at the outset, was desirous of a contract that would provide that he get everything recovered over and above the $40,500 provided for in the estimate under project No. 6, or at least the portion thereof embracing Metteer's fifty per cent. The negotiations between Gadd and Metteer, made known to the trustees of the district, and the urged need of Gadd's alleged pull being stressed, the trustees made the contract with Metteer, knowing of the contract either executed or about to be executed between Metteer and Gadd.

One significant feature of the case here disclosed is that it must have been apparent to all concerned that the arrangement would not bear scrutiny from the fact that, with knowledge as indicated, it was deemed expedient and tactful that there should be no express contract between Gadd and the trustees. Phrasing it bluntly, the unconscionableness of the entire transaction was manifest, and the proceeding in its inception indicated a scheme rather than a contract. Courts, as such, have no monopoly on conscience, but react in conformity to general human experience, and in this connection it is interesting and instructive to note the common interpretation placed upon the contract involved by that portion of the public most concerned, and particularly the state reclamation board, as disclosed by the record before us. When the facts surrounding the claim of the district, and the particular fact of the warrants being delivered to appellants here became generally known, the state board immediately convened and attempted to reopen the claim and make further investigation concerning the same. The attitude of the state board was one naturally to be expected. This board felt that, if a district could pay out a sum approximating $70,000 merely to bring to a hearing a claim for $160,000, then there must be something inherently wrong or fraudulent about the claim itself. Finding, upon examination, that the claim was correct in every detail, the other fair inference deducted from the transaction was that a claimed pull or influence with the board had been bartered, and from the record it cannot be disputed that this did not lack a factual basis. It might be deemed expedient or generous to gloss over the contract with a presumption of honesty and fair dealing, but in the face of the trial court's judgment annulling and canceling the contract, no amount of platitude or sophistry can overcome the presumptions arising when all of the concomitant facts are considered. When a member of a board or commission, before which a matter involving payment of money has been pending for some period of time without action, resigns his office and almost coincident therewith allies himself with the prosecution of the claim, and within a month thereafter secures favorable action on this undisputed claim, and for that service is awarded a sum of money approximating $50,000 out of a total claim of $160,000, it seems unnecessary to go to the authorities to find reasons why the transaction should be held unfair and of no effect. When the transaction is minutely detailed and each proposition of law separated, it might readily be that no one principle of law would suffice to nullify the transaction. On the other hand, it is equally true that no one principle of law could add conscience thereto. The case, as a whole, in all of its phases, must be considered, and, after such consideration, we agree with the trial court that the contract was unreasonable and unconscionable, and therefore void. Thus tainted it was beyond the power of the trustees to enter into such a contract, and no act on their part could or would have the effect of giving effect to the attempted arrangement through ratification.

Summing up the entire case it can be seen that the district received nothing more than a hearing, and that for this privilege it is to be mulcted in the sum of $68,000, if the judgment should be reversed. Surely public policy and public good, as the law uses these terms, does preclude such a result. A holding in support of a contract such as this would go far toward a destruction of all public service and would bring about suspicion and distrust of public agencies and hasten an era of anarchy and chaos.

The judgment is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

112 Cal. App. 314

BARTHOLOMAE OIL CORPORATION v. DELANEY et al.

Civ. 7739.

District Court of Appeal, First District, Division 2, California.

March 3, 1931.

Rehearing Denied April 2, 1931. Hearing Denied by Supreme Court April 30, 1931.

1. Quieting title 🔑21.

Defendants in action to quiet title to leasehold interest were without right to set up adverse claim under contract for purchase of oil produced on premises.

> Leasehold interest and oil in place to which plaintiff sought to quiet title were both real property, while the asserted claim by virtue of contract to purchase some of oil after it had lost its character of realty by severance from land did not affect real estate in any particular.

2. Quieting title 🔑21.

Contract to purchase oil was not "adverse claim" affecting real estate (Code Civ. Proc. § 738).

> [Ed. Note.—For other definitions of "Adverse Claim," see Words and Phrases.]

3. Judgment 🔑255.

Court, refusing to permit proof of contract to purchase oil in action to quiet title to leasehold interest, erroneously entered judgment restraining assertion of rights under contract.

> Since the asserted rights by virtue of contract to purchase oil did not constitute a claim adverse to interests under leasehold in premises, any judgment affecting such contract was wholly outside issues of case.

Appeal from Superior Court, Los Angeles County; William T. Aggeler, Judge.

Action by the Bartholomae Oil Corporation against A. J. Delaney, the Delaney-Camp Oil Company, Incorporated, the Camp Oil Company, Incorporated, and others. Judgment for plaintiff, and defendants named appeal.

Modified and, as modified, affirmed.

Hibbard & Kleindienst, of Los Angeles, for appellants.

Joseph E. Bien, Earl D. Killion, and Werner Olds, all of Los Angeles, for respondent.

NOURSE, P. J.

Plaintiff sued to quiet title to a leasehold interest for the exclusive right to drill, develop, and remove petroleum, natural gas, asphaltum, and other kindred substances from certain real property. The cause was tried before the court, which made findings and judgment in favor of the plaintiff from which the defendants appeal upon typewritten transcripts.

The complaint pleaded plaintiff's leasehold interest in the real property which gave to the plaintiff the exclusive right to drill, develop, and remove all petroleum and kindred substances from the land for a period of twenty years. It was also alleged that the plaintiff was in possession of the premises and of all petroleum, natural gas, asphaltum, and other kindred substances situated upon and contained in said premises; that the defendants claim some estate or interest therein, but that they had no estate or interest whatsoever "in said lease and/or to the oil, petroleum, gas, asphaltum and/or other kindred substances situated and being within said leasehold and said premises." These allegations were followed by the usual prayer for a decree quieting plaintiff's title to the lease of the premises and to the oil and kindred substances situated and being within and upon said premises. A prayer was added for an injunction restraining defendants from asserting any claim whatsoever to the leasehold interest or to the oil and kindred substances situated or being, "or produced" from said land and premises. The defendants answered denying any interest or estate in the lease but claiming an interest in the oil and gas situated upon said premises by reason of a contract between the plaintiff and defendants whereby the former agreed to sell to the defendants one-half of all the oil produced from a certain well known as Bartholomae No. 3 situated on the premises, such sale to be made at the market price of such oil at the Long Beach oil field.

Plaintiff made proof of its title to the leasehold and then dependants endeavored to prove what they claimed to be an interest in the oil by reason of the contract; objections were made to this line of proof and sustained. Thereupon the trial court made its findings and entered judgment in favor of plaintiff through which it quieted plaintiff's title to the leasehold and to all petroleum, natural gas, and kindred substances situated upon and contained in said premises. It further decreed that the defendants had no interest whatsoever in these properties, but the judgment forever enjoined and debarred them from asserting any claim to the leasehold or to the oil being or "produced from" said premises.

On this appeal the appellants raise five points, all of which concern the ruling which determine that the appellants' claim under their contract for the sale of the oil produced was not an adverse claim to the property to which the respondent sought to quiet title. These specifications may, therefore, all be considered as one.

[1] It will be noted from the portions of the complaint which we have cited that the respondent sought to quiet title to its leasehold interest and to the oil and other kindred substances situated upon the premises described. Thus all the property described in the complaint and to which issue was joined by the complaint was real property. By their answer the appellants denied any adverse claim to the leasehold, but endeavored to set up a claim to the oil by reason of their contract to purchase one-half thereof after a certain date. In denying appellants the right to offer proof in support of their claim and in finding that they had no adverse claim to the oil situated upon the premises the court did not err. The leasehold interest and the oil in place to which the respondent sought to quiet title were both real property, but the asserted claim of the appellants to purchase some of the oil after it had lost its character of realty by severance from the land did not affect the real estate in any particular. A somewhat similar case arose in Meyer v. Quiggle, 140 Cal. 495, 74 P. 40, where a plaintiff in a quiet title action was met by the offer of the defendant to prove an adverse claim by reason of a written contract under which plaintiff engaged the defendant to sink a well upon the premises and promised to pay him at the rate of $100 per inch of water developed from the well, either in land or in cash. In holding that defendant's rights under the contract did not constitute an adverse claim to the realty, but were such as must be enforced under an independent action, the Supreme Court (page 497 of 140 Cal., 74 P. 40) said: "It is clear that under the contract the defendant had no interest whatever in the land, nor any right to a conveyance which would be specifically enforced. * * * It is also clear that there is no lien on the land by virtue of the contract, taken in connection with the allegations of the answer and cross-complaint. There is nothing to show that the defendant ever filed or claimed a lien under the mechanic's lien law, and the contract itself does not purport to give the defendant a lien upon the land for the value of his services in performing the contract. The claim of the defendant, therefore, does not affect the real estate in any particular. It has no more relation thereto, in legal effect, than if it were an independent contract for the payment of money, or an independent cause of action in tort against the plaintiff."

[2] Thus, in the case at hand appellant's rights under their contract were nothing more than such rights as would ordinarily accrue in a contract for the sale and purchase of personalty. They did not constitute a lien upon or an interest in the land from which the oil was to be produced or in the oil itself while it remained unsevered from the land. At most, they obligated the respondent to deliver to the appellants one-half of such oil as the respondent should produce from the well. The contract, however, did not require the respondent to produce any fixed amount of oil from that well, nor in fact to produce any oil at all. No authorities have been cited by either party which are directly in point, but we are satisfied from first impression that notwithstanding the amendment to section 738, Code of Civil Procedure, which permits a suit to quiet title to personalty as well as to realty, there is no change from the rule announced in Meyer v. Quiggle, supra, that a contract of this nature does not constitute an adverse claim affecting the real estate, and is not a matter of defense to, or a subject of cross-complaint in, an action to quiet title to the land and to the oil in place.

However, the judgment appealed from is wholly without equity. The respondent having denied to the appellants the right to put their contract in issue, it nevertheless took judgment against the appellants forever restraining them from asserting any rights under that contract. The appellants were thus debarred from proving their contract and at the same time foreclosed from asserting any rights under it, and the injunction to this extent was decreed without any evidence of any character to support it.

[3] It must be apparent that if the asserted rights of the appellants under their contract are not a claim adverse to the interests of the respondent in the premises described, then any judgment affecting that contract is wholly outside the issues of the case tried. It must be equally apparent that the appellants might have a valid or enforceable contract for the purchase of the oil after it has been severed from the realty, and that whether such contract is valid and enforceable is a question upon which they are entitled to be heard.

For the reasons stated the judgment is modified by striking therefrom the language which purports to restrain appellants from asserting any rights under their contract to the oil, gas, and kindred substances produced from the land and premises described.

As so modified the judgment is affirmed, with costs to appellants.

We concur: STURTEVANT, J.; SPENCE, J.

112 Cal. App. 146

PEOPLE v. WALKER.

Cr. 2004.

District Court of Appeal, Second District,
Division 2, California.
Feb. 24, 1931.

1. Witnesses 🔑79(4).

Where witness is under ten years of age, entire record made by him may be examined to determine competency (Code Civ. Proc. § 1880).

> Code Civ. Proc. § 1880, provides that children under ten years of age, who appear incapable of receiving just impressions of facts on which they are examined, or of relating them truly, cannot be witnesses.

2. Witnesses 🔑40(2).

Admitting testimony of five year old girl, on whose person defendant allegedly committed lewd act, *held* not abuse of discretion; testimony showing competency (Code Civ. Proc. § 1880; Pen. Code, § 288).

3. Criminal law 🔑1129(3).

Assertion that court erred in not instructing jury on law contained in requested instruction presents nothing for review, in absence of argument or authority.

Appeal from Superior Court, Los Angeles County; J. O. Moncur, Judge.

Jess J. Walker was convicted of violating the provisions of the Pen. Code, § 288, and he appeals.

Affirmed.

Frederic H. Vercoe, Public Defender, and Franklin Padan, Chief Deputy Public Defender, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and W. R. Augustine, Deputy Atty. Gen., for the People.

WORKS, P. J.

Defendant was convicted upon a charge of violating the provisions of section 288 of the Penal Code by committing a lewd and lascivious act upon the person of a little girl. He appeals from the judgment and from an order of the trial court denying his motion for a new trial.

The alleged victim of appellant was five years of age on April 30, it was charged in the information that appellant committed the crime upon her on May 16, and the trial of the charge commenced on August 5, all in 1930. It is provided by section 1880 of the Code of Civil Procedure that "children under ten years of age, who appear incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly," cannot be witnesses. The little girl in question here was tendered as a witness, the trial judge subjected her to what we cannot but regard as a perfunctory examination in order to determine whether she rested under either of the disabilities mentioned in the statute, and at the end of the examination he concluded that she did not and permitted her to testify. It is now contended that the court erred in allowing her story to go to the jury.

[1, 2] This identical question received a most thorough consideration at our hands nearly ten years ago in People v. Delaney, 52 Cal. App. 765, 199 P. 896, 903, and during that lengthy period of time the trial judges and the profession of the state should have become acquainted with the views expressed in the opinion of the court. Despite that fact, in the present instance the judge, at the conclusion of the examination conducted by him, had not made a record from which he could possibly determine whether the child was sufficiently qualified to occupy the witness chair in a court of justice or whether she was not. It was said in People v. Delaney, however, that "it is the duty of a judge, at any time after he has determined that a child is competent as a witness, to change his mind upon due occasion, remove the child from the witness stand, and instruct the jury to disregard his testimony." This means that the entire record made by a witness under ten years of age in a particular case is to be scanned in order to determine whether he is competent to testify. If his testimony to the merits of one cause may be examined to nullify the ruling of the trial judge made at the end of an examination on voir dire, it follows necessarily that such testimony in another cause may be invoked to support the ruling on voir dire. We have accordingly read with care the entire testimony of the little girl in the present case, and while there are places in the record where the idiosyncrasies of childish expression and demeanor stand forth, we have no hesitancy in saying that this child had the mentality necessary to qualify her under both branches of the statute. In partial justification of this conclusion we quote a part of her direct examination on the merits, prefacing the quotation with the statement that the crime is alleged to have been perpetrated in a room in an apartment house:

"Q. Was this apartment house where you were, was that near your home? A. Yes.

"Q. On the same street? A. Yes.

"Q. In the same block? A. I live in a court.

"Q. You live in a court. That court is right near the apartment house? A. Yes.

"Q. Now * * * after you had been up in the room, and you told this man that you wanted to go home, did you leave the room and go home? A. Yes.

"Q. Did you cry? A. Yes.

"Q. Where were you when you started to cry? A. Downstairs.

"Q. Did you see anybody as you came out of his apartment? A. Yes.

"Q. Who? A. The landlady.

"Q. What is the landlady's name? A. I don't know.

"Q. Is she here? A. I don't know her name.

"Q. Is she here today? A. Yes.

"Q. Which lady is it? A. That one over there with the blue dress (indicating).

"Q. Which blue dress? A. The light one.

"Q. The light one. Will you stand up, please (addressing a lady in the courtroom, who arose to her feet). Is this the lady who is the landlady? A. Yes. * * *

"Q. Then did you go on home? A. Yes.

"Q. Did you see anybody when you got home? A. No.

"Q. Was your mother there? A. Yes.

"Q. Did you tell your mother what had happened? A. Yes.

"Q. What? A. Yes."

Following is a part of the record made on the cross-examination:

"What kind of bloomers did you have on that day? A. I don't know.

"Q. Did they have elastic in them? A. Yes.

"Q. Where was the elastic? Around the legs or around the waist? A. Around the legs.

"Q. It had elastic around the legs. Are all your bloomers made that way? A. Yes.

"Q. All the bloomers you have, have elastic around the legs? A. Yes.

"Q. And do they all have elastic around the waist? A. No.

"Q. And did the bloomers that you wore that day have elastic around the waist? A. No.

"Q. Did they have buttons on them? A. Yes.

"Q. Did you have on the same dress that day that you have on now? A. No, this is a different dress. I didn't have this dress when I was up there.

"Q. Were the bloomers the same color of the dress that you had on? A. I don't know.

"Q. Did Mr. Walker put his hands under the elastic of the bloomers? A. Yes.

"Q. Did you take your little bloomers down? A. He did, but I didn't.

"Q. Did you unbutton them? A. Yes.

"Q. Take them off? A. No, he just took his hand and put his hand in them.

"Q. Which way did he put his hand in, from the top or from the bottom? A. Here (indicating) from the top."

We think, as it finally turns out, that the trial judge exercised a proper discretion in permitting the child to testify.

[3] Appellant asserts that the trial court erred in refusing to give a certain instruction, setting it forth. No argument is advanced nor is authority cited to show that the proposed instruction contained a statement of the law. It is only said that "the law as set forth in the refused instruction" was not covered by any instruction given, and that the jury should have been "fully instructed on this question of law." Such a presentation gives us nothing to decide.

The same objection applies to questions attempted to be presented as to other instructions which were refused. In addition, we are convinced as to these particular instructions that they either do not state the law or were not required under the evidence, or that they were covered by instructions given.

Judgment and order affirmed.

We concur: CRAIG, J.; IRA F. THOMPSON, J.

211 Cal. 736

STOCKTON v. HUGHES et al.

L. A. 11079.

Supreme Court of California.
March 16, 1931.

1. Bills and notes 🔑**359.**

As respects purchase for value, pre-existing debt *held* sufficient consideration for transfer of negotiable instrument before maturity or default (Civ. Code, §§ 3106, 3265).

2. Bills and notes 🔑**525.**

Finding that assignee was not innocent purchaser of negotiable instruments, for value and without notice as to infirmities, *held* unsupported by evidence.

In Bank.

Appeal from Superior Court, Los Angeles County; W. D. McConnell, Judge.

Action by C. A. Stockton against G. O. Hughes and others. Judgment for defendants, and plaintiff appeals.

Reversed.

Leland S. Davidson and A. D. Mitchell, both of Ontario, for appellant.

Ernest P. Wellman, of Los Angeles, for respondents.

PER CURIAM.

This action is one for the foreclosure of a mortgage upon real property brought by the plaintiff who sues as the transferee of the note and mortgage from the mortgagees before maturity. The answer of the defendants admitted the due execution and delivery of the note and mortgage and the nonpayment thereof. The defendants, however, denied that said instruments had been assigned to the plaintiff or that he was the owner thereof, and further denied that he was an innocent purchaser for value. The answer then proceeded to affirmatively allege that there was no consideration for the making and execution of the note and mortgage. The trial court found that the note and mortgage were duly executed and delivered, and were purchased by, and assigned to, the plaintiff before maturity. The court, however, further found that the assignment was not made for value or in the ordinary course of business, that the consideration therefor had wholly failed, and that the plaintiff was not an innocent purchaser, but took the note and mortgage with all the equities existing between the mortgagor and mortgagees. As a conclusion of law from the foregoing findings, the trial court held that the plaintiff was not entitled to recover upon the note or to have the mortgage foreclosed. From the judgment entered thereon, the plaintiff has prosecuted this appeal and has filed his opening brief herein and an appendix containing the reporter's transcript.

[1] The appellant contends that the findings of the trial court to the effect that the transfer of the note and mortgage to him was not made for value nor in the ordinary course of business, and the further finding that he was not an innocent purchaser, but took the note and mortgage subject to all the equities existing between the mortgagor and mortgagees, are entirely unjustified by the evidence in the case; but that, on the contrary, the evidence conclusively shows that he was the purchaser of the note and mortgage in due course and for value, and without notice of any infirmity or defect therein or in the consideration therefor, and that from these premises it follows that he took said instruments free from any equities or infirmities that may have existed between the original parties thereto. The appellant, in support of these contentions, refers the court to the particular portions of the evidence in the case upon which he relies, and to the reporter's transcript which accompanies his brief. The respondents have presented no brief herein, although their attention has expressly been called to their failure so to do by the clerk of this court, and although an order to show cause was issued and duly served upon them requiring them to present such brief, and giving them notice that, unless they did so, the cause would be submitted for decision upon the appellant's brief on file. The cause has accordingly been submitted for decision. We have carefully examined the record, and we are satisfied therefrom that the several contentions of the appellant above noted should be sustained. The undisputed evidence shows that the note and mortgage in question were given by the respondent G. O. Hughes to the plaintiff's assignors as first payment upon a herd of cattle. They are in form negotiable. Civ. Code, § 3265. They were transferred to the plaintiff before maturity or default. The consideration for their transfer was that of the payment by the mortgagees to plaintiff, pro tanto, of an antecedent indebtedness amounting approximately to $8,000. That such preexisting debt constituted a sufficient consideration for the transfer of these negotiable instruments, the authorities uniformly hold. 19 Cal. Jur. 839; Civ. Code, § 3106; Popp v. Exchange Bank, 189 Cal. 296, 208 P. 113; Kunz v. Cal. Trona Co., 169 Cal. 348, 146 P. 883; Bridge v. Conn. Mut. Life Ins. Co., 167 Cal. 774, 141 P. 375; Hart v. Church, 126 Cal. 471, 58 P. 910, 59 P. 296, 77 Am. St. Rep. 195; Westphal v. Nevills, 92 Cal. 545, 28 P. 678. It follows necessarily, therefore, that the plaintiff, if otherwise an innocent purchaser of these negotiable instruments, was the holder thereof for value and in the ordinary course of business, and

that the findings of the trial court to the contrary are without support in the evidence.

[2] The only remaining question presented is as to whether there is sufficient evidence to support the further finding to the effect that the plaintiff was not an innocent purchaser of these instruments. The only evidence which we are able to find in the reporter's transcript touching this question consists of the testimony given by the son of the mortgagor, who testified that, after the execution of these instruments, but before their maturity and transfer to the plaintiff, he had held a conversation with the mortgagee King, wherein he complained of the cattle transaction in the course of which the note and mortgage had been given, and said that his father and he wanted to have the note and mortgage back. The witness stated that he thought Mr. Stockton was present in the room with a number of other people when this conversation was held, but that he did not know whether Mr. Stockton heard the conversation. The plaintiff positively denied being present upon the occasion referred to, or hearing any such conversation, and also testified most positively that he was entirely unaware of any infirmities in said instruments at the time of their transfer to him. In this state of the record it would seem to be clear that the finding of the trial court that the plaintiff was not an innocent purchaser for value and without notice as to any infirmities to the instruments in question is unsupported by the evidence in the case.

It follows that the judgment must be reversed, and it is so ordered.

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211 Cal. 734

KLOPPUTH v. McCORD et al.

L. A. 11006.

Supreme Court of California.

March 13, 1931.

1. Evidence ⚷450(3).

Instrument reciting sale *held* so informal and ambiguous as to require interpretation and permit introduction of parol evidence.

The instrument which was relied on as constituting deed, and on basis of which plaintiff sought to quiet title, was signed by sellers and dated with name of town, and recited sale to another of "lot 29, 25 by 150, for the sum of $200 paid $172.93 as part payment," and at the bottom thereof contained the words, "Stearn Compton Villa Tract."

2. Appeal and error ⚷671(1).

Decree for defendants could not be reversed where instrument relied on by plaintiff as deed was ambiguous and appeal was on judgment roll alone.

In Bank.

Appeal from Superior Court, Los Angeles County; J. Walter Hanby, Judge.

Action by Albert Klopputh against William McCord and wife. Judgment for defendants, and plaintiff appeals.

Affirmed.

Irving P. Austin, of Compton, for appellant.

Louis K. Beeks, of Los Angeles, for respondents.

PER CURIAM.

This action is one brought by the plaintiff to quiet title against the defendants to a lot in the city of Compton, county of Los Angeles. To the plaintiff's complaint alleging ownership the defendants William McCord and Mary McCord filed an answer, denying the allegations thereof, and also served and filed a cross-complaint alleging themselves to be the owners of the lot in question. The trial court made its findings of fact and conclusions of law in favor of the said defendants upon their cross-complaint, and judgment was accordingly entered decreeing that the plaintiff had no right, title, or interest in the premises and that the said defendants were the legal owners thereof. The plaintiff appeals to this court upon the judgment roll. The respondents have filed no brief and the cause has been submitted for decision after an order to show cause.

The appellant rests his claim of title upon an instrument in the following form:

"Feb. 6, 1923, Compton, Cal.

"Sold to Mrs. Elizabeth Pohlman Lot 29, 25 by 150, for the sum of $200.00 paid $172.93 as Part Payment.

$200.
172.93 Paid

$ 27.93 Bal.

"[Signed] William McCord
"Mary McCord.

"Stearn Compton Villa Tract."

[1] This instrument was acknowledged by Mary McCord only and was thereafter assigned to the plaintiff. It is contended by the appellant that this instrument constitutes a deed to the premises. It is evident, however, from a reading thereof that it is so informal and ambiguous as to require interpretation by the trial court, and in some respects at least to permit also the introduc-

tion of oral evidence to explain the scope and purpose of the instrument.

[2] The appeal being upon the judgment roll, we have nothing before us to indicate whether or not the trial court took such evidence and based its conclusion thereon that the instrument in question did not constitute a deed so as to invest the plaintiff's predecessor with title to the property. The defendants and cross-complainants, as the trial court found, were only the holders of an equitable interest in said premises at the time of the execution of the above instrument, but later became the owners of the legal title thereto by virtue of a grant deed from the holder of such legal title. The trial court accordingly adjudged said defendants to be the owners of the premises and quieted their title thereto. In the above state of the record we are unable to conclude that the trial court was in error in so doing.

The judgment is affirmed.

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211 Cal. 706

CENTRAL PAC. RY. CO. v. SUPERIOR COURT IN AND FOR SISKIYOU COUNTY et al.

S. F. 14032.

Supreme Court of California.

Feb. 25, 1931.

As Modified on Denial of Rehearing, March 26, 1931.

1. Mandamus ⚷3(11).

Plaintiff in condemnation proceeding could bring mandamus proceeding to determine qualification of judge notwithstanding proceeding pending in trial court to determine qualification; latter proceeding being inadequate (Code Civ. Proc. §§ 170, 1264).

2. Judges ⚷42.

"Interest" disqualifying judge must be direct interest in result of litigation which would tend to form improper bias (Code Civ. Proc. § 170).

[Ed. Note.—For other definitions of "Interest," see Words and Phrases.]

3. Judges ⚷42.

That judge was depositor in bank which was defendant in condemnation proceeding did not disqualify him (Code Civ. Proc. § 170, as amended by St. 1929, p. 957).

4. Judges ⚷43.

Judge owning stock in corporation which owned practically all stock of second corporation, defendant in condemnation proceeding, was not disqualified (Code Civ. Proc. § 170, as amended by St. 1929, p. 957).

CURTIS, J., dissenting.

In Bank.

Proceeding by the Central Pacific Railway Company against the Superior Court in and for Siskiyou County, Hon. C. J. Luttrell, Judge of said court, and another, for writ of mandate and writ of prohibition.

Writs issued.

Rehearing denied; Shenk and Curtis, JJ., dissenting.

Guy V. Shoup and Dunne, Dunne & Cook, all of San Francisco, Tebbe & Tebbe, of Yreka, and Frank Thunen, of San Francisco, for petitioner.

Jesse W. Carter, of Redding (Annette Abbott Adams, of San Francisco, of counsel), for respondents.

RICHARDS, J.

The petitioner seeks the issuance by this court of a writ of mandate directed to the Honorable C. J. Luttrell, judge of the superior court in and for the county of Siskiyou, requiring him as judge thereof to proceed with the further hearing and determination of a certain action pending in said court, and also for an ancillary writ of prohibition to be directed to Hon. Walter E. Herzinger, judge of the superior court in and for the county of Shasta, restraining him as judge of said court, or otherwise, from sitting in or entertaining any proceedings in said action. The action with respect to which the petitioner seeks the aforesaid remedies was and is a proceeding in eminent domain which on Janary 18, 1930, was commenced by this petitioner as plaintiff therein in the superior court in and for the county of Siskiyou, and which action was entitled "Central Pacific Railway Company, a Corporation, Plaintiff, v. Mary Louise Deetz, Bank of Italy National Trust and Savings Association, a National Banking Association, First Doe, Second Doe, First Doe Company, and Second Doe Company, Defendants." The purpose of said action was that of the condemnation of a certain right of way over and across a certain tract of land, the precise description and boundaries of which were fully set forth in a certain map or plat thereof which was attached to and made a part of the plaintiff's complaint in said action, and of which tract of land the defendant Mary Louise Deetz was alleged to be the sole owner. As to her codefendant Bank of Italy National Trust & Savings Association, it was alleged in said complaint that said association claimed some interest or lien upon the land sought to be taken "under and by virtue of a certain mortgage from

Henry J. Deetz and Mary L. Deetz to Frank H. Mills, dated May 7, 1924, and by said Mills assigned to defendant Bank of Italy National Trust and Savings Association on June 24, 1929."

The aforesaid actual defendants to said action were duly served with process therein. The defendant Bank of Italy National Trust & Savings Association did not appear in said action. The defendant Mary Louise Deetz did, however, appear therein through the filing of her separate answer, wherein she admitted and alleged her ownership of the aforesaid tract of land as averred in the plaintiff's complaint, but otherwise confined her answer therein to her claims for damage and compensation for the portions of her said land sought to be taken in said condemnation proceeding. The cause came on for trial in said court and before the Honorable C. J. Luttrell as the judge thereof on the 22d day of July, 1930, and the trial thereof thereafter proceeded from day to day until on or about July 29, 1930. During the progress thus far of the trial of said action the undisputed evidence educed therein disclosed that for many years prior to the institution thereof the plaintiff had been and still continued to be engaged in the operation of a certain standard gauge steam railroad upon and over a certain railroad right of way extending from Roseville in the county of Placer, state of California, northerly through the counties of Yuba, Sutter, Butte, Tehama, Shasta, and Siskiyou and beyond the California-Oregon interstate boundaries, and being the railroad for which a right of way over the route through said counties upon which the said railroad had been constructed had been granted by an Act of Congress approved July 25, 1866 (14 Stat. 239), entitled, "An act granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad, in California, to Portland, in Oregon." The main line of said railroad as originally constructed was as to a portion thereof located within and across sections 25 and 26, township 41 north, range 5 east, and the portion thereof as thus located was situate upon and was imposed as a right of way upon and across a certain tract of land therein consisting of several hundred acres, of which Henry J. Deetz and Mary Louise Deetz, his wife, had come to be the owners. The evidence as thus far taken in said action further disclosed that at some time prior to the institution of said condemnation proceeding Henry J. Deetz had conveyed to his wife, Mary Louise Deetz, the particular portion of said larger tract of land upon which the plaintiff through said condemnation proceeding was seeking to relocate its aforesaid railroad and right of way so as to eliminate certain curves therein and to confine the same as thus relocated solely to the portion of said larger tract of land of which said Mary Louise Deetz had thus become the sole and separate owner.

During the course of said hearing, the original of the map or plat of the entire Deetz properties was introduced in evidence. It showed that for many years prior to the institution of the condemnation proceedings the railroad right of way as originally laid out and used, to the width of 200 feet, formed roughly the dividing line between what is now the property of Mary Louise Deetz and the remainder of the original tract, the title to which remained up to the time of his death in Henry J. Deetz. There was thus at all of said times an actual and physical separation of these two tracts of land caused by the railroad right of way and its uses; the only means of access and regress between the two tracts being by means of a subway under said railroad at a certain point through which cattle might pass and the combined activities of the two bodies of land might be carried on. The evidence further disclosed that, subsequently to the making and execution of the aforesaid deed by which Mary Louise Deetz had become the sole and separate owner of said smaller tract of land, a mortgage had been made and executed by Henry J. Deetz and Mary Louise Deetz, his wife, to the aforesaid Bank of Italy corporation, covering the larger portion of said original tract of land, the ownership of which remained in Henry J. Deetz, but which mortgage did not in fact cover or constitute a lien upon any portion of the land and premises of Mary Louise Deetz which were sought to be affected by said condemnation proceeding. The evidence further disclosed that thereafter Henry J. Deetz had died, being at the time of his death the owner of said larger tract of land, leaving the same as a portion of his estate to his widow and heirs. The evidence in the case educed during the time when the trial of said action had thus far proceeded showed such jurisdictional and other facts as would have entitled the plaintiff to a decree of condemnation.

When, however, the trial of said action had thus proceeded up to a point when it was practically ready for the making and entry of the findings and decision of the trial court and of the aforesaid judge thereof, the defendant Mary Louise Deetz, through her attorney of record, Jesse W. Carter, Esq., presented and filed in said court on July 29, 1930, a certain statement verified by her, wherein she asserted and set forth that the Honorable Charles J. Luttrell, judge of said court, was disqualified to hear and determine said cause or to further sit and act as the judge of said court therein, or as such to further hear or determine said action, for the reason that said Charles J. Luttrell was interested in the result of said cause by virtue of the asserted fact that at the time of the commencement thereof he was and ever since had been and continued to be a depositor in the said Bank of Italy Trust & Savings Association, the codefendant of the affiant therein, and that, by virtue thereof, the relationship of debtor and creditor existed between said Charles J. Luttrell and the said Bank of Italy corporation, and that, by virtue of such interest, he was disqualified to sit or act in said cause or to hear and determine the same. The affiant further deposed that the aforesaid facts which were claimed to show the disqualification of said judge were not known to her or to her said attorney prior to July 26, 1930. Coincidentally with the presentation and filing of the foregoing statement, the defendant Mary Louise Deetz, presented and filed a further statement, verified by her said attorney, to the effect that the said Charles J. Luttrell was disqualified to hear and determine said action for the stated reason that he was at the time of the commencement of the action, had been, and continued to be, a stockholder in and the owner of certain shares of the capital stock of the Transamerica Corporation, which was during all of said time the owner and holder of practically all of the shares of stock of the Bank of Italy National Trust & Savings Association, and that, by reason of said fact, said Charles J. Luttrell was disqualified by interest from sitting or acting as the judge of said court in said action or from hearing or determining the same or any matter in connection therewith. Wherefore the said defendant Mary Louise Deetz prayed that the cause might be heard and determined by some other judge or jury as provided by the laws of the state of California.

In the meantime, and while the trial of the cause of action was in course of progress, the attorney of record of the defendant Mary Louise Deetz, assuming, as the petition herein narrates, to represent certain children of Mary Louise Deetz, undertook to intervene in the action in eminent domain, claiming to have some interest in the entire tract formerly owned by Henry J. Deetz, adverse to the interest of Mary Louise Deetz therein. The matter of the right of these asserted adverse claimants was undetermined at the time the aforesaid statements asserting the disqualification of Judge Luttrell were presented and filed. In the answer which the respondents have made and filed to the petition herein it is alleged that during the trial of said action it was stipulated that, with respect to the aforesaid adverse claims of the children of the defendant Mary Louise Deetz, the said superior court should proceed with the trial of the cause upon the theory that Mary Louise Deetz was the sole owner of all of the property described in the complaint in said action, and that any award made for compensation or damages to said property would be made solely to Mary Louise Deetz, and that the interest, if any, of the children of Mary Louise Deetz in any of said property could be determined in any subsequent proceeding which said children might see fit to institute against said plaintiff, and that, in view of such stipulation, the interest of the children of Mary Louise Deetz in any of said property was not considered by said superior court in said proceeding, and was and is not an issue therein or in the instant proceeding.

Upon the presentation and filing of the aforesaid statements asserting the disqualification of Judge Luttrell, the plaintiff in said action presented and filed its resistance to the charge of disqualification, and in so doing set forth and showed, through the presentation of the official record of the mortgage held and possessed by the Bank of Italy National Trust & Savings Association, that said association had in truth and fact no interest whatever in and no lien upon the property of Mary Louise Deetz which was in course of being subjected to such condemnation proceeding, and that said banking association had been joined in said action by the plaintiff therein upon an erroneous report presented by a searcher of records with respect to the lands affected by said mortgage. Thereupon and upon such showing the plaintiff moved the trial court for leave to amend its complaint in said action by striking therefrom all reference to the Bank of Italy National Trust & Savings Association, and to dismiss the action as to it, upon the ground that through said error it had been improperly joined as a defendant in the action. In the aforesaid state of the record it is alleged by the petitioner that the Honorable C. J. Luttrell, one of the respondents herein, declined to rule upon either or any of the aforesaid motions of the plaintiff in said action or to in any wise proceed with said cause, except that he did, without prejudice to any charge of disqualification, but by reason of the great expense to which the petitioner herein had been put in preparing for said trial and in going to the county of Siskiyou for the same and of the nature of said trial and the necessity for a speedy determination of the cause, hear the testimony upon the issues tendered therein to the extent that all of the evidence in the cause has been taken and the parties thereto have rested. The petitioner alleges that the respondent Luttrell, having so done and the cause being thus ready for decision upon the merits, declined and refused to decide the cause on its merits or to determine the same or to take any further action therein, except to call in another judge. The record discloses that the parties to the action agreed and stated in open court that Judge Luttrell might select another judge agreeable to the parties, to sit and act further in the cause, but that Judge Luttrell was unable to secure such other judge upon whom the parties might agree. Thereupon, and upon the suggestion of Judge Luttrell, but without the consent of the petitioner herein, the chairman of the judicial council of the state of California, upon the representation that the parties to the action had failed to agree as to the calling in of another judge, requested the respondent herein Hon. Walter E. Herzinger to sit and act as the judge in said action, in order to pass upon the question of the disqualification of respondent C. J. Luttrell, and that, in conformity with said request, the respondent Herzinger has undertaken to sit and act as the judge in said action, and has set for hearing therein the matter of the disqualification of his co-respondent Luttrell. For the foregoing reasons the petitioner prays this court to issue the aforesaid writs of mandate and prohibition.

[1] The respondents appeared in response to said petition and presented and filed their demurrer thereto and also and at the same time moved this court to strike out certain portions of the petition upon the ground that the same and each thereof were irrelevant, immaterial, and surplusage. The respondents also filed an answer to the petition containing specific admissions and denials, the latter of which were in the main based upon a want of information and belief. The respondents a little later presented and filed an amendment to their answer, setting up certain matters which were deemed by them to be material. To the respondents' amended answer the petitioner has presented a demurrer, the merits of which are also discussed in the briefs of counsel filed herein, but whether or not the matters thus presented require decision will depend upon our disposition of the main issues involved in this proceeding. The primary questions presented for our consideration are those which arise upon the respondents' demurrer to the petition. The respondents in support of their demurrer insist that the petition does not state facts sufficient to justify the issuance of either writ as prayed for therein, for the reason that it appears upon the face thereof that the petitioner has a plain, speedy, and adequate remedy in the ordinary course of law. The remedy which they thus urge as a reason why neither of these writs should issue is that already invoked and in process of determination under the provisions of section 170 of the Code of Civil Procedure, as amended in 1929 (St. 1929, p. 957), and which has relation to the disqualification of judges in actions or proceedings and to the method by which the existence or nonexistence of such disqualification is in the first instance to be determined. The respondents plausibly argue that, since the very question as to whether Judge Luttrell was or was not disqualified to sit or act in the action in eminent domain instituted and pending in the court over which he presides has been presented to Judge Herzinger for determination, in strict compliance with the method provided for in section 170 of the Code of Civil Procedure as recently amended, and that the determination of that issue by Judge Herzinger either way will furnish the petitioner all of the remedy to which it is entitled. We are of the opinion, however, that the remedy thus afforded to the petitioner is not, when pursued to its finality, such a plain, speedy, and adequate remedy as would suffice to meet the emergencies of this particular case, since, while the law does not provide for an immediate appeal from the decision of a judge who is thus called in to determine the question of the disqualification of the judge whose regular function and duty it would be to proceed with the hearing and determination of the cause pending before him, the matter thus decided would be the proper subject of consideration upon an ultimate appeal from whatever judgment might be entered in the cause, and, since this is true, the result might finally be that the party to the action, who might deem himself injuriously affected by the decision of the judge called in to determine this single issue might, by prevailing upon such appeal, set aside and render nugatory all of the proceedings and eventualities of the cause, for the reason that the judge who had actually tried the same was not the judge who in point of law was entitled to sit or act therein. Proceedings in eminent domain partake of the nature of summary proceedings. Code Civ. Proc. § 1264. It is the public interest which is to be subserved by the taking for public or quasi public purposes the property of those private persons who are parties defendant in such action. This is well illustrated by the situation presented in the original action wherein it must be assumed that the public interest will be subserved by the speedy completion of a main line railway over the route prescribed and over the lands of the immediate party or parties defendant in said action. It would amount to a very serious interference with this result to have the question of the qualification or disqualification of the judge, whose regular function and duty it would be to hear and determine said action, remain in doubt and in danger until such time as the question should be determined upon the ultimate appeal from the judgment. We are enforced in our conclusion that the particular question sought to be submitted to Judge Herzinger for decision cannot be held to constitute such a plain, speedy, and adequate remedy, as would prevent the petitioner from seeking these writs, by the decision in the case of Evans v. Superior Court (Cal. App.) 290 P. 662, wherein substantially the precise question submitted for our decision herein was involved. In that case it appeared that the trial judge was proceeding to hear and determine several causes at issue in his court, when a statement as to his disqualification so to do was presented and filed in conformity with the procedure outlined in section 170 of the Code of Civil Procedure as recently amended; whereupon another judge was des-

ignated, pursuant to such procedure, to hear and determine the question of the disqualification of the trial judge, and who upon such hearing determined that the trial judge was not disqualified. Notwithstanding such determination, a writ of prohibition was sought in the appellate tribunal preventing the trial judge, thus held to be qualified, from proceeding to hear and determine the causes thus at issue before him. The appellate tribunal entertained such application and granted the writ, and, in so doing, considered the question as to whether the procedure undertaken in pursuance of the provisions of section 170 of the Code of Civil Procedure furnished such a plain, speedy, and adequate remedy as would serve to prevent the issuance of such a writ. In deciding this question to the contrary, the court reviewed the recent decisions of this court in the cases of Hall v. Superior Court, 198 Cal. 373, 245 P. 814, 820, and Lindsay-Strathmore Irr. Dist. v. Superior Court, 182 Cal. 315, 187 P. 1056, and also the decision of the appellate court in the case of Quatman v. Superior Court, 64 Cal. App. 203, 221 P. 666, 668, in which latter case it was stated that "where a judge is disqualified to act in any proceeding or cause, the disability necessarily enters into all orders and decisions made by him other than those specially excepted and provided for in the Codes, and to refuse the writ on the ground that a remedy might be had in another manner would be to permit the trial to proceed to a final conclusion by the disqualified judge and then set aside the proceedings as void ab initio." This language was quoted with approval by this court in Hall v. Superior Court, supra, which added thereto its own conclusion that "no good purpose could be served in permitting a disqualified judge to perform certain acts and thereafter declare them void on the ground that he had no jurisdiction to perform the same." We are satisfied with the correctness of these views, and hence conclude that the fact of a pending proceeding in the trial court under the provisions of section 170 of the Code of Civil Procedure to determine the qualification or disqualification of Judge Luttrell to further proceed with the hearing and determination of the original cause pending before him does not furnish an adequate reason why this court should not entertain the instant proceeding.

[2, 3] The real issue presented is as to whether upon the admitted facts set forth in the verified statement presented and filed before the trial court Judge Luttrell is or is not disqualified to sit or act in the original action and to proceed to hear and determine the same. The primary reason set forth in the first statement presented and filed by the defendant Mary Louis Deetz consisted in the admitted fact that at the time of the institution of such action and at all times thereafter Hon. C. J. Luttrell was and continued to be a depositor in that certain banking corporation known as Bank of Italy National Trust & Savings Association, and which banking corporation was her codefendant in said action. It was urged before the trial court, and is here insisted by the defendant Mary Louise Deetz, that the aforesaid relationship of the trial judge to said corporation amounted to a disqualification under the provisions of section 170 of the Code of Civil Procedure; the basis of such contention being that the relation thus existing between the trial judge and said corporation amounted to the relation of debtor and creditor, to the extent of creating such an interest in the action as would suffice to prevent Judge Luttrell from hearing or determining the same. Section 170 of the Code of Civil Procedure (St. 1927, p. 1403, § 1), as it existed prior to its recent amendment, read as follows: "170. No justice, judge or justice of the peace shall sit or act as such in any action or proceeding: 1. To which he is a party; or in which he is interested."

The section of the Code as it thus read did not attempt to define the particulars wherein the "interest" of a trial judge should consist, but it is quite well settled by the uniform current of authority upon the subject that it must be such a direct and immediate interest in the result of the litigation as would in some degree tend to form an improper bias which might influence his conduct in the consideration and disposition of the cause; and, while it is true that the relation which one holds to a banking corporation in the capacity of a depositor has been held to constitute the technical relation of creditor and debtor which might in some instances arise to the dignity of a disqualifying interest, the current of authority is averse to the conclusion that the bare fact that a trial judge may happen to be a depositor in a bank which may have such a more or less immediate relation to the action and to the result thereof as to cause it to be made a defendant therein, is thereby, in the absence of any further showing, subject to the disqualification of interest in respect to the trial of the cause. In each of the cases relied upon by the respondents the interest of the trial judge which was held to constitute such disqualification arose out of some special relationship of the trial judge to the parties in the action, as, for example, in Regents of the University of California v. Turner, 159 Cal. 541, 114 P. 842, Ann. Cas. 1912C, 1162. The case was one wherein the judge in whose court an estate was being administered had a creditor's claim against the decedent, and hence was required in the course of administration to pass upon the validity of his own claim. In the case of Moody v. Shuffleton, 203 Cal. 100, 262 P. 1095, also relied upon by the respondents, the relation between a judge and a party defendant was not involved; the alleged disqualification being that of a supervisor to pass upon a claim before the board in which he was directly interested. In the case of Quatman v. Superior Court, 64 Cal. App. 203, 221 P. 666, the judge was one of the creditors of a corporation upon the alleged insolvency of which another creditor was seeking the appointment of a receiver in an action wherein the trial judge would be required to pass directly upon the validity of his claim against such corporation. It is not necessary to review the conflicting decisions from other jurisdictions, since those, as a rule, depend upon the particular language of the statutes upon which the varying rulings of such tribunals depend. The trend of authority in California, under section 170 of the Code of Civil Procedure as it read prior to its recent amendment, has been favorable to the view that the bare relationship of debtor and creditor existing between a trial judge and a party defendant would not in and of itself suffice to constitute a disqualification. Southern California M. R. Co. v. San Bernardino National Bank, 100 Cal. 316, 34 P. 711; Johnston v. Dakan, 9 Cal. App. 522, 526, 99 P. 729. It may be generally stated that the bare relation which a trial judge might happen to hold toward a national banking corporation, one of the defendants in an action, in the capacity of a depositor therein, ought not, in the absence of any further showing, to constitute any more of a disqualification to try the cause than would the relation which such a judge might hold to a municipality as a taxpayer therein disqualify him to pass in judgment upon the validity of the tax. See Oakland v. Oakland Water Front Co., 118 Cal. 249, 50 P. 268; Higgins v. City of San Diego, 126 Cal. 303, 58 P. 700, 59 P. 209; Los Angeles v. Pomeroy, 133 Cal. 529, 65 P. 1049; Oakland v. Pac. C. L. Co., 171 Cal. 392, 153 P. 705. Whatever might have been our views, however, with relation to the effect of the foregoing decisions pro and con upon this general subject prior to the recent amendment of section 170 of the Code of Civil Procedure, we are satisfied that the immediate question here under review has been set at rest by such amendment. This section was amended in 1929 (St. 1929, p. 957), so as to read in part as follows:

"170. No justice, judge or justice of the peace shall sit or act as such in any action or proceeding:

"1. To which he is a party; or in which he is interested other than as a holder or owner of any capital stock of a corporation, or of any bond, note or other security issued by a corporation;

"2. In which he is interested as a holder or owner of any capital stock of a corporation, or of any bond, note or other security issued by a corporation."

The foregoing amendment to this section of the Code had for its obvious purpose that of defining the relationship between the judge or justice in any action or proceeding and a corporation, whether plaintiff or defendant therein, which should constitute a disqualifying interest. It is therein expressly stated that it is the relationship of a stockholder which shall constitute the interest in the corporation amounting to a disqualification to sit or act in an action to which such corporation is a party. In these days of widespread interrelationships between one banking corporation and another it would seem that such a differentiation would be salutary, since otherwise justices and judges, who may be assumed as a rule to be depositors in some bank or other, might find themselves disqualified to hear and determine any cause in which any bank was a party plaintiff or defendant.

[4] This brings us naturally to the consideration of the second ground of disqualification which was urged before the trial court and is still insisted upon here. This other alleged disqualification was held to consist in the admitted fact that Judge Luttrell was at the time of the institution of the original action and continued to be thereafter a stockholder in a corporation known as Transamerica Corporation, which was asserted in the statement presented and filed before the trial court to be the owner of substantially all of the capital stock of the Bank of Italy National Trust & Savings Association. Had the Transamerica Corporation been made a party to said original action, the situation would doubtless have been one directly covered by the provisions of section 170 of the Code of Civil Procedure as above amended. But the fact that, whatever the relationship thus alleged to exist between Transamerica Corporation and Bank of Italy National Trust & Savings Association might be, the former corporation was not a party to said action and hence does not come within the intendment of said action. Neither do we think that the situation as thus presented could in any event constitute a disqualification under the well-settled rule above stated that the alleged disqualifying interest must appear to be an immediate and direct interest in the outcome of the litigation. To be a stockholder in some corporation which is not and could not be made a party to the action cannot by any stretch of reasoning be held to amount to a disqualification, and we are cited to do no authority which so holds. On the contrary, the cases not only within our own but other jurisdictions have expressly held that in such cases no disqualification exists. Central Sav. Bank of Oakland v. Lake, 201 Cal. 438, 444, 257 P. 521; Favorite v. Superior Court of Riverside County, 181 Cal. 261, 184 P.

15, 8 A. L. R. 290; Rooker v. Trust Company, 263 U. S. 413, 44 S. Ct. 149, 68 L. Ed. 362; Texas, etc., Ass'n v. Williams, 117 Tex. 218, 300 S. W. 44; Webb v. Town of Eutaw, 9 Ala. App. 474, 63 So. 687; People v. Whitridge, 144 App. Div. 493, 129 N. Y. S. 300.

Having thus arrived at the conclusion, for the reasons and upon the authorities above cited, that Judge Luttrell was not disqualified by reason of either of the causes set forth in the verified statement of the defendant Mary Louis Deetz presented and filed in the trial court, but that at all of the times mentioned therein and in the petition herein Judge Luttrell was qualified to sit and act as the trial judge in said action and to hear and determine the same, it follows that it has become unnecessary to decide any of the other questions presented in this proceeding and particularly those urged by the respondents in both their answer and amended answer herein. If, as above found, Judge Luttrell was at no time disqualified to hear and determine said original action, it follows of necessity not only that a writ of mandate should issue herein requiring him so to do in the performance of an act which the law specially enjoins as a duty resulting from his office, but that a writ of prohibition should also issue herein requiring his co-respondent Judge Herzinger to refrain from the further performance of any judicial action in connection with the hearing and determination of said cause.

Let these respective writs issue as prayed for.

We concur: WASTE, C. J.; SHENK, J.; SEAWELL, J.

PRESTON, J., deeming himself disqualified, does not participate in the foregoing decision.

CURTIS, J. (dissenting).

I dissent. The majority opinion holds that a judge who is the owner of stock in a corporation which in turn owns practically all of the stock of a second corporation, which second corporation is a party defendant to the action, is not disqualified from acting at the trial of said action.

Section 170, Code of Civil Procedure, provides that no judge shall act as such in any action in which he is interested as a holder of any capital stock of a corporation. To hold that a judge must hold stock in the corporation which is actually a party to the action before he comes within the terms of this section is giving to the section a narrow and technical interpretation. A judge may, as in the present action, have just as disqualifying an interest in an action by holding stock in the holding company as if he were a stockholder in the subsidiary corporation, practically all of whose stock is held by the holding company. It is the interest of the judge in the litigation before him that disqualifies him, and the Code section makes no distinction as to whether this interest is due to ownership of stock directly in the corporation, which is a party to the action, or indirectly in a holding company, the owner of the stock of the first-named corporation.

"These provisions of the Code, taken in connection with the authorities cited, indicate that section 170 is to have no technical or narrow construction, but is to be broadly applied to all litigation, where a judge is called upon to adjudicate property rights." Howell v. Budd, 91 Cal. 342, 27 P. 747, 750.

The majority opinion is directly opposed to the liberal and reasonable construction given to section 170, Code of Civil Procedure, by the following decisions of this court: Lindsay-Strathmore Irr. Dist. v. Superior Court, 182 Cal. 315, 187 P. 1056; Hall v. Superior Court, 198 Cal. 373, 245 P. 814; City of Vallejo v. Superior Court, 199 Cal. 408, 249 P. 1084. None of the authorities cited in the majority opinion bear directly upon the question involved, nor do they sustain the holding of the majority opinion.

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112 Cal. App. 428

RIGGLE v. JACKSON et al.

Civ. 7735.

District Court of Appeal, First District, Division 2, California.
March 10, 1931.

Rehearing Denied April 9, 1931. Hearing Denied by Supreme Court May 4, 1931.

1. Attachment ⚿374.

In action for alleged wrongful attachments of personalty furnished by others for plaintiff's use in drilling oil well, contract whereby others agreed to pay plaintiff damages in case of delay caused by them *held* competent.

The contract was competent evidence of the agreement of the other parties furnishing the personalty, and was material to the issue under which the defendants in the attachment suit sought to prove that plaintiff had been fully compensated for all loss sustained.

2. Attachment ⚿377.

Compensatory damages alone are recoverable for wrongful but good-faith attachments of personalty (Civ. Code, § 3294).

3. **Attachment** ⚷369.

Where parties furnishing personalty for plaintiff's use had compensated plaintiff for damages sustained by delay caused by attachments, as they were required to do under contract, plaintiff could not recover for alleged wrongful attachments.

> Facts disclosed that the writs of attachment were issued against the parties furnishing the personalty for plaintiff's use in a suit against such parties by their creditor, but that the parties were under contract to compensate plaintiff for delay caused by them in drilling oil well.

Appeal from Superior Court, Los Angeles County; Guy F. Bush, Judge.

Action by E. W. Riggle against C. E. Jackson and others. Judgment for defendants, and plaintiff appeals.

Affirmed

C. F. Culver, of Los Angeles, for appellant.

Joe Crider, Jr., and Clarence B. Runkle, both of Los Angeles, and Head, Rutan & Scovel and Morris A. Cain, all of Santa Ana, for respondents.

NOURSE, P. J.

Plaintiff sued for damages for the alleged wrongful attachments of personal property used by him in drilling an oil well. The defendants are the sheriff, his bondsman, and the attaching plaintiff. The cause was tried without a jury, and resulted in a judgment for all defendants. The plaintiff appeals on a bill of exceptions.

Behr and White entered into a contract with plaintiff wherein the latter agreed to drill a well for oil and the former agreed to furnish plaintiff a derrick, engine, and other necessary equipment to be used in the work. As a part of the agreement, Behr and White undertook to pay plaintiff $250 a day as damages for each day's delay in the drilling operations caused by them, such sum to cover the value of the use of such personal property. Suit was commenced by one Moore against Behr and White to recover the purchase price of this personal property, and out of that suit issued the writs of attachment which the sheriff served upon this plaintiff, and which are the base of this action for damages. The trial court found that the several writs of attachment were duly and regularly served; that, by reason of such attachments, the drilling operations were delayed approximately nine days; that the damages to plaintiff because of such delay were $150 a day; that the plaintiff was actually paid by Behr and White the sum of $250 for each day to cover such damage.

On this appeal the appellant's chief attack is on the attachment proceedings. In support of the judgment the respondents defend these proceedings and also insist that appellant has suffered no damage. Because of our view on the latter point, it is unnecessary to consider the questions relating to the attachment proceedings.

[1] The respondents put in evidence the written contract between appellant and Behr and White for the purpose of showing the agreement of the latter to pay appellant damages for any delay caused by them. The contract was competent evidence of this agreement, and the evidence was material to the issue respondents sought to prove. This proof was followed by the uncontradicted proof of these facts: That appellant's damages amounted to but $150 a day; that the delay was caused by the fault of Behr and White; and that they had actually paid appellant the sum of $250 for each day his operations were suspended. Upon this evidence the trial court found that the appellant was fully compensated for all loss sustained by reason of any delay caused by said attachments.

[2] The good faith of the respondents is conceded; hence compensatory damages alone were recoverable. Section 3294, Civ. Code; Maher v. Wilson, 139 Cal. 514, 518, 73 P. 418. The trial court adopted the proper measure of damages within the rule of Hurd v. Barnhart, 53 Cal. 97, and, having found that appellant was paid more than the damages suffered, the single question remains whether such payment inures to the benefit of respondents.

[3] That appellant's only damage resulted from the forced delay in the use of the property, and that this delay was caused by the fault of Behr and White, who fully compensated him for such delay, must be conceded. If these payments were merely voluntary contributions from a collateral source, they could not be used in mitigation of the damages suffered by the appellant. 8 R. C. L. p. 554. And, if they were involuntary payments made by one who stood in the relation of an insurer, but who was not himself at fault, they could not be so used. 8 R. C. L. p. 557. But, when the payment is not a mere gratuity but is an obligatory one made by a party in privity with the tort-feasor, a different rule obtains. Thus, in Drinkwater v. Dinsmore, 80 N. Y. 390, 36 Am. Rep. 624, it was held that no recovery for loss of time alone could be had if plaintiff had been paid his full wages during the period of his disability, and to the same effect is Montgomery & E. R. Co. v. Mallette, 92 Ala. 209, 9 So. 363. These cases are referred to in Nashville, C. & St. L. Ry. Co. v. Miller, 120 Ga. 453, 47 S. E. 959, 67 L. R. A. 87, 93, 1 Ann. Cas. 210, where a distinction is made because the payments

by the employer were voluntary and were made merely as a gratuity.

The rule of the New York and Alabama cases is sound and just, particularly in a case such as we have here, where the plaintiff seeks compensatory damages for time lost by reason of the alleged wrongful act of the respondents. The peculiar phase of the case is that, by reason of this alleged wrongful act, the appellant here gained a substantial benefit and did not suffer any loss.

Judgment affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

112 Cal. App. 438

HANNA et al. v. HIRSCHHORN et al.

Civ. 6454.

District Court of Appeal, Second District,
Division 1, California.
March 10, 1931.

Rehearing Denied April 7, 1931. Hearing Denied by Supreme Court May 4, 1931.

1. Estoppel 🔑107.

Ordinarily, waiver should be specially pleaded, where cause depends on proof thereof.

2. Pleading 🔑229.

Where proposed amendment of pleadings will not radically change issues, delay case, nor prejudice adverse party, but will further justice, court is rarely justified in refusing leave to amend.

3. Pleading 🔑236(1).

Discretion to deny application to amend pleadings must be guided by fixed principles of law.

4. Pleading 🔑236(1).

Whether court has abused discretion in denying application to amend pleadings depends on whether amendment will perfect cause of action otherwise imperfectly pleaded.

5. Appeal and error 🔑1041(2).

In action by purchasers, refusal of application to amend complaint to show time for performance had been waived *held* prejudicial error, where original complaint alleged that time was extended.

> The trial court should have permitted the amendment to show waiver by defendants of the time limit because the allegation in the original complaint that the time for performance was extended, and that, as extended, the plaintiffs had offered performance which had been denied or refused, was sufficient to put defendants on notice that plaintiffs asserted the right to perform the conditions of the contract at a date subsequent to the time limit specified therein. The issues in the action would not have been changed, and defendants would not have been taken by surprise, and amendment would not have worked delay, but would have been in furtherance of justice.

Appeal from Superior Court, Los Angeles County; James H. Pope, Judge.

Action by Toufiek R. Hanna and another against Rose Fine Hirschhorn and another. Judgment for defendants, and plaintiffs appeal.

Reversed.

Tanner, Odell & Taft, of Los Angeles, for appellants.

Lloyd W. Moultrie and Newlin & Ashburn, all of Los Angeles, for respondents.

HOUSER, J.

In substance, the facts necessary to a decision in the pending appeal are that, by the terms of a contract entered into between plaintiffs on the one side and defendants on the other, defendants agreed to sell to plaintiffs, and plaintiffs agreed to buy from defendants, certain real and personal property at a fixed price, to be paid partly in cash and the remainder of the purchase price by a mortgage on, or a trust deed to, the property, to be executed by plaintiffs in favor of defendants on or before a specified date. In part performance of the provisions of the contract, plaintiffs paid to defendants the sum of $3,500 in cash. About one month after the date specified in the contract for the consummation of the transaction had expired, plaintiffs offered to an attorney, who throughout the negotiations between the parties had represented defendants, to fully perform the conditions as expressed in said contract that were to be performed by plaintiffs, which offer was by said attorney on behalf of defendants refused. Whereupon plaintiffs commenced an action for damages, which resulted in the rendition of a judgment in favor of defendants, and from which judgment the appeal herein is presented.

In the complaint, among other things, plaintiffs pleaded performance and "that the time for performance was extended. * * *"

Although by the appeal herein several different legal questions are submitted by the respective parties to this court for determination, it is thought that but one of them requires consideration. It has to do with the question of whether on the trial of the action plaintiffs should have been permitted to amend their complaint by alleging the existence of facts which, if satisfactorily established, might have constituted a waiver by defendants of the provision in the contract by which it was to be performed on or before a certain date specified therein. The situation which by the trial court was acted upon adversely to the interest of plaintiffs is presented in the following résumé (found in appellants' brief herein) of the several declarations by respective counsel at the time when plaintiffs sought from, but were refused by, the trial court permission to amend their complaint in the action then on trial, to wit:

"Time is not made the essence of the contract between the plaintiffs and defendants and no demand for performance on the part of the defendants was made at any time, and these conversations and actions of the defendants are competent to show that they did not claim any breach of the contract, but waived performance on the days and dates when performance should be made. If the court thinks that the pleadings should be amended to allow evidence of such waiver, then I ask leave to amend the complaint so as to set forth the facts constituting waiver."

[1, 2] Ordinarily, it would appear to be a well-settled rule of pleading that, where a cause of action depends upon proof of waiver, it must be specially pleaded (25 Cal. Jur. 931, and authorities there cited); and, abstractly, the principle of legal procedure is equally well established that, in the matter of permitting amendments to be made to pleadings, although great liberality should be shown by the trial court, a refusal of permission so to do will be disturbed on appeal only when it is apparent that an abuse of discretion has occurred. 21 Cal. Jur. 183 et seq. However, in furtherance of justice, where it appears that a proposed amendment will not radically change the issues originally presented in the action, and will neither work great delay nor prejudice rights of the adverse party to the action, as has been judicially declared, it is clear that "it can very rarely happen that a court would be justified in refusing a party leave to amend his pleading so that he may properly present his case." Crosby v. Clark, 132 Cal. 1, 8, 63 P. 1022, 1024, and cases there cited.

From the fact that, by the allegations contained in plaintiffs' complaint, it was alleged that performance was not due as of the date specified in the agreement, but "that the time for performance was extended," and that, as extended, the plaintiffs had offered performance which had been denied or refused by defendants—it was, or at least should have been, made manifest to defendants that plaintiffs relied upon either an express or an implied extension by defendants of time within which to comply with the terms of the contract. However, it is plain that a waiver of exact time of performance might not be the equivalent of an extension of time, since at least the former might be for a definite period and the latter might be indefinite in that regard. But, in the circumstances of either situation, defendants were placed on notice that, by reason of some unspecified acts or declarations of defendants, plaintiffs asserted a right to perform the conditions provided for by the contract at a date subsequent to that specified therein as a limit for such performance; and, from their denials set forth in their answer, defendants were presumed to be ready to rebut such evidence as might be adduced by plaintiffs in support of their allegations.

[3, 4] In matters of the character of that here under consideration, the discretion with which the trial court is vested is to be guided by fixed principles of law. Wixon v. Devine, 91 Cal. 477, 27 P. 777. Nor may such court arbitrarily deny an application to amend a pleading. In the case of Norton v. Bassett, 158 Cal. 425, 427, 111 P. 253, 254, it is said that, "speaking generally, it may be said that the test as to whether or not the court has abused its discretion will depend upon whether the amendment is a permissible amendment which will perfect a cause of action otherwise imperfectly pleaded."

[5] In the instant case, the alleged cause of action depended upon a breach of contract upon the part of defendants which arose from their refusal to permit plaintiffs to perform the conditions upon them made incumbent by the terms of the agreement of the parties. Without reference to other questions either of fact or of law in the case, the liability of defendants for such alleged breach of contract was contingent upon whether such tendered performance by plaintiffs had been made within a time either expressly or impliedly agreed upon by the parties. Among the several ways of producing an extension of the time limit for the performance of conditions by plaintiffs as fixed by the original agreement may well have been an express or an implied waiver of such time limit by defendants. As a matter of pleading of the cause of action, it is clear that, if waiver of such time limit by defendants was relied upon, proper allegations of fact from which such a waiver would have resulted would have been most appropriate. However, since it is apparent that the cause of action may have been "imperfectly pleaded" (Norton v. Bassett, 158 Cal. 425, 427, 111 P. 253); that by the proposed amendment the issues in the action as originally presented would not have been radically or at all changed; that defendants could not have been taken by surprise by the proposed amendment; that, if permitted, it would have worked no delay; that, by permitting such amendment, no rights of defendants would have been jeopardized; but, to the contrary, that it would have been in furtherance of justice—it follows that, in refusing leave to plaintiffs to amend their

complaint as requested, prejudicial error was committed by the trial court.

It is ordered that the judgment be, and it is, reversed.

We concur: CONREY, P. J., YORK, J.

TRABUCCO et al. v. SORRELS.*

Civ. 4177.

District Court of Appeal, Third District, California.

March 9, 1931.

Rehearing Granted April 8, 1931.

1. Appeal and error 🔑**1010(1).**

Judgment of trial court determining boundaries will not be disturbed, where testimony supports findings.

2. Boundaries 🔑**54(4).**

Original corners established by government surveyors, if they can be found, are conclusive without regard to whether they were located correctly or not.

3. Boundaries 🔑**37(3).**

Evidence *held* to sustain finding of trial court establishing boundaries in accordance with original government corners.

Appeal from Superior Court, Mariposa County; E. N. Rector, Judge.

Action of ejectment by John Trabucco and another against A. R. Sorrels. Judgment for plaintiffs, and defendant appeals.

Affirmed.

Edward J. Lynch, of San Francisco, and Charles L. Gilmore, of Sacramento, for appellant.

F. M. Ostrander, of Merced, and Louis T. Milburn, of Mariposa, for respondents.

Mr. Justice PLUMMER delivered the opinion of the court.

The plaintiffs had judgment against the defendants in an action of ejectment involving the ownership of the east half of the southwest quarter of section 13, township 4 south, range 18 east, M. D. B. & M. From this judgment the defendant appeals.

At the conclusion of the trial the court made the following findings of fact:

"I. That the plaintiffs are, and ever since the 7th day of September, 1922, have been the owners in fee, and entitled to the possession of all that certain real property situate, lying and being in the County of Mariposa, State of California, and particularly described as follows, to-wit: (Here follows the description above given);

"II. That the east line of the east one-half of the southwest quarter of Section 13 Township 4 South, Range 18 East, M. D. B. & M., bears from a stone mound marked '¼', being the quarter stone between Sections 12 and 13, T. 4 S., R. 18 E., M. D. B. & M., S. 5 deg. 18 min E. to a stone mound standing on ridge running to the southwest, as said east line and said stone mound are set out as 'P. Trabucco's southeast corner, stone mound identified by John Trabucco as quarter corner between sections 13 and 24,' on that certain map introduced in evidence by plaintiff herein, and marked plaintiff's exhibit 7."

The court further found that the defendant, on or about the 10th day of July, 1927, located a certain mining claim known as, and called, "Big Pine Number 1 Quartz claim," and placed the point of discovery within the boundaries of the lands found to belong to the plaintiffs, as hereinbefore described, and that the defendant was wrongfully in possession of the premises claimed by him. Conclusions of law were drawn to the effect that the plaintiffs were the owners of the premises described, and judgment went for them as herein stated.

[1] Upon the trial of the action, and upon this appeal, the only question really presented for determination is the location of the south quarter corner of the lands described. On the part of the plaintiffs, it is contended that the original corner was found in place; that the original monument of the original United States survey was found in place, and so determined by the trial court. On the part of the defendant and appellant, the claim was and is made that the real quarter corner should be 351 feet west of the position described in the findings and judgment of the court. While there is conflicting testimony in the record as to the true location of the quarter corner referred to, if there is in the record testimony sufficient to support the findings of the trial court, then and in that case the judgment should be affirmed. If the testimony on the part of the plaintiffs, to the effect that the original corner set at the time of the original United States survey is still in place, and was in place at the time of the trial, and was the quarter corner referred to at the time the patent was issued for the lands and premises mentioned in the findings as belonging to the plaintiffs, then and in that case, irrespective of whether the original survey was or was not strictly accurate, the plaintiffs were entitled to judgment.

[2] As stated in 9 C. J. 164, original corners as established by the government sur-

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*Superseded by opinion 298 P. 521.

veyors, if they can be found, or places where they were originally established, if they can be definitely determined, are conclusive on all persons owning or holding with reference thereto, without regard to whether they were located correctly or not, and must remain the corners or monuments by which to determine the boundaries.

If the testimony upon which the court acted was sufficient to show the actual existence of the corner as marked when the original survey was made, then all questions and all the citation of authorities relative to locating lost corners and lost monuments become immaterial.

With these preliminary statements, the following excerpts taken from the testimony, we think, support the findings of the trial court:

[3] The witness C. A. Robinson, called on behalf of the plaintiffs, testified that he was a licensed surveyor in the state of California, and had been such since the year 1895; that at one time he was county surveyor of Mariposa county, and also of Merced county; had at different times been a United States deputy surveyor, located in California. This witness testified that he found the quarter corner in dispute; that one of the blocks of stone had chisel marks on it, to wit, "1—4," indicating the quarter corner, and from that corner, conforming to Mr. Winton's, he used the field notes more carefully. Mr. Winton, called as a witness on the part of the plaintiffs, testified that he was a licensed surveyor; was, at the time of the trial, the city engineer of the city of Merced and the deputy county surveyor of the county of Merced; that he went with Mr. Robinson to the quarter corner, and found the stone marked as "1—4," with a small mound of rocks. Mr. Bertken, a witness called on the part of the plaintiffs, testified that he acted as flagman with A. G. Herrman, United States deputy mineral surveyor, when a township plat was made of township 4 south, range 18 east, and during the survey they camped on Pete Trabucco's homestead; that, while he did not assist in locating the quarter corner of the south line of section 13, between sections 13 and 24, he was there when it was located; that he saw the men working in marking the corner, saw them establishing the monument; that they used rocks in making the monument; that he had visited the property off and on for thirty years; that he visited the place recently and pointed out where it was. This witness also described the topography of the country where the monument was located, and where it was established by the United States surveyor; that he was up there the Saturday preceding the trial, had no difficulty in locating the monument; that it was the quarter section corner on the south line of section 13. The witness Robinson, to whom we have heretofore referred, further testified as to the topography of the country; also recognized the photograph of the place where the monument is located; that he had no difficulty in finding the corner; that the monument he found there was, in his opinion, the original monument established when the Herrman survey was made. The witness Winton further testified that he used the field notes of the original survey, and that the field notes place the corner on the ridge of land theretofore described by the witness as being the place where the monument was found. This witness further testified that the corner as located and indicated on the map as the southeast corner stone mound, identified as hereinbefore stated, was the quarter corner section between sections 13 and 24.

The testimony set out in the record further shows that there was practically no dispute as to the quarter corner on the north line of the section, and that, following the field notes of the survey from the north quarter corner, the south quarter corner would be and was located at the place identified by the witnesses as hereinbefore stated, and also as found by the trial court.

As contradiction of the testimony which we have set out, the defendant called M. B. Nevins as a witness, who testified that he followed the field notes of the United States survey, and did not find them very accurate; that in going over the field notes he could not make them coincide with the ground. This witness further testified that the corner should be west of the position found by the trial court. The field notes of the original survey were introduced in evidence in relation to the corner in dispute, and read as follows: "On ridge to S. W. set ¼ sec. cor. Set oak stake 4" sq. and 4 ft. long 12" in ground, marked ¼ S. an N. Fac. Raised a md. of rocks 4 ft. in dia. at base 1½ ft. high around stake. Pits impracticable. No bearings near. Descend on N. side of ridge." This corresponds to the testimony of the witnesses as to the place where the quarter section corner monument was found.

Referring again to 9 C. J. 164, § 18, we find the following: "Original corners as established by government surveyors, if they can be found, or the places where they were originally established, if they can be definitely determined, are conclusive on all persons owning or holding with reference thereto, without regard to whether they were located correctly or not, and must remain the true corners or monuments by which to determine the boundaries. Errors of location cannot be corrected by the courts or by surveyors called on to locate government corners and lines." In the same volume, as to relocation of corners as lost corners, the rule is set forth that, so long as the original corners remain marked and the monuments can be identified, the original survey is controlling.

That the location of the corner to which we have referred was the only question in dispute satisfactorily appears from the following which we find in the record:

"Mr. Ostrander: The only corner in dispute is the southeast corner?

"Mr. Lynch: That is the only corner in dispute; this corner, the southeast corner of Mr. Trabucco's place, is the corner of dispute."

From what we have stated, it satisfactorily appears that there is sufficient testimony in the record to sustain the finding of the trial court as to the existence of the monument marking the corner in dispute, as originally located by the United States surveyor at the time of making the original location. This being true, further consideration of the cases having to do with the fixing of the boundaries, cited by the respective parties, would seem to be superfluous. We may, however, call attention to the case of Churchill Co. v. Beal, 99 Cal. App. 482, 278 P. 894, where this court used the following language, quoting from page 490 of 99 Cal. App. 278 P. 894, 897: "If the original survey * * * fixed the westerly boundary of the lands granted to the plaintiff and the plaintiff's grantors as found by the trial court, then, and in that case, whether the line as originally located was correct becomes immaterial. It is the correct line in the determination of this action, as it fixes on the grounds the lands covered by the patents, the ownership of which has passed to the plaintiff in this action." The following California cases support the rules which we have just herein set forth: Kimball v. McKee, 149 Cal. 435, 86 P. 1089; Foss v. Johnstone, 158 Cal. 119, 110 P. 294; Weaver v. Howatt, 161 Cal. 77, 118 P. 519; Weaver v. Howatt, 171 Cal. 302, 152 P. 925; Spiers v. Spiers, 176 Cal. 557, 169 P. 73; Wilmon v. Aros, 191 Cal. 80, 214 P. 962.

The judgment is affirmed.

McCANDLESS v. CITY OF LOS ANGELES.*

Civ. 6442.

District Court of Appeal, Second District, Division 1, California.

March 3, 1931.

Rehearing Denied March 30, 1931. Hearing Granted by Supreme Court April 30, 1931.

1. Municipal corporations ⇨646.

Sidewalk of street is part of "highway" to which sidewalk is adjacent.

[Ed. Note.—For other definitions of "Highway," see Words and Phrases.]

2. Municipal corporations ⇨269(4), 657(2).

It would be within power of constituted authorities not to provide for construction of sidewalk or to abolish existing sidewalk on street.

3. Eminent domain ⇨119(10).

Construction of pedestrian tunnel by city on part of sidewalk in front of part of plaintiff's lot *held* not new "taking"; hence not compensable (Const. art. 1, § 14).

It appeared that alleged taking here involved was caused by city in erection and construction of pedestrian tunnel on part only (both as to length and as to width) of sidewalk on street on which lot belonging to landowner abutted. Such construction would not be ground for action for damages, since general dedication of street or highway to public use ordinarily is all-inclusive, and embraces, not only every known use for moving, carriage, locomotion, transportation, or conveyance of persons or property, but includes any other or additional reasonable use, either of similar or dissimilar kind, that may be discovered for benefit or welfare of traveling public.

[Ed. Note.—For other definitions of "Taking (In Eminent Domain)," see Words and Phrases.]

YORK, J., dissenting.

Appeal from Superior Court, Los Angeles County; Arthur Keetch, Judge.

Action by Elizabeth McCandless against the City of Los Angeles. From a judgment in favor of defendant, plaintiff appeals.

Affirmed.

Gilbert A. McElroy, Lorrin Andrews and Porter T. Kerckhoff, all of Los Angeles, for appellant.

Erwin P. Werner, City Atty., Jerrell Babb and Sam H. Erwin, Deputies City Atty., all of Los Angeles, for respondent.

HOUSER, J.

Plaintiff brought an action against the defendant by which she sought to recover a judgment for damages alleged to have been occasioned by the action of the defendant in causing the erection and construction of a pedestrian tunnel on a part only (both as to length and as to width) of a sidewalk on a street on which a certain lot belonging to plaintiff abutted. From a judgment in favor of the defendant, plaintiff has appealed to this court.

Although several different legal principles are urged by appellant as suggesting a sufficient reason or reasons for a reversal of the judgment, it is conceded that each of such

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*Hearing granted 4 P.2d 139.

reasons is, and that all of them are, finally dependent upon a determination of the ultimate question of whether the construction of the said pedestrian tunnel which occupied a part of the sidewalk of the street on which the lot of plaintiff abutted constituted the taking of any property belonging to plaintiff which would give rise to a legal claim for compensation therefor and thereby afford a basis for an action for damages.

[1, 2] At the outset, it may be well to remember that a sidewalk of a street is a part of the highway to which the sidewalk is adjacent. Martinovich v. Wooley, 128 Cal. 141, 60 P. 760; Bonnet v. San Francisco, 65 Cal. 231, 3 P. 815; Marini v. Graham, 67 Cal. 130, 7 P. 442; Ex parte Taylor, 87 Cal. 94, 25 P. 258. It is also apparent that, while ordinarily for the purpose of affording greater convenience and safety to pedestrians a sidewalk is constructed apart from that portion of the highway used for vehicular traffic, it would be within the power of the constituted authorities to depart from the usual custom, and either fail to provide for the construction of a sidewalk on a street or to abolish an existing sidewalk thereon.

From an examination of the authorities throughout the United States, it appears that, as far as may be ascertained, no decision has been made in a case wherein the facts resembled those in the instant case. But it also appears that, where the question of the right of damages by the owner of property which abutted upon a street for injuries which resulted to him by reason of a public use having been made of the street other than, or different from, that to which the street was originally intended or subjected, the decisions emanating from the several courts of last resort are not harmonious one with the other. As examples of decisions wherein the courts of one state have differed in their determination of the question from the conclusion reached thereon by tribunals of other jurisdictions, see Ryan v. Preston, 59 App. Div. 97, 69 N. Y. S. 100; Minnequa Lumber Co. v. Denver, 67 Colo. 472, 186 P. 539; Pillings v. Pottawattamie County, 188 Iowa 567, 176 N. W. 314; Town of Longmont v. Parker, 14 Colo. 386, 23 P. 443, 20 Am. St. Rep. 277; Commissioner of Highways v. Ely, 54 Mich. 173, 19 N. W. 940; Morris v. Covington County, 118 Miss. 875, 80 So. 337; Newton v. New York, etc., R. Co., 72 Conn. 420, 44 A. 813. The foregoing cases include situations such as the construction and maintenance of side paths for the use of bicycles along a public highway (Ryan v. Preston, supra); the building of a viaduct in a street (Minnequa Lumber Co. v. Denver, supra); the making of large cuts or fills in a street (Pillings v. Pottawattamie County, supra); the digging of a ditch in a street (Town of Longmont v. Parker and Commissioner of Highways v. Ely, supra); the closing of a street where it crossed railroad tracks and the construction of a tunnel at a different point in order to accommodate traffic (Newton v. New York, etc., R. Co., supra); and the vacation of a country road by which the owner of land abutting thereon was deprived of access to his property (Morris v. Covington County, supra).

The case of Genazzi v. County of Marin, 88 Cal. App. 545, 263 P. 825, concerned the asserted right of an owner of certain ranch property to an injunction by which the supervisors of the county in which such property was located would have been restrained from diverting a stream, so that, instead of the water thereof following its natural course across the highway on which the property abutted, it would be conducted by or through a "wide and deep ditch" along one side of the highway and adjacent to a part of the property in question. It was held that (syllabus):

"While, generally speaking, an abutting land owner on a public highway has a special right of easement and user in the public road for access purposes, and this is a property right of easement which cannot be damaged or taken from him without due compensation, such owner is not entitled, as against the public, to access to his land at all points in the boundary between it and the highway, although entire access cannot be cut off; if he has free and convenient access to his property, and his means of ingress and egress are not substantially interfered with by the public, he has no cause of complaint."

See, also, Lane v. San Diego Elec. Ry. Co., 208 Cal. 29, 33, 280 P. 109; Strehlow v. Mothorn, 100 Cal. App. 692, 699, 280 P. 1021.

Although in the case of Eachus v. Los Angeles, etc., Railway Co., 103 Cal. 614, 37 P. 750, 42 Am. St. Rep. 149, the constitutional provision (article 1, § 14), to the effect that, without just compensation being paid to the owner thereof, private property "shall not be taken or damaged for public use," is construed and a ruling announced in substance that an owner of a city lot which abuts on a public street is entitled to compensation for an injury to his property which results from a change of grade of such street, nevertheless, in the later case of Hayes v. Handley, 182 Cal. 273, 187 P. 952, 955, which, as far as has been pointed out, is the only case in this state where a question similar to that here under consideration was involved, it was held that the construction by a municipal corporation of a traffic tunnel in a city street was a use which might be made of such street without additional compensation being made therefor to the owner of land abutting on the street adjacent to such tunnel. The court further declared that it is well settled that the manner and extent of the public use of a street is not limited by any standards or methods of use in vogue at the time such street was dedicated; and then quoted the following excerpt from the opinion in the case of Montgomery v.

Santa Ana, etc., Co., 104 Cal. 186, 191, 37 P. 786, 25 L. R. A. 654, 43 Am. St. Rep. 89: "* * * We affirm that, when a public street in a city is dedicated to the general use of the public, it involves its use subject to municipal control and limitations for all the uses and purposes of the public as a street, including such methods for the transportation of passengers and freight as modern science and improvements may have rendered necessary, and that the application of these methods, and indeed of those yet to be discovered, must have been contemplated when the street was opened and the right of way obtained, whether by dedication, purchase, or condemnation proceedings, and hence that such a user imposes no new burden or servitude upon the owner of the abutting land."

In addition thereto, Sears v. Crocker, 184 Mass. 586, 69 N. E. 327, 100 Am. St. Rep. 577, which was said to be "a well-considered and carefully reasoned case," was largely drawn upon for reasons in support of the conclusion reached therein that (syllabus): "The construction of a subway and tunnel in the street * * * without a formal taking of land in the streets, is not illegal on the ground that it would impose an additional servitude on lands previously taken for streets, and thus deprive of their property the owners of the fee of the streets." Among other statements contained in the case to which reference has just been had, the following may be noted: "It hardly can be contended that this is an unreasonable mode of using the streets in reference either to travelers or abutters. * * * The necessary requirements of the public for travel were all paid for when the land was taken, * * * and whether the particulars of them were foreseen or not. The only limitation upon them is that they shall be of a kind which is not unreasonable. * * *"

[3] It would appear that the trend of judicial opinion in the matter under consideration is that a general dedication of a street or highway to public use ordinarily is all-inclusive in character, and, at the time such dedication becomes effective, embraces, not only any and every use then known, practiced, or even conjectured either by the general public or by private individuals for the moving, carriage, locomotion, transportation, or conveyance of either persons or property of any kind, but as well includes any other or additional reasonable use either of a similar or of a dissimilar kind, nature, or character which thereafter may be discovered for the benefit or welfare of the traveling public.

Considering the broad character of the legal principle enunciated in the authorities last cited herein, and remembering especially that in the instant case a portion only of the sidewalk in front of but a part of plaintiff's lot is used for the construction of the pedestrian tunnel in question, it would seem apparent that plaintiff had no ground upon which to maintain her action.

The judgment is affirmed.

I concur: CONREY, P. J.

I dissent: YORK, J.

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112 Cal. App. 413

KENNEPOHL v. CARY & CO. et al.

Civ. 6375.

District Court of Appeal, Second District, Division 1, California.

March 9, 1931.

1. Brokers 🔑4.

Where securities broker's bond was given January 1, 1925, and transaction involving alleged conversion of stock occurred after approval, but before effective date of 1925 amendment, amendment did not apply (St. 1917, p. 677, § 5, par. 3, as amended by St. 1923, p. 90, § 2, and as amended by St. 1925, p. 967, § 3).

2. Brokers 🔑4.

Securities broker's bond given prior to 1925 amendment *held* not to cover alleged conversion of customer's stock pledged with broker (St. 1917, p. 677, § 5, par. 3, as amended by St. 1923, p. 90, § 2, and as amended by St. 1925, p. 967, § 3).

Such bond did not cover alleged conversion of customer's shares of stock delivered to broker as security for payment of other stock which customer agreed to buy from broker, but which, according to customer's allegations, broker never delivered, since such broker's bond, given under St. 1917, p. 677, § 5, par. 3, as amended by St. 1923, p. 90, § 2, prior to amendment by St. 1925, p. 967, § 3, did not cover cases of breach of contract, conversion, or misappropriation.

Appeal from Superior Court, Los Angeles County; Elias V. Rosenkranz, Judge.

Action by Emmilie Kennepohl against Cary & Co. and others and the Indemnity Insurance Company of North America. From a judgment in favor of plaintiff, defendant last named appeals.

Reversed.

Joe Crider, Jr., and Clarence B. Runkle, both of Los Angeles, for appellant.

J. J. Hughes, of Los Angeles, for respondent.

YORK, J.

The defendant Cary & Co., a copartnership, was organized in the late fall of 1924. On January 1, 1925, pursuant to paragraph 3, section 5, Corporate Securities Act, as amended in 1923 (Stats. 1923, p. 90, § 2), Cary & Co., as principal, and the appellant indemnity company, as surety, executed and delivered a bond to the state of California in the penal sum of $5,000. This bond was executed in connection with the issuance by the corporation commissioner, of a license authorizing Cary & Co. to transact business as a securities broker. On June 25, 1925, the plaintiff entered into a transaction with an agent of the Cary Company, whereby she agreed to buy, through said company, seventy-five shares of Pacific Deisel Company's stock at $9.25 per share, at the same time delivering to said company, as security for payment of said stock, five shares of preferred stock and six shares of common stock of the Nicholls Grain & Milling Company. The complaint alleged that plaintiff never received the Pacific Deisel Company's stock, and, further, that the Nicholls Grain & Milling Company stock was never returned to her. The trial court gave judgment against the surety company on its bond for the sum of $785, the value of the Nicholls stock.

The bond under consideration was executed pursuant to the provisions of paragraph 3, section 5, Corporate Securities Act, as amended in 1923 (Stats. 1923, p. 90, § 2), to the effect that, "upon failure to comply with the provisions of law in so far as the same may apply to any and all transactions carried on by said principal as such broker, the said principal and surety shall be liable to any and all persons who may suffer loss by reason thereof."

In 1925, the Legislature enacted an amendment to paragraph 3, section 5 of the Corporate Securities Act (Stats. 1925, pp. 962, 967, § 3), which added to the liabilities of the surety, upon a bond given thereunder, that of guaranteeing the honest and faithful application of all funds received, and the faithful and honest performance of all obligations and undertakings in the purchase or sale of securities by said broker, etc., and the respondent, in support of the judgment of the trial court, maintains that the transaction here involved is governed by the provisions of the said 1925 amendment.

[1] The 1925 amendment to the Corporate Securities Act was approved on May 23, 1925, and took effect ninety days after the Legislature adjourned, to wit, July 24, 1925. It would appear, therefore, that the 1925 amendment to the Corporate Securities Act does not apply to the situation now before this court, for the reason that the bond was executed and the transaction complained of took place prior to the effective date of the 1925 amendment.

[2] "The broker's bond given pursuant to the Corporate Securities Act, as it existed prior to the amendment of 1925, has been held not to cover cases of breach of contract, conversion, or misappropriation. Mitchell v. Smith, 204 Cal. 197, 267 P. 540; Blumenthal v. Larson, 79 Cal. App. 726, 251 P. 241; Anthony v. Van, 96 Cal. App. 523, 274 P. 563." Giles v. Welling, 100 Cal. App. 515, 516, 280 P. 539.

In view of the cases above cited, we are of the opinion that the amended complaint does not state facts sufficient to constitute a cause of action against the appellant surety company. Having reached this conclusion, we deem it unnecessary to discuss the other points raised by the appellant.

The judgment is reversed.

We concur: CONREY, P. J.; HOUSER, J.

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112 Cal. App. 427

CAPLEY v. CLARK.

Civ. 7873.

District Court of Appeal, First District, Division 1, California.

March 10, 1931.

Appeal and error ⚷627(2).

Appeal will be dismissed where transcript is not filed within time prescribed by law (Code Civ. Proc. § 953a).

Appeal from Superior Court, Marin County; Edward I. Butler, Judge.

Action by Herbert C. Capley against Carl W. Clark. Judgment for defendant, and plaintiff appeals. On motion to dismiss.

Appeal dismissed.

A. S. Whitmore and Paul A. McCarthy, both of San Francisco, for appellant.

Redman, Alexander & Bacon, of San Francisco, and Thomas P. Boyd, of San Rafael, for respondent.

PER CURIAM.

Motion to dismiss appeal.

It appears from the record that on November 4, 1929, plaintiff filed a notice of appeal from a judgment in favor of defendant. No bill of exceptions has since been prepared nor has any transcript been settled under section 953a of the Code of Civil Procedure, and all proceedings for such settlement were terminated and dismissed on the 6th day of February, 1931. The transcript not having been filed within the time prescribed by law, the appeal is dismissed.

112 Cal. App. 343

WIDESS et al. v. DOANE.

Civ. 6438.

District Court of Appeal, Second District, Division 1, California.

March 5, 1931.

1. Action 🔑65.

Right to return of money deposited in escrow must be determined as of commencement of action.

2. Money received 🔑4.

If depositors were entitled to judgment against depositary when commencing action for return of money deposited in escrow, they are entitled thereto against defendant substituted after depositary paid money into court (Code Civ. Proc. § 386).

3. Escrows 🔑8(1).

Money deposited in escrow by purchasers *held* not deposited for vendor's benefit until conditions in instructions were fulfilled.

4. Escrows 🔑8(1).

Pending procurement of title guaranty required in instructions accompanying money deposit, depositary held money in trust for purchasers, and vendor had no claim thereto.

5. Escrows 🔑8(1).

Purchasers could withdraw money deposited in escrow according to terms of instructions, though vendor did not read instructions when depositing deed.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by C. M. Widess and another against the Title Insurance & Trust Company, to recover money deposited in escrow. Defendant deposited the money in court, and Jennie B. Doane was substituted as defendant. From a judgment in favor of plaintiffs, substituted defendant appeals.

Affirmed.

M. M. Lyter and Norman T. Mason, both of Los Angeles, for appellant.

S. W. Newman and Jack G. Schapiro, both of Los Angeles, for respondents.

CONREY, P. J.

This is an action arising out of a transaction wherein the following are the principal items: (a) An option, by Jennie B. Doane, owner, to W. Ross Campbell Company, to purchase a two-thirds undivided interest in described real property; (b) an assignment of the option, by optionee to plaintiffs; (c) notice to defendant Doane of exercise of right to purchase under the terms of the option, and that "escrow has been made" with the Title Insurance and Trust Company; (d) delivery of check for $5,000, by plaintiffs to said title company, as a deposit on said option, but to be used in accordance with written instructions concurrently delivered and which were signed by the plaintiffs; (e) demand by plaintiffs, for return of the $5,000, and compliance refused by the title company.

Thereafter, plaintiffs having commenced this action against the Title Insurance & Trust Company to recover said sum of $5,000, the money was deposited in court by said defendant (in accordance with section 386, Code of Civil Procedure), and Jennie B. Doane was substituted as defendant. Thereafter, by answer, Mrs. Doane pleaded the facts relied upon by her to establish her claim to said money. From judgment entered in favor of plaintiffs, the defendant Doane appeals.

The findings of the court adequately cover the issues raised by the pleadings. The court found as follows:

"I. That on the 23rd day of February, 1928, plaintiffs deposited with the Title Insurance and Trust Company, a corporation, the original defendant herein, the sum of $5000.00, with instructions executed concurrently therewith, which provided that said sum of money was to be held and used by said Title Insurance and Trust Company in the manner and in accordance with instructions to be executed and delivered by the plaintiffs to said defendant; that pursuant thereto, and in furtherance thereof, and as a part of said transaction, and for the purpose of controlling the disposition of said sum and the manner in which the same could be used by the Title Insurance and Trust Company, or any other person, the plaintiffs made, executed and delivered further written instructions which provided that in the event the said Title Insurance and Trust Company was unable, by the 24th day of March, 1928, to issue and deliver its Guarantee or Policy of Title Insurance showing the title to certain property therein described to be vested in C. M. Widess and David Tierstein as to an undivided two-thirds thereof and Liberty

Mortgage Company, Henry G. Bodkin and John F. Sheran as to an undivided one-third thereof, free from encumbrances except the second installment of taxes for the fiscal year 1927–1928, that then and in such event, the said Title Insurance and Trust Company was to return to the plaintiff, on demand, said sum of $5,000.00 deposited as aforesaid.

"II. That on and prior to the 24th day of March, 1928, there existed numerous judgments against said John F. Sheran and by reason thereof, the Title Insurance and Trust Company was unable and unwilling to write or deliver its Guarantee or Policy of Title Insurance assuring to the plaintiffs herein the title as aforesaid.

"III. That thereupon and after the 24th day of March, 1928, the plaintiffs made demand upon the Title Insurance and Trust Company for a return of said sum of $5,000.00 but said Title Insurance and Trust Company did not pay said sum to the plaintiffs, or any part thereof.

"IV. That after the commencement of this action the Title Insurance and Trust Company filed its answer herein, showing conflicting claims to said fund by reason of the fact that one Jennie B. Doane made claim to said fund and thereupon, said Jennie B. Doane was substituted as party defendant herein, and pursuant to order of Court, the said Title Insurance and Trust Company caused to be deposited said sum of $5,000.00 with the County Clerk of Los Angeles County and said fund is now on deposit with the County Clerk of Los Angeles County.

"V. That on the 17th day of February, 1928 the substituted defendant, Jennie B. Doane, made, executed and delivered a certain option in writing to W. Ross Campbell Company and said W. Ross Campbell Company did on the 23rd day of February, 1928, assign said option to the plaintiffs herein; that on the said 23rd day of February, 1928, the plaintiffs herein caused to be delivered to said Jennie B. Doane, an instrument in writing wherein they stated that the option aforesaid had been assigned to them and was exercised in accordance with and subject to the terms thereof, as is more particularly in said letter, heretofore received in evidence, set forth.

"VI. That it is not true that on the said 23rd day of February, 1928, or at any other time, plaintiffs paid to the said Title Insurance and Trust Company, pursuant to the terms and conditions of said option and purchase contract, and/or for the use and benefit of said Jennie B. Doane, and/or to be applied on the purchase contract of said real estate, the said sum of $5,000.00 aforesaid and it is true that said sum of $5,000.00 aforesaid, was paid to the Title Insurance and Trust Company, pursuant to and in accordance with the escrow instructions hereinbefore referred to, and that the disposition thereof was governed and controlled by said escrow instructions and not by any other instrument whatsoever."

It may be conceded that, at the time when the plaintiffs deposited the money with the escrow holder and gave the escrow instructions, the option given by appellant to the assignor of plaintiffs had ripened into a contract of purchase and sale of the property described in the option papers. It may further be conceded that, under the terms of the agreement, the vendor had not obligated herself to see that the one-third interest of Liberty Mortgage Company et al., in said real property should be free from incumbrance. Nevertheless, the plaintiffs, in said escrow instructions, in direct terms and without including any explanation of the reason therefor, authorized the escrow holder to use the deposited money with "your escrow No. 1049125" when the escrow holder could issue its guaranty certificate showing record title vested in the plaintiffs as to an undivided two-thirds of the property and in the other parties named as to an undivided one-third, free from incumbrances (with the exception of certain tax items, etc.). It was stipulated in the instructions that time was of the essence thereof and that if on or before March 24, 1928, the title company was unable to comply with the instructions and the plaintiffs had complied therewith, then all money deposited by the plaintiffs should be returned to them on their written demand. It is an undisputed fact that the title of the owners of the one-third interest was incumbered by judgment liens and for that reason the title company was unable to comply with said escrow instructions within the time limited.

[1-5] In this case we are not concerned with any rights which appellant may have or assert against respondents by reason of any breach of their contract of purchase of appellant's interest in said real property. The only question here relates to the right of the plaintiffs to have said sum of $5,000 returned to them. And that right must be determined as of the time of the commencement of this action, when the plaintiffs filed their complaint against the Title Insurance & Trust Company. If respondents were then entitled to judgment against the title company, they are now entitled to such judgment against the substituted defendant. Money deposited by a vendee with an escrow holder, under such instructions as were given by respondents in this case, was not deposited with the escrow holder for the account of the vendor at the time when the deposit was made, but was only to be so applied when the title company could secure for the vendee the described guaranty certificate. Pending the procurement of the title guaranty, the escrow holder held the money in trust

for the vendee and the vendor had no claim to it. Hildebrand v. Beck, 196 Cal. 141, 145, 236 P. 301, 39 A. L. R. 1076.

In substance, the grounds of appeal relied upon by appellant are all presented on the assumption that the money claimed by appellant was paid into escrow for her benefit, under a contract which entitled her to payment of the purchase price for her interest in the land; and it is contended that, since she had a good and unencumbered title to an undivided two-thirds interest in said land and had complied with her agreement, she was entitled to have paid over to her the said $5,000 deposit. But as we have shown, the money paid into the hands of the escrow holder could not be deemed to be paid in "for her benefit" until the conditions for payment to her, as set forth in the escrow instructions, were fulfilled. Those conditions never were fulfilled. It has not been alleged or proved that the requirements written into the escrow instructions by the respondents were fraudulently placed therein, or concealed from appellant. If she did not read said instructions at the time when she deposited her deed with the escrow holder, that omission was the result of her own negligence, and does not change the controlling fact that, so far as the deposit of money in escrow is concerned, the depositors had the right to withdraw said money in accordance with the terms of said escrow instructions.

The judgment is affirmed.

We concur: HOUSER, J.; YORK, J.

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112 Cal. App. 258

PEOPLE v. VAILE.

Cr. 1147.

District Court of Appeal, Third District, California.

Feb. 27, 1931.

1. Constitutional law 🔑203.

Statute depriving habitual criminal of prison credits for good behavior and denying him right of parole *held* not ex post facto (Pen. Code, § 644).

2. Criminal law 🔑1206(1).

Statute denying habitual criminal right to parole *held* not unconstitutional as increasing punishment because of former convictions (Pen. Code, § 644).

3. Criminal law 🔑1213.

Statute depriving habitual criminal of right to parole *held* not in violation of constitutional inhibition against inflicting of cruel and unusual punishment (Pen. Code, § 644; Const. art. 1, § 6).

Appeal from Superior Court, Yolo County; W. A. Anderson, Judge.

Alton H. Vaile was convicted of lewd and lascivious conduct in violation of Penal Code, § 288, and of an infamous crime against nature in violation of section 286, after having pleaded guilty to three prior convictions of other felonies, and he appeals.

Affirmed.

Percy Napton, of Woodland, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

R. L. THOMPSON, J.

This is an appeal from a judgment and order of life imprisonment imposed on the defendant upon conviction of two felonies and three prior convictions of felonies formerly committed by him.

By means of an information filed in Yolo county the defendant was charged with four separate felonies, together with three prior convictions of other felonies. To each of these charges of prior convictions of felonies he pleaded guilty. To each of the major felonies charged in the information he pleaded not guilty. To each of these last-mentioned charges he also pleaded not guilty by reason of insanity. The second and third alleged offenses charged in the information were dismissed for lack of evidence. Upon trial the jury rendered separate verdicts finding the defendant guilty, (1) of lewd and lascivious conduct in violation of section 288 of the Penal Code, and (2) guilty of the infamous crime against nature in violation of section 286 of the same Code. The jury also rendered separate verdicts finding the defendant sane at the times of the commission of the two last-mentioned offenses. The defendant was thereupon sentenced to imprisonment in the state prison at Folsom for the term of his natural life without the benefit of parole. From this judgment the defendant has appealed.

The appellant contends that section 644 of the Penal Code, pursuant to the terms of which he was sentenced, is ex post facto and unconstitutional since it purports to increase the penalty by depriving the accused of the benefit of prison credits for good behavior and by denying him the right of parole on account of the three former convictions of felonies. This challenged statute reads, in part: "Every person convicted in this state of any felony who shall have been previously three times convicted, either in this state or elsewhere, of any felony, shall be punished by imprisonment in the state prison for not less than life and shall not be eligible to parole."

The defendant also contends that these added penalties to the punishment of an habitual criminal are in conflict with article 1, section 6, of the Constitution of California, which provides, in part: "Nor shall cruel or unusual punishment be inflicted."

The appellant argues that depriving an habitual criminal of the benefit of prison credits for good behavior and denying him the right of parole are contrary to the spirit of modern legislation and that this innovation strikes a death blow to the spirit of prison reform. No other points are raised on this appeal.

[1-3] There is no merit in these contentions. Section 644 of the Penal Code is not ex post facto in its application nor unconstitutional on account of its alleged increase of punishment prescribed for an habitual criminal because of former convictions. Ex parte Gutierrez, 45 Cal. 429; People v. Rosencrantz, 95 Cal. App. 92, 272 P. 786; People v. James, 71 Cal. App. 374, 235 P. 81; Cooley's Cons. Lim. (7th Ed.) 382. Nor is this provision of the statute in violation of the inhibition of the Constitution prohibiting the inflicting of cruel and unusual punishment. In re Rosencrantz, 205 Cal. 534, 271 P. 902, 904. This last-cited authority is a complete answer to every contention made by the appellant on this appeal. The opinion reads: "Neither can it be said that the deprival of petitioner of the right to parole is either cruel or unusual. It has only been at a comparatively recent date in the history of our state that any prisoner has been granted the favor of parole. The right to parole is simply a favor granted by the people of the state to those committed to our penal institutions as punishment for crime. The withholding of this favor by the Legislature from any particular class of criminals cannot be said to inflict upon those from whom the privilege has been denied a punishment either cruel or unusual. The granting or withholding of the privilege of parole to any particular class of prisoners is largely a matter of expediency which is left to the lawmaking branch of our government, and the courts will not interfere with the Legislature in the exercise of such power."

The parole and credit systems were enacted to encourage the reformation of criminals. There is good reason to assume the reformation of habitual criminals is comparatively hopeless. Having been thrice previously convicted of felonies, it is probable the criminal habit of one is so firmly fixed that he is likely to follow a life of crime. Under such circumstances, greater care is necessary to protect society against the criminal tendencies of such a lawless individual. The chief purpose of imposing a penalty for crime is to deter the accused and others from the commission of similar offenses. Habitual criminals require more stringent means of restraining them from their criminal tendencies than first offenders. There is sound reason for the enforcement of added penalties for the perpetration of felonies by habitual criminals. The law is not unconstitutional.

The judgment and order are affirmed.

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112 Cal. App. 261

GRAVES et al. v. KERN COUNTY TRANSP. CORPORATION et al.

Civ. 316.

District Court of Appeal, Fourth District, California.

Feb. 27, 1931.

Rehearing Denied March 25, 1931.

1. Automobiles ⚿245(43).

Whether defendants were operating at excessive speed, through subway over wet pavement, stage which collided with stalled automobile, *held* for jury.

Facts disclosed that an automobile being demonstrated by a salesman stalled near the entrance of a subway, that passengers alighted and shoved the automobile to start it, that it again stalled in the subway, that driver of stage passed flagman who was warning the motorists of the danger, that the pavement was wet, and that the lights of approaching automobiles blinded the stage driver, who drove the stage in a hole on the right side of the stalled automobile, causing it to overturn, killing a pedestrian who had previously been a passenger in the stalled automobile.

2. Automobiles ⚿245(43).

Whether driver of stage which collided with automobile stalled in subway could have stopped stage after he saw automobile *held* for jury.

3. Negligence ⚿136(9).

Only where deduction to be drawn from evidence is inevitably one way or other may question of contributory negligence be withdrawn from jury.

4. Automobiles ⚿245(83).

Salesman demonstrating automobile *held* not guilty of negligence as matter of law in starting defective automobile through subway, as regards liability for collision in subway.

5. Negligence ⚿93(1).

Alleged negligence of automobile salesman, in starting defective automobile through subway, could not be imputed to passenger who was neither driving nor in charge of automobile.

6. Automobiles ⇒245(90).

Whether salesman's negligence, if imputable to passenger, in starting defective automobile into subway, was proximate cause of collision in subway, *held* for jury.

7. Automobiles ⇒245(17).

Whether stage driver was negligent in passing flagman and in operating stage through subway in which collision with automobile occurred *held* for jury.

8. Automobiles ⇒245(62).

Whether negligence, if any, of stage driver in passing flagman was proximate cause of collision in subway *held* for jury.

9. Automobiles ⇒245(83).

Where flagman was sent back after automobile had stalled in subway, whether adequate precaution had been taken to avoid collision *held* for jury.

10. Automobiles ⇒245(88).

Contributory negligence of automobile passenger, regarding tail-lights on stalled automobile struck by stage, *held* for jury.

11. Trial ⇒260(8).

Refusing instructions on contributory negligence *held* not error, in view of instructions given.

> The court in several instructions plainly told the jury that, if they found that deceased was guilty of any negligence which proximately contributed to the injury, plaintiffs could not recover for the death; hence the instructions, taken together, as plainly defined contributory negligence as if formal definition had been given.

12. Negligence ⇒72.

Rule that person confronted with sudden peril is not held to strict degree of accountability as under ordinary circumstances applies where person without his fault finds himself in position of apparent and sudden peril.

13. Trial ⇒260(1).

Refusing instructions covered by other instructions, so far as applicable to evidence, *held* not error.

14. Trial ⇒253(9).

Refusing instructions, which ignored fact deceased was pedestrian and was not required to look behind him for approaching automobiles, *held* not error.

15. Trial ⇒253(9).

Refusing instruction which ignored duty of stage driver to have avoided accident, if possible, which resulted in pedestrian's death, *held* not error.

16. Trial ⇒260(1).

Refusing requested instruction covered by other instructions *held* not error.

Appeal from Superior Court, Kern County; Robert B. Lambert, Judge.

Action by James I. Graves and another against the Kern County Transportation Corporation and another. Judgment for plaintiffs, and defendants appeal.

Affirmed.

B. P. Gibbs, of Los Angeles, Theodore Hale, of San Francisco, and Siemon & Garber, of Bakersfield, for appellants.

Rowen Irwin and Aldrich & Mack, all of Bakersfield, for respondents.

BARNARD, P. J.

This is an action in which the plaintiffs seek to recover damages for the death of their son, caused by a motor vehicle accident. The accident occurred in the city of Bakersfield, in a subway under the Santa Fé Railroad tracks, on Union avenue, a paved street which runs north and south. The bottom of the subway is flat for eighty feet, and the ascent on either side is 300 feet long from the level of the bottom to the street level above, the grade on these ascents being about 5 per cent. At a point on the east side of the north incline, about one hundred feet up the slope from the beginning of the ascent and twelve feet east of the east edge of the pavement, on the night here in question, there was a hole about four feet long, north and south, three feet wide, and one and one-half feet deep. The twelve feet from the pavement to this hole was a gradual rise, and from the hole on, the slope of the bank sharply ascended to the ground level. The hole was, in fact, one in the bank, having been made by the water washing part of the bank away at that point. This accident occurred about 8 o'clock in the evening of September 8, 1929, while the pavement was wet from a recent rain. One Walter L. Lawrence, an automobile salesman, was demonstrating a Hudson automobile to plaintiffs' son, and they were accompanied by five mutual friends. The Hudson car was proceeding north on Union avenue, and the testimony shows it stalled about five blocks south of the subway, but was again started in some manner not appearing from the evidence. About the time it reached the entrance to the subway, the car again stalled. Five of the men, including Graves and Lawrence, alighted. Lawrence testified that he

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⇒For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes told the driver that they would give the car a push and if it started to run, to pull up on the hill on the other side and wait for them. The car was given a push and the motor started. One witness testified that the motor started before the car reached the entrance to the subway, and that it entered the subway on its own power. Another witness thought the engine may not have started until the car was ten or twelve feet along the descending slope. The car stalled again in the bottom of the subway, and the five men walked down to it and attempted to push it on through. However, one of the men, McBride, went back about thirty feet for the purpose of flagging approaching cars. He succeded in flagging three cars, one of which came to a stop and the other two slowed down and went around the stalled car. Subsequently a stage, owned by one of the defendants and driven by the other, entered the subway from the south. McBride tried to flag this stage, but when he saw it was not going to stop, he shouted a warning to the others that they were going to be hit. Two cars with bright headlights were entering the north incline of the subway, so that the stage could not pass to the left of the Hudson. By this time the Hudson, which was being pushed, had reached a point on the pavement directly opposite the hole above referred to. The driver of the stage, in attempting to pass on the dirt to the right of the Hudson, ran into the hole and the stage tipped over against the Hudson. The Hudson was hit about fifteen feet back from the front of the stage, which was twenty-five feet long. The son of the plaintiffs was killed, and this action resulted. The jury brought in a verdict for the plaintiffs for $15,000. A motion for a new trial was denied upon the condition that $8,000 of this be remitted, which was done, and this appeal is from a judgment for $7,000, which followed.

[1, 2] Appellants' first point is that the evidence is not sufficient to support the verdict of the jury as to negligence upon their part which proximately caused the injuries complained of. It is argued that there is no evidence to show excessive speed or other negligence; that the driver of the stage testified that he entered the subway at twenty miles an hour; that he did not see the Hudson until within twenty feet of it; that he was then going about fifteen miles per hour; that he was unable to pass to the left of the Hudson because of approaching automobiles; and that he thought there was room to pass to the right of the Hudson, between that machine and the bank. On the other hand, McBride, who had gone back to flag approaching cars, testified that other approaching cars either stopped or slowed down sufficiently to pass, and that he tried to stop the stage, without success; and that the stage was traveling forty-five or fifty miles an hour when it passed him. Appellants point out that he was not a good judge of speed, as he testified at the coroner's inquest, "No; I'm not what you would call a good judge of speed but it was going very fast." While this might affect the weight of his evidence, that argument is one for the jury. One of appellants' witnesses (Keck) testified that just as he was entering the south slope of the subway in a Ford coupe, at about twenty-five miles an hour, the stage passed him and proceeded down the incline. The driver of the stage testified that he did not apply his brakes as he descended the slope, but that when he first saw the Hudson, when about twenty feet therefrom, he put his car in second speed and set his brakes. If McBride's testimony could be disregarded, it still appears from the evidence that a stage, twenty-five feet in length, traveling at a rate of speed sufficient to pass another car going twenty-five miles an hour, entered a decline of 5 per cent grade which was 300 feet long, passed down the same without its brakes being applied, and crossed over a level strip eighty feet in length; that it then proceeded up more than 100 feet of ascending 5 per cent grade; that during the last thirty-five feet of this (the front of the car having passed fifteen feet beyond the Hudson) the car was in second gear with its brakes set; that it then stopped because its wheels dropped in a hole a foot and a half deep; and that it then struck the Hudson with sufficient force to knock it fifteen feet farther up the grade. With such evidence in the record it can hardly be said, as a matter of law, that the stage was running through a subway, over a wet pavement, at a moderate and lawful speed, and that there is no evidence to sustain a different conclusion reached by a jury. In Davis v. Brown, 92 Cal. App. 20, 267 P. 754, 757, the court said: "A wet pavement downgrade in a tunnel certainly calls for the exercise of a degree of care that must be measured only by the circumstances and conditions presented, and not by any limited mileage per hour set forth in the Motor Vehicle Act. * * *" The driver testified that he was hindered from seeing by the wet weather; that the lights are always bad in wet weather; that the reflection of the lights on the pavement is always bad in wet weather; and that he was blinded by approaching lights and did not see the Hudson until within twenty feet of it. Whether this constituted negligence, under the circumstances, was a question for the jury. Skaggs v. Willhour (Cal. Sup.) 292 P. 649. The witness Keck, who was riding with his brother-in-law in a Ford coupé, at the south entrance to the subway, testified that they slowed down after the stage passed them, and also: "I told my brother-in-law, 'hold 'er.' I seen the other car up on ahead and I says, 'hold 'er.' I figured he could not get by because it looked like the other car was standing still there." While the driver of

the stage testified that he did not see the Hudson in time to stop, this evidence of Keck, who apparently was in a less favorable position to see than was the driver of the stage, was sufficient to enable the jury to conclude that the driver of the stage was negligent in not seeing the Hudson before he did. At another time, the driver testified that he saw the Hudson just as he left the flat bottom of the subway and began to ascend the incline, which would have placed him about one hundred feet from the Hudson. He also testified that he could have stopped his car in from thirty-five to thirty-seven feet. Whether he should have stopped his car, after he saw the Hudson, was another question for the jury. We are unable to agree with appellants' contention that there is no substantial evidence from which a jury could have inferred negligence upon their part, and we think the facts pointed out and relied upon by them show no more than a conflict in the evidence.

[3-8] Appellants next contend that the evidence, in three different aspects, shows contributory negligence upon the part of the deceased. It is first argued that since the deceased and his companions knew that the Hudson car had stalled twice within five blocks of the entrance to the subway, it was contributory negligence, as a matter of law, for them to have started the car down into the subway. It is only where the deduction to be drawn from the evidence is inevitably one way or the other, that the question of contributory negligence is to be withdrawn from the jury. Wise v. Maxwell Hardware Co., 94 Cal. App. 765, 271 P. 918. In this point, appellants infer that the car was pushed into the subway while the engine was not running. While the car was pushed to start the engine, one of the party, Fred P. Thaddeus, testified that the engine started before it reached the descent and that the car entered the subway on its own power. Be that as it may, the car was in charge of the automobile salesman, who was demonstrating it, and another man who was driving it. They may have known the car stopped on these two occasions because of the way it was adjusted, or because of some defect which caused it to stop when it was slowed down too much, but which never appeared when the car was being given the gas. Such an experience is not unknown to automobile drivers. They may have had reason to believe that the trouble was not to be expected to repeat itself in the next seven hundred feet, even though they had to pass over an incline with a grade of 5 per cent. It could hardly be held as a matter of law that they were guilty of negligence. Even if it could be so held, there is nothing in the evidence to attribute this negligence to the deceased, as a matter of law. He was neither driving the car nor in charge of it. He is neither shown to have suggested proceeding through the tunnel, nor conclusively shown to have taken part in conveying the car into the tunnel. In fact, we think there is no evidence to show that he actually took part in pushing the car in order to start it. Whether, as a passenger, he did anything that a reasonable man would not have done, is a question of fact and not of law. Moreover, if negligence in connection with starting the car into the subway could be imputed to him, as a matter of law, whether this was the proximate cause of the accident presents another question of fact. After the car again stalled in the bottom of the subway and the party again attempted to push it along the highway, a flagman was sent back to warn approaching cars. So far as shown by the evidence, this was successfully done in the case of every car approaching except the stage in question, and the question whether the driver of the stage was guilty of negligence in passing the flagman and in his manner of operating the stage through the subway, and the question whether such actions on his part were or were not the proximate cause of the accident, were questions of fact for the jury.

[9] It is next argued that the deceased was guilty of contributory negligence as a matter of law, in standing behind the Hudson without taking adequate precaution for his own safety. The evidence shows that some of the party were at the side of the Hudson while pushing it and there is no evidence in the record to show that the deceased was in the rear of the car. A flagman had been sent back, who succeeded in stopping other cars, and who tried to stop the stage. Some precaution being shown, the question of whether or not it was adequate under the conditions shown, was for the jury.

[10] A third argument is that contributory negligence on the part of the deceased is conclusively shown by the fact that no lights on the rear of the Hudson were visible. In the first place, the evidence on this point is conflicting. While there was testimony that the lights were not seen, there is other testimony that they were burning, and the stage driver's statement that the bodies of men behind the Hudson obscured the light, is contradicted by the testimony of McBride, who testified as follows:

> "A. Well, there were some on the right side pushing and some of them on the rear of the car pushing and about the middle.
>
> "Q. Were any of them in such a position as to obscure the tail light? A. No, the tail light was not obscured."

Even if it were true that the tail-light was obstructed by some person, there is no evidence that this was done by the deceased, or that he had anything to do with causing it to be obstructed.

Not only does a conflict in the evidence appear, as to each of these contentions, but we find no evidence in the record to show that the deceased, as a passenger, did anything that could be conclusively held to be other than would have been done by a reasonable man, under the circumstances. Under the facts shown, the question of contributory negligence was one for the jury.

[11] Appellants next complain of the refusal of the court to give the following instruction on contributory negligence: "Negligence in any degree on the part of the deceased, Howard W. Graves, amounting to a want of ordinary care, which operating concurrently with the negligence of the defendants, if any, contributed proximately to the accident in question, bars a recovery in this action by the plaintiffs, and this is so whether or not the defendants or either of them could have guarded against it by the exercise of ordinary care." It is first contended that this was not otherwise covered, as there was no clear and adequate definition of contributory negligence in the other instructions. In Metcalfe v. Pac. Elec. Ry. Co., 63 Cal. App. 331, 218 P. 486, 487, the court said: "Taking all the instructions together, it was not necessary specifically to define the term 'contributory negligence.' The sum total of the instructions gave to the members of the jury everything that a specific definition could have conveyed to their minds." An instruction practically the same as that quoted in the case just cited, was given in the instant case, in which, after defining negligence and the rules to be followed in determining the issue of negligence, the court instructed the jury that if they found that the greater weight of all the evidence was in favor of the contributory negligence of the plaintiff, they should accept such contributory negligence as a proved fact; otherwise, they should find that the plaintiff was not guilty of contributory negligence. The court then went on to instruct the jury that in order to find a verdict for the plaintiff, they must not only find from a preponderance of the evidence that the defendant was negligent, but that such negligence was the proximate cause of the injury; and must further find that the evidence fails to show by a preponderance thereof, that the deceased was guilty of negligence contributing proximately to the injury. In this and three other instructions, the jury was plainly told that if they found that the deceased was guilty of any negligence which proximately contributed to the injury, the plaintiffs could not recover. Taking all of the instructions together, it fully appears that contributory negligence was as plainly defined as if a formal definition had been given, and so far as constituting a definition thereof, the requested instruction is no better or clearer than the instructions given. In the second place, the appellants insist that the jury was not otherwise instructed that negligence "in any degree" on the part of the deceased would constitute contributory negligence. The jury was adequately instructed in that regard in an instruction which contained the following: "* * * Before you will be justified in finding a verdict against the defendant * * * you should also be convinced by a preponderance of the evidence * * * that the deceased was not guilty of any negligence proximately contributing to said accident."

This sufficiently covered that portion of the requested instruction and was sufficient in connection with the other instructions given. Sinclair v. Pioneer Truck Co., 51 Cal. App. 174, 196 P. 281; Power v. Crown Stage Co., 82 Cal. App. 660, 256 P. 457.

[12] Appellants next complain of the refusal of the trial court to give the following instruction: "I charge you that a person when suddenly confronted with danger is not to be held to the strict degree of accountability for their acts that they would be under ordinary circumstances, and in judging whether or not the driver of the stage exercised ordinary care as required of him his actions were to be measured by the facts and circumstances as they would have appeared to a reasonably prudent man in the exercise of the highest degree of care; and the fact that he might have taken some other course and thus avoided the accident, when viewed from the circumstances discovered later, would not be negligence on his part, simply because he chose the wrong course to avoid a danger then open and apparent to him."

This instruction left out of consideration the fact that the rule therein set forth applies where a person, without his own fault, finds himself in a position of apparent and sudden peril. Offerdahl v. Motor Transit Co., 80 Cal. App. 667, 252 P. 773; Rush v. Lagomarsino, 196 Cal. 308, 237 P. 1066. Appellants argue that this instruction should have been given in the instant case because the defendant driver was proved to have been proceeding at a moderate rate of speed, and without negligence. As we have heretofore pointed out, there was ample evidence to the contrary and that fact cannot be taken to have been established. There being evidence tending to show that the driver's perilous position was due to his own negligence, the omission from the instruction of the element of freedom from fault on the part of appellants was alone sufficient ground for its rejection. Brooks v. City of Monterey (Cal. App.) 290 P. 540. In the form given, the instruction was not proper, because one of the questions before the jury, under the evidence, was whether or not the driver of the stage was negligent prior to the time he saw the Hudson car, and the issue was not entirely the question of his conduct thereafter. Vedder v. Bireley, 92 Cal. App. 52, 267 P. 724. A further consideration is that the jury was repeatedly instructed that appellants were not liable unless they themselves had been guilty of negligence and had done what no prudent or reasonable man would have done, under the circumstances.

[13-16] Error is next claimed because of three instructions which the trial court refused to give, which were as follows:

"(a) If you find that the injury to Howard W. Graves was unavoidable on the part of the defendant Haworth, then you must find for the defendants. In other words, if the accident happened without negligence on the part of defendant Haworth, then the plaintiff cannot recover in this action."

"(b) If from the evidence you believe that at any time before the accident in question, by the exercise of ordinary care the deceased, Howard W. Graves, could have remained or placed himself in a position of safety had he known of the approaching automobile of defendants, and if you further believe that he could have known of the approaching of said automobile by exercising his sense of sight or hearing, then I charge you that the plaintiffs in this case cannot recover damages from the defendants."

"(c) If you believe from the evidence in this case that the deceased, Howard W. Graves, was not exercising ordinary care at the time and place in question, and that but for this failure to use ordinary care on the part of the deceased the accident would have been avoided, then the plaintiff in this action cannot recover and your verdict must be in favor of the defendants."

Not only does the evidence in this case fail to warrant such an instruction as the first of these, but the main purport thereof is covered by two instructions in which the jury were told that in order to find a verdict for the plaintiff, they must find from a preponderance of the evidence that the defendant was negligent; that this negligence was the proximate cause of the injury; that this negligence could not be presumed but must be proved; and that unless they were satisfied from the evidence that the defendants were negligent, and that the deceased was free from contributory negligence, then their verdict must be for the defendants. The second of these instructions overlooks the fact that the deceased was a pedestrian at the time he was injured, and that the law did not necessarily compel him to look behind him for approaching cars. Devecchio v. Ricketts, 66 Cal. App. 334, 226 P. 11. It also ignores the duty of the driver of the stage to have avoided the accident if he could. Furtado v. Bird, 26 Cal. App. 152, 146 P. 58. In addition, this was covered by other instructions by which the jury was told that if the deceased was negligent in any respect which contributed to his injury, the plaintiffs could not recover. The third of these instructions merely restates the matter of contributory negligence, and was covered by at least three other instructions, two of which were given at the request of appellants. In our opinion, the jury was fully and fairly instructed as to all issues submitted to them.

The judgment is affirmed.

We concur: MARKS, J.; JENNINGS, J.

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112 Cal. App. 501

PEOPLE v. KRAUSE.

Cr. 2011.

District Court of Appeal, Second District,
Division 1, California.
March 12, 1931.

Criminal law 🔑829(1).

Refusing defendant's requested instructions *held* not error, where instructions, as requested, were given in so far as they were proper or applicable.

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Louis Krause was convicted of conspiracy to bribe jurors, and he appeals.

Affirmed.

Samuel L. Rummel, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., John L. Flynn, Deputy Atty. Gen., and Buron Fitts, Dist. Atty., and Harold Jones, Deputy Dist. Atty., both of Los Angeles, for the People.

YORK, J.

The appellant raises two points: First, that the evidence is insufficient to sustain or justify the conviction; and, second, that the court erred in matters of law in instructing the jury.

Eliminating the evidence of the admitted accomplices, there is ample and sufficient evidence to sustain the conviction. The court by its instructions left to the jury the question as to whether or not certain of the witnesses were accomplices, and properly instructed the jury in defining an accomplice, and properly gave to the jury the limitations affecting the evidence of an accomplice.

We can find no error in the given instructions, and the principal objections raised by appellant as to the refusal of the court to give the instructions offered by him are fully met by the fact that such instructions, as requested, were given to the jury in so far as they were proper or applicable to the evidence introduced.

The judgment and order denying motion for a new trial are affirmed.

We concur: CONREY, P. J.; HOUSER, J.

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112 Cal. App. 424

PELKEY et al. v. HODGE et al.

CLUTTER v. SAME.

Civ. 7665, 7666.

District Court of Appeal, First District, Division 1, California.

March 10, 1931.

Rehearing Denied April 9, 1931. Hearing Denied by Supreme Court May 4, 1931.

1. Contracts ⚷129(2).

Contract to pay witness for testifying, contingent on success of litigation, is against public policy.

> Such contracts are against public policy, since they offer inducement to perjury, and tend to prevent administration of justice.

2. Contracts ⚷129(1).

Contract of class tending to prevent administration of justice will be declared void, although in particular instance no injury to public resulted.

> Test of validity is evil tendency of contract, not its actual injury to public in particular instance, that is, its validity is determined by general tendency at time it was made, regardless of good intent of parties and absence of injury to public in particular case.

3. Contracts ⚷129(2).

Contract, made while jury in will contest were deliberating, to pay witnesses stated sum if contracting litigants won their case, *held* invalid as against public policy.

> Although contract was entered into after testimony had been given and jury had retired, payment was contingent on litigants winning their case and receiving money from estate, and, in event of granting of new trial or reversal, witnesses would be called on again to testify, thus exposing them to temptation of perjury, against which rule declaring such contracts to be against public policy is directed.

Appeals from Superior Court, Los Angeles County; Clair S. Tappaan, Judge.

Actions by Lillian Pelkey and by Madaline Clutter, formerly Madaline Higgins, against John L. Hodge and another. From judgments sustaining demurrers, plaintiffs appeal. Cases consolidated on appeal.

Affirmed.

Lewis & Lehman and Walter L. Case, all of Los Angeles, for appellants.

Redwine & Redwine, Anderson & Anderson, and Edward K. Sheahan, all of Los Angeles, for respondents.

DOOLING, Justice pro tem.

These two cases have been consolidated on appeal because they involve complaints based upon identical facts and contain identical allegations. Demurrers were sustained to the amended complaints in each case, and appeals are prosecuted from the judgments which followed.

The complaints in substance allege that plaintiffs and appellants were witnesses to a certain will, and were called as witnesses at the trial of the contest of such will before a jury, at which trial they were in attendance for about three weeks, that they had not received their witness' fees, and that, after the case had gone to the jury, and while the jury was deliberating, they demanded their witness' fees, and that defendants then stated to plaintiffs "that if they would waive all claim against defendants for their fees while attending court at said trial, if the verdict of the jury then out would be returned favorable to defendants, and if they won their case, that defendants would upon receiving their money from the estate pay to" plaintiffs the sum of $10,000 each. It is further alleged that this offer was accepted and the witness' fees waived, that the jury returned a verdict favorable to defendants herein, and that the will was accordingly admitted to probate and the defendants received from the estate a sum in excess of $200,000, and that they paid to each plaintiff the sum of $2,000 and no more.

[1-3] The sole question presented on appeal is whether the contract as alleged is against public policy and therefore void. It is well settled that a contract to pay a witness for testifying where the payment is made contingent upon the success of the litigation is against public policy, since such a contract offers an inducement to perjury and tends to prevent the administration of justice. Dawkins v. Gill, 10 Ala. 206; Laffin v. Billington (Sup.) 86 N. Y. S. 267; Bowling v. Blum (Tex. Civ. App.) 52 S. W. 97; Davis v. Smoot, 176 N. C. 538, 97 S. E. 488; Keown & McEvoy v. Verlin, 253 Mass. 374, 149 N. E. 115, 41 A. L. R. 1319; Sherman v. Burton, 165 Mich. 293, 130 N. W. 667, 33 L. R. A. (N. S.) 87; 13 C. J. pp. 448, 449; 6 R. C. L. p. 756. Appellants contend that the foregoing rule has no appli-

cation to the contract here because the contract was entered into after their testimony had been given and the jury had retired, and hence the evil against which the rule is invoked did not exist. The payment, however, was made contingent upon defendants winning their case and receiving the money from the estate, and, in the event of the granting of a motion for new trial or a reversal on appeal, appellants would be called upon to testify again, in which event the temptation to perjury against which the rule is directed would exist. "Where a contract belongs to this class, it will be declared void, although in the particular instance no injury to the public may have resulted. In other words its validity is determined by its general tendency at the time it is made, and if this is opposed to the interests of the public it will be invalid, even though the intent of the parties was good and no injury to the public would result in the particular case. The test is the evil tendency of the contract and not its actual injury to the public in a particular instance." 13 C. J. p. 425. Measured by this standard, we must hold the contract set out in the complaints invalid.

Judgments affirmed.

We concur: TYLER, P. J.; CASHIN, J.

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112 Cal. App. 319

BARNES v. COCKE.

Civ. 7744.

District Court of Appeal, First District, Division 2, California.

March 3, 1931.

Rehearing Denied April 2, 1931. Hearing Denied by Supreme Court April 30, 1931.

1. Landlord and tenant ⚷157(7).

Lessee improving land under agreement for share of profits on sale thereof was entitled to recover, regardless of failure to sell land during contract period.

> The contract for the lease of the premises for a period of five years required lessee to plant entire tract with trees and keep trees in good shape and growing for such period, and provided that if land was sold during life of agreement that parties should share profits over certain amount, and if not sold during such time that a settlement be made by lessee taking his profits in land with provision therein for appointment of appraisers to appraise land involved in agreement and also to separately appraise portion of land to be taken by lessee as his share of the profits.

2. Landlord and tenant ⚷157(1).

Lessee agreeing to plant trees and keep them in good shape for five-year period was not insurer or guarantor that trees would grow.

3. Landlord and tenant ⚷157(1).

Lessee's obligation to plant and care for trees during five-year period related to date of lease and did not continue five years after planting.

4. Evidence ⚷6.

It is common knowledge that not every tree planted will survive even under most favorable conditions.

5. Landlord and tenant ⚷157(7).

Lessee's continued possession of premises after lessor's failure to appoint appraiser did not defeat recovery of profits under agreement for improving property.

> Exact amount of interest of lessee in accordance with agreement for planting and caring for trees during five-year period, with right to share in profits on sale of land for more than specified amount, could only be determined following an appraisement as provided in agreement in case land was not sold during such period.

6. Landlord and tenant ⚷157(7).

Lessee fully performing agreement to plant and care for trees during five-year period was entitled to share in increased value of land.

Appeal from Superior Court, Los Angeles County; Arthur Keetch, Judge.

Action by Peter Barnes against R. V. Cocke, wherein defendant filed a cross-complaint. Judgment for defendant and cross-complainant, and plaintiff and cross-defendant appeals.

Affirmed.

See also 99 Cal. App. 700, 279 P. 190; 101 Cal. App. 170, 281 P. 503.

M. W. Conkling, of San Diego, for appellant.

W. A. Alderson, of Los Angeles, for respondent.

SPENCE, J.

The issues presented by the first cause of action of defendant's amended cross-complaint and plaintiff's answer thereto were tried before a jury pursuant to stipulation of the parties. By his cross-complaint defendant sought to recover from plaintiff damages for breach of a certain "Land Lease and Agreement" hereinafter set forth. The trial resulted in a judgment in favor of defendant and cross-complainant for approximately $36,000, from which judgment plaintiff and cross-defendant appeals.

The instrument above referred to was executed by the parties on August 20, 1921, and reads as follows:

"Land Lease and Agreement

"August 20, 1921.

"This agreement made this 20th day of August, 1921, between Peter Barnes, party of the first part, and R. V. Cocke, party of the second part, both of Los Angeles, State of California, Witnesseth: that in consideration of one-third (1/3) of the crop completely harvested and marketed the party of the first part agrees to rent to the party of the second part for five years (5) commencing from date and the party of the second part agrees to rent the following described land: the west forty (40) acres more or less of his ranch near Downey known as the Barnes ranch for consideration of two-thirds (2/3) of the crop.

"The party of the second part agrees to plant the entire tract in trees before March 1st, 1922, and put the land in good shape before planting the trees, keep the trees in good shape and growing for five (5) years.

"The land can be sold at any time during the life of this contract upon the mutual agreement of both parties, the price not to be less than eight hundred dollars ($800.) per acre. If a sale of the land is made during the life of this contract the party of the first part is to receive five hundred dollars (500) per acre and additional to this amount is to receive the full amount of the cost of the pipe and the trees with seven (7) per cent interest to start from date of purchase of pipe and trees. The remainder of the profits to be divided equally between the parties.

"The party of the second part shall not sublease, let, or underlease the land described within this contract, without the written consent of the party of the first part, and at the termination of five (5) years if the land is not sold the parties will have the land appraised by disinterested parties. The party of the first part will select his own appraiser and the party of the second part will select his own appraiser. These two appraisers will select a third appraiser jointly.

"If the land herein described is not sold during the life of this contract a settlement may be made between the parties by the party of the second part taking his profits in land adjoining his ranch now owned by him. This adjoining land to be taken by the party of the second part as his profits shall be appraised separate from the remainder of the land.

"If the party of the second part fails to comply with all the provisions in the above contract it becomes void and the party of the first part can enter into and take possession of the land described within this contract. This contract binds their heirs and assigns.

"Peter Barnes,
"Party of the First Part.
"R. V. Cocke,
"Party of the Second Part.
"Witness: Margaret J. Cocke."

The premises referred to adjoined other land belonging to plaintiff and also adjoined land belonging to defendant. Under the foregoing agreement, defendant entered into possession. The land had not been cultivated for some time and defendant proceeded "to put the land in good shape before planting the trees," as provided. Plaintiff furnished the trees which were planted by defendant. Crops were grown upon the land each year and from time to time the parties adjusted their accounts under the provisions of the agreement relating to crops. Many difficulties were encountered. The testimony showed that the trees furnished by plaintiff were not in good condition when delivered to defendant for planting; shortage of water made it impossible to obtain sufficient water at the time required; various pests, such as Johnson grass, nematodes, and crown gall were present. Defendant, nevertheless, continued caring for the orchard, replanting trees where necessary and growing crops as directed by plaintiff. The parties were frequently together and discussed the existing conditions which were of mutual concern to both of them. Defendant appears to have worked the land industriously and no objection was voiced to his performance of the terms of the agreement until shortly before the expiration of the lease. Some time prior thereto plaintiff had advised defendant that he had sold the land for $2,000 per acre and that defendant's share in the profits would be $45,000. This sale was never consummated. On February 5, 1926, six months prior to the expiration of the five years, plaintiff wrote to defendant advising him that he declared "said agreement null and void and terminated on account of your failure to keep and perform the terms thereof," specifying certain alleged failures on the part of defendant to perform under the agreement. Thereafter on July 23, 1926, and prior to the expiration of the five years, plaintiff filed his complaint for cancellation and rescission of the agreement. Plaintiff refused to appoint an appraiser or otherwise recognize any further rights of defendant under the agreement. After the expiration of the five years, defendant filed his cross-complaint alleging performance on his part, plaintiff's failure to perform, and sought damages for the alleged breach of the agreement on the part of plaintiff, alleging that the value of the land at the termination of the lease was $3,000 per acre. By his answer to the cross-complaint plaintiff denied performance on the part of defendant, denied any breach on the part of plaintiff and denied that the land was worth in excess of $1,000 per acre. There were other allegations in the cross-complaint and answer thereto, some of which allegations will be hereinafter referred to.

It may be observed that the agreement above set forth is incomplete and is obviously vague and indefinite in many respects. A casual reading of its terms can lead to no other conclusion. In the cross-complaint respondent alleged that the written agreement was incomplete and respondent set forth what he claimed to be the entire agreement of the parties including the agreement by appellant to furnish the trees, pipe line and water for irrigating all crops and trees on the premises. It was further alleged that the tract of "40 acres more or less" was in fact a tract of 50 acres. Some of the allegations of the cross-complaint were admitted and others denied. Evidence was admitted by the court in support of these allegations, and much of this evidence was admitted without objection.

Appellant contends: First, that the verdict was contrary to the uncontradicted evidence; second, that the court erred in the giving and refusing of instructions to the jury; and, third, that the court erred in its rulings on evidence.

[1-5] Under the first contention appellant argues that as the evidence failed to show a sale of the land during the five years covered by the agreement, respondent was not entitled to recover any profit from the increased value of the land at the end of the five years. We cannot agree with appellant in this construction of the agreement. It clearly appears that the parties intended that respondent should share not only in the crops raised, but also in the increased value of the land. If sold during the life of the agreement, it was provided that the parties should share the profits over a certain amount; if not sold during the life of the agreement, it was provided that a settlement be made by respondent taking his profits in land adjoining his ranch. For this purpose it was agreed that the parties should appoint appraisers to appraise the land involved in the agreement and also to separately appraise the portion of the land to be taken by respondent as his share of the profits. Appellant further urges that the phrase "keep the trees in good shape and growing for five (5) years" should be so construed as to make respondent an insurer and guarantor that the trees would all be "growing and in fine shape five years after planting." The court instructed the jury that under the agreement respondent was not an insurer or guarantor that the trees would grow for five years and that the agreement only placed upon respondent the "obligation to cultivate and care for said trees in a reasonable and ordinary husbandry manner and to do so in the same manner as would be expected to be done under the same conditions by a reasonable and ordinary rancher and farmer." The jury was further instructed that the agreement covered the period of five years from its date and that the obligations of respondent did not continue until five years after the planting of the trees in February, 1922. We are of the opinion that the court's instructions placed the proper construction on the agreement. The construction contended for by appellant is entirely unreasonable. It is a matter of common knowledge that not every tree planted will survive even under the most favorable conditions. In the present case appellant furnished the trees and his position is wholly untenable as the choice of the type and the quality of the trees furnished was left to appellant. We are further of the opinion that the period covered by the agreement was five years from the date thereof and not five years from the planting of the trees as contended by appellant. No definite time was fixed for the planting except that it should be done "before March 1, 1922." A reading of the entire agreement shows that the five years referred to in the paragraph relating to planting and caring for the trees was the same five years covered by the lease. It is further contended that respondent is not entitled to recover as it was admitted that respondent remained in possession after the termination of the lease. It is argued that this affirmatively shows a violation of the implied promise of respondent as lessee to surrender possession at the termination of the lease and that his proof of performance therefore fails. Whatever rule may be generally applicable to the ordinary case involving the rights of the lessor and lessee, it can have no application here. It was admitted by the pleadings and on the trial that the land had increased in value. Under the rather unusual agreement between the parties, respondent was entitled to an undetermined interest in the land as his share of the profits resulting from the increased value of the land. The exact amount of this interest and the particular portion of the land to be taken by respondent could only be determined following an appraisement as provided in the agreement. Appellant failed and refused to appoint an appraiser and under these circumstances we find no merit in appellant's claim that respondent's continued possession of the premises defeated his right of recovery.

[6] In our opinion the second and third main contentions of appellant relating to the giving and refusing of instructions and the rulings upon evidence are likewise without merit. Some of appellant's specifications of error under these headings involve the questions hereinbefore discussed. We have examined the entire charge given to the jury and are satisfied that the instructions were fully as favorable to appellant as he was entitled to have them. Neither in the instructions to the jury nor in the rulings upon evidence do we find any prejudicial error which would warrant a reversal. The record discloses that respondent spent a great amount of time and money in carrying out the terms of the agreement and that he worked the land continuously in order to produce the best results under the adverse conditions encountered. Appellant took no exception to respondent's performance until shortly before the termination of the lease. The evidence of the condition of the land and orchard at the end of the five years amply sustained the implied finding that respondent had performed and he was therefore entitled under the agreement to his share in the increased value of the land.

The judgment is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

112 Cal. App. 296

FIDLER v. BOARD OF TRUSTEES OF ROSEVILLE UNION HIGH SCHOOL et al.

Civ. 4154.

District Court of Appeal, Third District, California.

March 2, 1931.

Rehearing Denied April 1, 1931.

1. Schools and school districts 🔑135(1).

Statute respecting powers of school authorities expressly authorized employment by contract made between teacher and school district (School Code, §§ 5.530, 5.731, and § 5.734, pars. 1, 2).

2. Schools and school districts 🔑135(1).

Status of teacher as permanent teacher is conferred upon him by statute and is not dependent upon contract, but right to compensation is proper subject of contract (School Code, §§ 5.530, 5.731, and § 5.734, pars. 1, 2).

3. Schools and school districts 🔑144(4).

Under statute authorizing board of trustees to fix compensation, board, acting in good faith in reclassifying duties to be performed in department, could reduce permanent teacher's compensation (School Code, §§ 4.540, 4.700, 4.870, 5.530, 5.731, and § 5.734, pars. 1, 2).

4. Schools and school districts 🔑144(4).

Trustees did not abuse discretion in rearranging duties of permanent teacher and reducing salary from $2,900 to $2,500 (School Code §§ 5.530, 5.731).

Stipulated facts showed that during previous year teacher had taught classes in forenoon and devoted entire afternoon to administrative functions in position of vice principal, but that, in place of performing these duties, it was intended for ensuing year that teacher would be available for classes during afternoon as well as forenoon.

5. Evidence 🔑129(6).

Where school board rearranged teacher's duties and reduced salary, evidence of what was done and construction placed on meaning of previous contract by parties thereto was admissible (Civ. Code, § 1647).

The evidence admitted showed teacher to have occupied office of vice principal of high school during year when he received higher salary and was admitted to show primarily that school board acted with reasonable discretion in rearranging work to be done by teacher during ensuing year under School Code, §§ 3.800, 3.805, relating to courses of study.

6. Evidence 🔑460(2).

Parol evidence is admissible to identify subject-matter to which writing refers (Civ. Code, § 1647).

7. Appeal and error 🔑1011(1).

Trial court's finding upon conflicting evidence that teacher seeking to compel board to permit him to teach had resigned was binding upon appellate court.

Appeal from Superior Court, Placer County; J. B. Landis, Judge.

Action by J. L. Fidler against the Board of Trustees of Roseville Union High School, E. J. Schellhous and others, as Trustees of Roseville Union High School. From a judgment for defendants, plaintiff appeals.

Affirmed.

Butler, Van Dyke, Desmond & Harris, of Sacramento, for appellant.

Orrin J. Lowell, of Auburn, for respondents.

Mr. Justice Pro Tem. McDANIEL delivered the opinion of the court.

This is an appeal from a judgment in mandate proceedings. The appellant was petitioner in the trial court, seeking by mandate to compel the respondent board of trustees of the Roseville Union high school district, and the members thereof, to admit him to the use and occupation of his right as a permanent teacher, to teach in the respondent Union high school and to pay him the salary to which he claimed to be entitled, under the law, as such teacher. An alternative writ was issued, and the respondents and defendants therein filed their answer, which not only met and traversed material averments in the petition, but affirmatively set up certain facts.

The findings and judgment were in favor of the respondents; a motion for a new trial was duly made and denied. At the trial, no witnesses were sworn, and certain facts, documentary exhibits, and proposed testimony of witnesses were admitted upon stipulation; the oral objections to the introduction of testimony were reserved by appellant, and motions were made to strike out certain portions of the answer. The motions to strike portions were denied, and all objections to testimony were overruled.

The following statement of facts, contained in appellant's opening brief, are conceded by respondents to be correct:

"The facts show that the appellant was employed in the Roseville Union High School in 1923 under a written contract, his status being that of a probationary teacher. His salary was fixed at that time at $2400 a year. It was stipulated that the form of the contract for 1923 was the same as the contract for 1924, except as to the amount of salary. In 1924 he was re-employed as probationary teacher, at a salary of $2700 a year. In 1925, on June 25, he was again employed under a written contract, and, according to law, having served as a probationary teacher for two years, was classed as a permanent teacher at a salary of $2700 a year. On June 9, 1926, another contract was entered into between the appellant and the respondent in which appellant was employed to serve as permanent teacher at a salary of $2,800 a year. On June 1, 1927, another contract was entered into in writing between the parties, in which appellant was classed as a permanent teacher, at a salary of $2900 a year. On July 31, 1928, he was again employed under a written contract as a permanent teacher at a salary of $2,900 a year.

"On May 16, 1929, the Board of Trustees of Roseville Union High School addressed a letter to appellant, in which they stated:

" 'At a special meeting of the trustees of the Roseville Union High School, called for the purpose of electing teachers, it was decided to make a change in the vice-principalship.

" 'You are herewith offered a teacher's contract for the year 1929–1930. Kindly notify the Board of your acceptance, or rejection, on or before June 8th, 1929.'

"With that letter was submitted a form of contract similar to the contracts previously submitted, except that the salary indicated therein was fixed at $2,500 per year instead of $2900 per year. Appellant signed the contract submitted after changing the figures from $2500 to $2900, and returned it to the Board, with a letter stating that as a permanent teacher with his salary having been previously fixed and determined, he was entitled to receive a salary of $2900 a year. Following this, there was various correspondence between the Board and appellant, the Board maintaining its right to reduce the salary, and appellant insisting upon his right to teach, and presenting himself each day at the school and offering to serve, and demanding that classes be assigned to him.

"On September 14, 1929, a letter was addressed to appellant by respondent, in which was stated, among other things:

" 'The teaching job is open to you and you may teach at once. The salary which the Board have fixed and which they believe is a legal salary under the circumstances and which they are willing to pay is the sum of $2500. If you fail to commence teaching forthwith, the Board will be forced to the conclusion that you refuse employment.'

"In answer to this letter appellant replied, saying, among other things:

" 'I am ready, as I have been since the opening of the term, to teach, and to perform my part of the contract of employment. No teaching work has been assigned to me. * * * I shall expect to be paid the sum to which I am legally entitled, whether it be twenty-five hundred dollars or twenty-nine hundred dollars.' * * *

"At the beginning of the school year, the appellant presented himself at the school, offered to teach, and demanded that he be assigned to classroom work. The principal of the high school, acting under the direction of the Board of Trustees, respondent herein, refused to permit appellant to teach, and refused to assign him to any classes or to any duties as a teacher, or to pay him any salary for any period of the current school year. The appellant continued to present himself at the school each morning thereafter with a similar demand, and met with a similar refusal.

"The respondent Board offered evidence over the objection of appellant that the reason for the increase in the salary of appellant prior to the current school year was that the appellant had been assigned to and had performed the duties of vice-principal in the school, and that the reason for the decrease in appellant's salary from $2900 to $2500 was that he was to be relieved from his duties as vice-principal during the current year; that it was intended that appellant should devote his entire time to classroom teaching; and it has been stipulated that he would have been assigned more classroom teaching than he had theretofore performed. It is conceded by all parties that no attempt has ever been made to discharge the appellant under the provisions of the Teacher's Tenure Act, and the evidence discloses that appellant is a thoroughly capable teacher."

The questions of law involved in this appeal are as follows: Is it true that—

(1) The decision and judgment is against law, in that there is no express statutory authority for a board of trustees of a union high school district to reduce the salary of a permanent teacher?

(2) The evidence is insufficient to support the verdict (judgment) for if, under given circumstances, for cause, the board of trustees should have the power to reduce the salary of a permanent teacher, no justifying circumstances exist in this case?

(3) The court erred in admitting in evidence over objection of petitioner testimony showing the petitioner to have occupied the position of vice principal of the Roseville union high school, for the reason that no such office or position is known to the law, and for the further reason that the written contracts of employment of the petitioner constitute the best evidence as to the nature of his employment?

[1-3] The principal point relied upon in this appeal is presented by the first of the above questions suggested by appellant. At the time the controversy arose in May, 1929, the act of the Legislature known as the Teacher's Tenure Act existed, as set out in section 1609 of the Political Code of California (St. 1927, p. 1913). The Legislature of 1929 codified that law, and references to it will now be found in the School Code of California, which went into effect on August 14, 1929. The annual school term, the subject of the controversy herein, began September 10, 1929. The final disagreement between the appellant and respondents, as shown by the letters herein set out, occurred in September, 1929. All references to the law of this case, therefore, will indicate the School Code of California.

The contention of the appellant appears to be that, when a teacher in the public schools has once attained the status of a permanent teacher, and his salary as such teacher has been fixed by the board of trustees, such board thereafter shall have no power to reduce the salary; that there is a total lack of statutory authority permitting the school board to reduce the salary of a permanent teacher, and no judicial authority for said board so to do.

Section 5.530 is as follows: "Boards of school trustees, and city, and city and county boards of education shall have power and it shall be their duty to fix and prescribe the duties to be performed by all persons in public school service in the school district."

Section 5.731 is as follows: "Boards of school trustees, and city, and city and county boards of education shall have power and it shall be their duty to fix and order paid the compensation of persons in public school service requiring certification qualifications, employed by such boards, unless the same be otherwise prescribed by law."

The first two paragraphs of section 5.734 are as follows:

"In cities teachers of beginners shall be ranked in the salary schedule with the highest salaried teachers in the elementary grades of equal training and experience.

"Uniform allowance may be made in any schedule of salaries for years of training and for years of service."

The second paragraph is especially referred to in the argument.

Appellant contends that an analysis of these several sections will show that, while it was the intention of the Legislature to empower boards of trustees to raise and thus to fix the salary of teachers, the power to reduce is withheld by implication, and that in no other provisions of the School Code, or the Political Code, is there to be found any provision, directly or inferentially, giving the school board the right to reduce the salary of a permanent teacher.

Respondents, of course, contend that correct interpretation of the same sections indicates that boards of trustees have a wide range of discretion, including not only the prescribing, fixing, and assigning of duties to teachers, with power to relieve them of duties previously assigned to them, but, before contracts for the school year are actually made, may fix salaries, in the exercise of a sound discretion, according to the duties to be performed, keeping in mind the years of training and experience teachers may have had, and may either raise or lower salaries at the times and in the manner provided by law. Respondents do not contend, however, that there can be any arbitrary or unreasonable exercise by the board of the power to reduce the salary of a permanent teacher. If the board, in a given case, comes to the conclusion that a reapportionment of duties and a change in appellant's salary is essential to accord with the change of duties, it would be valid to make the change in the legal exercise of authority.

Appellant contends that the teacher, once having attained a permanent status, is not subject to the board except as to those matters governed by statute. Respondents contend: "That under the law the Board of Trustees has full and complete control over all teachers and employees employed by the School District, except as such control may be limited by statute"—citing Grigsby v. King, 202 Cal. 299, 260 P. 789.

Considerable argument is devoted to the consideration of the proper definition of the word "fix," as used in the statute with reference to the compensation of teachers. As shown in the foregoing statement, the appellant for years past had successive contracts with the board of trustees fixing and regulating his compensation in each year of his employment. He received successive increases of salary, so that appellant, while contending that the word "fix" as used in the statute, considered in conjunction with the second paragraph of section 5.734, which says, "Uniform allowance may be made in any schedule of salaries for years of training and for years of service," necessarily imports by implication that the trustees may raise salaries but may not lower them.

Appellant argues that the respondents "endeavor to convince the court that to 'fix' means to 'change.' Logically, the conception of fixity and of change are mutually exclusive. Etymologically, the word 'fix' is derived from the Latin 'figo,' meaning 'to fasten.' (Standard Dictionary of the English Language.) In ordinary parlance the word 'fix' excludes the idea of change. In this instance the power to fix, coupled with the power to raise, excludes the power to lower salaries."

The last sentence just quoted, while terse, if not sententious, and though syllogistic in form, appears to us illogical in conclusion. If the word "fix" excludes the idea of "change," how can it be coupled with the power to raise? If it be so coupled, however, why does it exclude the power to lower salaries?

The entire argument of appellant is well met and appears to be overthrown by the well-considered case, under a statute similar to the permanent tenure law for teachers under the School Code of California, entitled Buckbee v. Board of Education, 115 App. Div. 366, 100 N. Y. S. 943. It was held in that case that the statute requiring a board of education to fix the compensation of permanent teachers conferred upon the board the right, in the exercise of its discretion, from time to time, to regulate such compensation, whether the result was to increase or decrease the salaries of teachers. That case has been frequently cited with approval in a number of other New York cases, and it has been affirmed by the Court of Appeals in 187 N. Y. 544, 80 N. E. 1106.

In Brigham v. City of New York, 191 App. Div. 866, 182 N. Y. S. 145, 146, which cites Buckbee v. Board of Education Case, supra, it is said: "The provision that a civil service employee shall not be removed or reduced to a lower grade without charges and upon a hearing was intended to protect individual employees from arbitrary and unjust action on the part of their superiors. It was not intended thereby to limit the power of the proper officials of the city, so that, having fixed the salary of a position at a certain figure, which, under the classification of the civil service commission was placed in a certain grade, they could not reduce it to an amount which would carry that position into a lower grade, providing the reduction was not unjust, made in good faith, and not for the purpose of discriminating against any single employee. * * * The power to fix salaries does not mean that, where the board of aldermen have designated a salary to be paid to an employee of the city, it cannot thereafter change the salary. As was said by Mr. Justice Clarke: 'When we consider the legislative character of these bodies, no other conclusion can be arrived at but that in the exercise of their governmental functions the power to fix was merely the power to regulate, and was continuous.' "

Rudd v. Cropsey, 159 App. Div. 275, 144 N. Y. S. 198, holds that, where there is no positive law against reduction in salaries, "In such case, power to fix a salary carries power to reduce it"—citing Sauerbrunn v. Bd. of Education, 150 App. Div. 407, 135 N. Y. S. 85, affirmed on opinion below, 208 N. Y. 550, 101 N. E. 1120; Buckbee v. Board of Education, supra.

It is unnecessary to follow the argument based upon appellant's theory that boards of education and boards of trustees, etc., being creatures of statutes, have only the powers expressly conferred and have no implied powers, for the reason that we think that the statute in this case does expressly authorize employment by contract made between the teacher and the district. The entire argument of appellant is based upon this view that appellant had acquired the status as far back as 1925, of a permanent teacher; that the board of trustees entered into a contract with him, whereby his compensation was fixed at a certain figure; that a contractual relationship was created, which would continue from year to year, unless changed by consent, and changed by increases in salary only.

An examination of each contract made between the board of trustees and appellant demonstrates that it was a contract for one year only, in so far as compensation was concerned. A distinction must be kept in mind at all times in consideration of the instant case between the right to permanent tenure of the office and the right to compensation during each year. Appellant is perfectly aware of that distinction, for he says in his closing brief: "The distinction between appellant's right to his status as a permanent teacher and his right to a salary as such teacher must be kept clearly in mind." It is an important distinction, for his status as a permanent teacher is conferred upon him by the statute, and is not dependent upon contract; while his right to compensation is a proper subject of contract. Appellant has recognized this by making his successive contracts with the trustees, and even in this controversy, as shown by his letter of September

17th, above quoted, in fact, was requesting the said board of trustees again to contract with him as to his compensation, at the rate of $2,900 per year for the school year of 1929–30.

In this connection, the concurring opinion of Judge Laughlin, found on page 950 of 100 N. Y. S., of Buckbee v. Board of Education, supra, is pertinent and illuminating: "I am of opinion that, after the school year commences, the salaries for that year of teachers accepting employment on the faith of the salary as then fixed cannot be affected during that school year by any change of salary subsequently made. There is an obligation until the Legislature sees fit to change the law, but not a contract, for the permanent employment of teachers so long as their services are required, and so long as they have not forfeited the right to continue as teachers. The obligation, however, in that respect is not mutual, and therefore is not, strictly speaking, a contract. The teacher only contracts for the single year, and may or may not continue thereafter. The duty of the municipality, erroneously, I think, called a contract, to continue the employment of the teacher for life or good behavior, is in the nature of a civil service regulation. The obligation is to re-employ the teacher from year to year, as if taken from an eligible list of the civil service. The salaries sought to be recovered here, as I understand the facts, embrace a period beyond the school year during which the change in salary was made. A teacher entering upon the service for the school year after the change in salary was made accepts the employment, subject to the salary then prescribed for the position."

The erroneous hypothesis upon which appellant's entire argument rests as to his right to the salary of $2,900 for the school year of 1929–30, is that, when that figure was fixed and agreed to in the contract of 1928–29, it continued beyond that last-named school year. By an inspection of the contract itself, it will be seen that the school year begins September 10, 1928, and consists of not less than 170 days of actual teaching, and has printed upon it, "each contract shall be renewed annually."

The entire system of support and maintenance of the public schools of California, as shown by the School Code, contemplates that each year's expenditures shall be paid out of the income and revenue of that year. Section 4.540 of the School Code, for instance, requires an estimate to be made by every high school board of the amount of money requisite for maintaining the high school in the ensuing school year, which estimate must be filed with the county superintendent at least 15 days before the 1st day of the month in which the board of supervisors must levy taxes for county purposes.

Section 4.700 provides as follows: "Boards of school trustees and city boards of education must use the school moneys received from the state and county apportionments exclusively for the support of schools for that school year, until at least an eight months' school has been maintained." And all of the provisions relating to the expenditure of moneys by governmental agencies seem to contemplate and require that the expenditures be kept within the amount required for governmental purposes for the current year. Under section 4.870, the state superintendent of schools makes his annual apportionment of moneys to the various high school districts of the state.

If these views are correct, then, at the time the present controversy arose, there was actually in existence no contract relating to the compensation of appellant as a permanent teacher, for 1929–1930.

We quote from Martin v. Fisher (Cal. App.) 291 P. 276, 278: "The position of a teacher in the public schools of California is not an office. It is an employment by contract made between the teacher and the district. Leymel v. Johnson (Cal. App.) 288 P. 858. The becoming a permanent teacher, and the continuation of this employment, is a right given by statute, which right can be terminated or forfeited in the manner provided by law. Grigsby v. King, 202 Cal. 299, 260 P. 789; Saxton v. Bd. of Education, 206 Cal. 758, 276 P. 998. The relation between the district and the teacher is that of employer and employee and is created by contract which must be dependent, for its terms and conditions, upon the authority granted the district by law and the limitations placed by law upon its power to contract."

If the board, in reclassifying the duties to be performed in the grade or particular school department, acted in good faith, and then fixed the compensation at $2,500 instead of $2,900, it was acting within the limits of expressly conferred power.

The appellant had the unquestioned and admitted right to continue in his status as a permanent teacher and to accept the offer at a reduced salary or reject it, as he pleased.

[4] It is argued under the second question of law by appellant, however, that no circumstances existed in this case justifying the board of trustees in their action, whereby they reduced the salary of his position. The one obvious answer to that proposition is, as shown, at the time the change was made, which change was for the succeeding year's salary, appellant's existing contract was not affected nor impaired. For the succeeding year, no contract with fixed salary existed. However, if the board must prove that, in reclassifying the duties of the position, it acted with sound discretion, it appears from

the evidence admitted and the facts found by the court in support of respondents' affirmative defense, that the trustees for the fiscal year 1929–30 discontinued the horticultural exhibits, by reason of the lack of attendance in said subjects, and the said Roseville union high school lost thereby the federal state aid it had theretofore received under the statute, known as the Smith-Hughes bill. It further appears that, when appellant carried out his contract for the year 1928–29, in addition to his classroom work as teacher therein, he had performed duties of an administrative or executive character, under the designation or title of vice principal.

At the trial in the superior court, the following stipulation was made:

"It is stipulated that the correct figure for the increase in the salary of the teacher appointed as vice-principal, as mentioned on page 2 of the Reporter's Transcript, is the sum of $600 and not the sum of $100.

"It is stipulated that, subject to the objections of petitioner specified in the Reporter's Transcript, witnesses for respondents would testify: That petitioner, during the past year's service for respondents, taught classes in the forenoon and devoted the entire afternoon to administrative functions. During the afternoon of the school days the principal visited classrooms, etc., and petitioner occupied the office rooms of the principal and performed the executive and administrative functions usually performed by the principal. This performance by him of the usual functions of the principal was by virtue of his assignment to the position as vice-principal and the said executive and administrative functions were the duties from which petitioner was relieved at the end of the past school year. In place of performing these duties, it was intended for the ensuing year that petitioner would be available for class teaching during the afternoon of each day as well as the forenoon."

Subject to the objections of appellant, there was admitted on the trial testimony that the salary of $2,500 per year, as fixed by respondent board, was in all respects a reasonable salary and was ample and sufficient compensation for the services to be performed by petitioner as teacher during the school year 1929–30.

Accepting the foregoing as showing the considerations influencing the trustees to rearrange the duties of the position formerly held by appellant and as properly before the court, we are unable to see that there was any abuse of discretion or any improper conduct on the part of the trustees in readjusting the salary of the position. We are therefore of the opinion that the circumstances explain and justify the reduction and that it was not arbitrary nor discriminatory, nor a violation of the Teachers' Tenure Act.

[5, 6] We come now to the third question of law presented by this appeal: Whether or not the court erred in admitting evidence over the objection of petitioner, showing the petitioner to have occupied the office of vice-principal of the Roseville Union High School, for the reason that no such office or position is known to the law, and for the further reason that the recent contract of employment of the petitioner constituted the best evidence of the nature of his employment. We think the court correctly ruled.

The contract of 1928–29 and the preceding contracts of employment each set out that appellant was employed as a permanent teacher, naming the compensation for the year, the monthly installments of salary, the minimum number of days to be taught for the year, and does not specifically undertake to enumerate any particular duties. It is true the statute provides that the high school boards shall prepare and control the course of study. Section 3.800, School Code.

Section 3.805 sets out what may be included in such high school course of study. All these subjects named in the courses of study provided are not taught by one teacher, but, naturally, are assigned to and divided among many different teachers. Other duties are defined by statute. The evidence was offered and admitted, not for the purpose of altering or modifying any contract, but to show primarily and principally that the board of trustees acted with reasonable discretion in rearranging the work to be done in the year 1929–30. Whether or not the board had the legal right to pay appellant for any services he may have rendered as vice principal, we need not at this time decide. He voluntarily performed such services; in fact, it seems to have been by mutual consent of the parties herein, though the strict purview of the contract of employment did not state that appellant should act as such vice principal, if he had been so acting under his previous contract as a permanent teacher. Under these circumstances, evidence of what actually was done and the construction placed upon the meaning of the contract by the above parties thereto, in our judgment, was admissible. Section 1647, Civil Code, provides: "A contract may be explained by reference to the circumstances under which it was made, and the matter to which it relates." "Although parol evidence is not admissible to supply omissions or introduce terms, or to contradict, alter or vary a written instrument, it is admissible for the purpose of identifying the subject matter to which the writing refers." 6 Cal. Jur. 258, citations and note 8.

Appellant has cited no authority in support of his objections, and we, therefore, need not extend consideration on this point.

[7] There is another question which appears to us to be merely a question of fact.

presented by appellant in his closing brief. It is contended that appellant can be deprived of his status as a permanent teacher by discharge only in the manner provided by law or by resignation. It is conceded that a refusal to teach is, of course, tantamount to a resignation. It is conceded that he has never been formally discharged. Appellant contends that it is also conceded that he never refused to teach, but, in fact, has always been ready, able, and anxious to teach. This last statement that he "never refused to teach" seems to us to be actually in dispute under the evidence, and is disputed in the evidence as well as in the argument. It is in fact an important question in the case.

It is strongly urged by appellant that, in his letter of September 17, 1929, appellant indicated no change in his position with reference to the controversy. With respect to this matter, whether the said letter represented any change of position on the part of appellant or not, it, by its own terms, does show it was not an unqualified or unlimited acceptance of the offer to renew the contract at the $2,500 salary.

On May 16, 1929, the board of trustees wrote appellant that it had decided to make a change in the vice principalship. He was offered a teacher's contract for the year 1929–30; a copy being inclosed with the letter. He was asked to notify the board of his acceptance or rejection on or before June 8, 1929. He replied on June 7, 1929, returning the contract, the form of which had been sent to him, stating:

"June 7, 1929.

"To the Board of Trustees of Roseville Union High School, Roseville, California.

"Attention: E. C. Bedell, Clerk.

"Gentlemen: I acknowledge receipt of your letter of May 16th, enclosing form of contract for my employment as permanent teacher in the Roseville Union High School for the coming year, noting from your letter that my acceptance or rejection of the contract was required on or before June 8, 1929.

"The contract as submitted to me contains an error in the amount of salary to be paid. My status in the school is that of a permanent teacher, and my salary, as previously established by your Board, is $2900 per year and not $2500. I have, therefore, taken the liberty of amending the contract, and I call your attention to the change made by me in the offer of employment, where I have corrected the salary from $2500 to be paid in ten payments of $250 each, to $2900, to be paid in ten payments of $290 each. The offer as thus corrected is accepted by me, and you will find my acceptance endorsed on the contract which I return to you herewith for your verification.

"You will please understand my position to be, that, having been classified by your Board as a permanent teacher under the teacher's tenure act, at a definite salary fixed by your Board in previous contracts, that your Board is now without power to reduce that salary arbitrarily. I trust you will find my suggestions in order, and that the contract as amended will be accepted.

"Very truly yours,

"J. L. Fidler."

On June 10, 1929, the board wrote him as follows:

"Mr. J. L. Fidler, Roseville, California.

"Dear Sir: This will inform you that your offer of June 7th is not acceptable to the Board, and has been rejected. We understand that you have rejected our offer of contract.

"Yours truly,

"E. C. Bedell, Clerk."

On June 17, 1929, appellant wrote the following:

"To the Board of Trustees of Roseville Union High School, Roseville, California.

"Gentlemen: This will acknowledge receipt of your letter of June 10, 1929, regarding my employment as a teacher in the Roseville Union High School for the coming year. In your letter you state as follows: 'We understand that you have rejected our offer of contract.' I have refused your offer of contract, the grounds of my refusal being set forth in my previous letter to you. But, however, I do not reject my right to continue as a teacher in the Roseville Union High School under my privileges and status as a permanent teacher in that school. I am a permanent teacher in the Roseville Union High School under the teacher's tenure act. My standing as such, and my salary or rate of compensation, has become fixed. You are without power to change that status or that rate of compensation except for cause shown, and under the procedure indicated by subdivision 5 of Section 1609 of the Political Code of the State of California.

"Therefore, you are advised that I am holding myself in readiness to continue to teach in the Roseville Union High School this coming term, upon the same terms and at the same salary and pay as last year, and shall be present on the opening of the school term, prepared to take up my duties, as heretofore.

"Yours very truly,

"J. L. Fidler."

We think these letters manifest a refusal on the part of appellant to accept the offered contract. Conceding, however, only for the purpose of discussion, appellant's contention that he was willing to work for $2,500 per year, leaving the amount of his compensation to be determined later by litigation, or otherwise, to be meritorious, it is met and overcome by conflicting evidence, for it was stipulated that witness would testify that by reason of the refusal of petitioner to accept the precise terms of the offer of respondents, and by reason of the position and demands of petitioner respondents did on September 27th make final arrangements for the performance of the teaching duties to have been assigned to petitioner, and from that date the offer of respondents to employ petitioner at an agreed salary of $2,500 per year was deemed finally and conclusively rejected by petitioner, and thereafter was no longer subject to acceptance.

This shows a sharp conflict in the evidence, if appellant's interpretation of the appellant's offer to continue teaching be correct. That conflict was resolved against appellant by the trial court's finding that appellant refused to continue teaching. As expressed by appellant, "a refusal to teach is, of course, tantamount to a resignation." The finding upon conflicting evidence is binding upon this court.

The judgment is affirmed.

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112 Cal. App. 207

PACIFIC COAST COAL CO. v. LINDSAY CO-OPERATIVE CITRUS ASS'N.

Civ. 309.

District Court of Appeal, Fourth District, California.

Feb. 25, 1931.

1. Bills and notes ⚿85.

To recover on written promise to accept bill of exchange, language must import absolute promise and clear unequivocal acceptance (Civ. Code, § 3216).

2. Bills and notes ⚿86.

Telegram, "We agree sign packing house acceptance," surrounding circumstances, and parties' interpretation of agreement, *held* not to show unconditional promise to accept bill of exchange (Civ. Code, § 3216).

3. Bills and notes ⚿86.

Telegram, relied on as promise to accept bill of exchange, should be interpreted in light of what preceded and followed it (Civ. Code, § 3216).

4. Bills and notes ⚿70.

Corporation not returning trade acceptances within 24 hours *held* to have accepted them (Civ. Code, §§ 3216, 3218).

The parties subsequently agreed on a different procedure respecting one of the acceptances, and the corporation was not named drawee in the other.

Appeal from Superior Court, Tulare County; J. A. Allen, Judge.

Action by the Pacific Coast Coal Company, a corporation, against the Lindsay Co-operative Citrus Association, a corporation. Judgment for defendant, and plaintiff appeals. Affirmed.

D. E. Perkins, of Visalia, for appellant.

Jas. R. McBride, of Lindsay, and H. B. McClure, of Visalia, for respondent.

BARNARD, P. J.

In this action, the plaintiff seeks to hold the defendant as an acceptor of a bill of exchange. The defendant is engaged in conducting a packing house for oranges and other citrus fruits at Lindsay, Cal. The plaintiff is engaged in the business of manufacturing and selling briquets or solid fuel for orchard heaters, and in the fall of 1925 one C. A. Bishop was its agent in the vicinity of Lindsay. At the same time, in the same vicinity, one J. W. Irwin, as the agent of the Phillips Orchard Heater Company, was selling orchard heaters designed to use solid fuel. Because of their common interest, these two salesmen worked together in soliciting business, and occasionally each would take orders for the other, but without compensation. Late in October, 1925, as the two agents were passing the property of one Ivan McIndoo, Irwin remarked that they could sell some heaters and fuel to him. Bishop replied that "we couldn't accept Mr. McIndoo's business without a packing house order." Later, Bishop went to Los Angeles, leaving with Irwin an order book on which he could take orders for briquets. Irwin secured an order from McIndoo for heaters, and also one for a hundred tons of briquets which are involved in this action. On November 20, 1925, Irwin wired Bishop as follows: "Ivan McIndoo offers packing house acceptance out of Valencia crop next May hundred tons briquets buying seven hundred fifty heaters asking same terms on five hundred dollars of heater order paying three hundred twenty five dollars cash on heaters communicate with Phillips wiring reply quick when would briquets arrive."

The same day Bishop replied by wire: "Phillips will accept McIndoo order but wants acceptance accompanied by seven per cent personal note stop I will accept acceptance from Mr. McIndoo packing house to read May fifteenth with six per cent per annum from January first stop if this is satisfactory have packing house wire me authorizing terms and I will wire order immediately and send order for signature."

Irwin and McIndoo visited this defendant and secured and sent to Bishop a telegram reading:

"Lindsay, Calif. 1106 A Nov 21, 1925.

"C. A. Bishop 700 W. 30th Street, Los Angeles, Calif.

"We agree sign packing house acceptance in payment of heaters and briquets for Ivan McIndoos requirements payments for above to be made by May fifteenth twenty seven. Lindsay Cooperative Citrus Assn 1202 P."

He replied to Irwin as follows: "I am in receipt of telegram from Lindsay Cooperative referring to Ivan McIndoo order which reads payment for above to be made May 15 27 stop I am very glad to extend the courtesy to Mr. McIndoo of May 15, 1926, as per my telegram kindly interview Lindsay Cooperative and see if that is satisfactory stop immediately on receipt of your wire I will telegraph the order to Seattle."

Upon receipt thereof, Irwin prepared another telegram and, with McIndoo, went to defendant's packing house, procured defendant's signature thereto, and forwarded it to Bishop. This read:

"Lindsay Calif 1045 A Nov 23 1925.

"C A Bishop Answer NL 2—700 West 30 St Los Angeles Calif

"Correct our telegram of twenty first regarding Ivan McIndoos acceptance to read payment May 15 1926 instead of 1927."

Upon receipt of that telegram, Bishop forwarded an order to plaintiff, and the briquets were shipped to McIndoo. Plaintiff wrote to defendant under date of November 24, 1925, as follows:

"Lindsay Co-operative Citrus Association, Lindsay, California.

"Gentlemen: This will acknowledge receipt of and confirm your order given our Mr. Bishop directing 100 tons of Diamond Briquets, sacked, to be shipped Ivan McIndoo at Lindsay. It is understood that we are to prepay the freight and that payment will be due May 15, 1926, with interest from January 1, 1926.

"We thank you for this order and it is being given our immediate attention.

"Yours very truly,

"Pacific Coast Coal Company."

The following trade acceptance was also sent:

$1,669.44 Seattle, Wash. Nov. 30, 1925.

"On May 15, 1926, pay to the order of Pacific Coast Coal Company, 563 R. R. Ave., So., Seattle, Wash. One Thousand Six Hundred Sixty Nine 44-100 Dollars. The obligation of the acceptor hereof arises out of the purchase of goods from the drawer. To Lindsay Cooperative Citrus Assn., Lindsay, Calif.

"Pacific Coast Coal Company

"By ————, Asst. Sales Manager."

Under date of December 10, 1925, defendant wrote to plaintiff as follows:

"We have received your letter of Nov. 24th, accompanied by freight bills and invoices covering 100 tons of Diamond briquets shipped to Ivan McIndoo at Lindsay, also trade acceptance which you desire this association to execute in your favor.

"In order that this matter may be handled by us under the same conditions as other such transactions for our other growers have been handled we would suggest that you make out the trade acceptance covering this purchase designating Ivan McIndoo as the acceptor, with this Association as endorser of such acceptance.

"Will you kindly arrange to handle this transaction in this manner."

To this letter the plaintiff replied as follows:

"Replying to your letter of December 10th, we made our trade acceptance in line with your order, as received by telegraph from our Mr. Bishop. To this date we have never received a written confirmation of this order.

"In conformity with your request we are attaching our trade acceptance No. 106 for $1669.44, made out to Ivan McIndoo, and will ask you to kindly have this accepted by him, with your indorsement."

Inclosed with this reply was a second trade acceptance, reading thus:

"Seattle, Wash., Nov. 30, 1925.

"On May 15, 1926, after blank Pay to the order of Pacific Coast Coal Company, 563 R. R. Ave., So. Seattle, Wn. One Thousand Six Hundred sixty nine 44-100 Dollars.

"Pacific Coast Coal Company.

"By ————, Ass't Sales Mgr.

"To Ivan McIndoo, Lindsay, Calif."

This was forwarded by defendant to McIndoo, together with a similar one in favor of the Phillips Orchard Heater Company, for his acceptance. McIndoo signed and returned the one in favor of the Phillips Orchard Heater Company, but refused to sign the one in favor of this plaintiff, because of the misunderstanding in regard to the date of maturity. The defendant never accepted or returned to the plaintiff either of said bills of exchange or trade acceptances. From a judgment in favor of the defendant, the plaintiff has appealed.

The appellant first contends that this transaction discloses a written promise upon the part of the respondent to accept a bill of exchange for goods sold and delivered to McIndoo, one of respondent's customers, within the meaning of section 3216 of the Civil Code. This section reads as follows: "*Promise to Accept.* An unconditional promise in writing to accept a bill before it is drawn is deemed an actual acceptance in favor of every person who, upon the faith thereof, receives the bill for value."

[1] Appellant also relies upon the case of James v. E. G. Lyons Co., 134 Cal. 189, 66 P. 210. In that case it was held that a certain

letter, "read and interpreted in the light of what had preceded it, as well as what followed it," contained an unconditional promise to accept a certain instrument. It can hardly be doubted that, where an unconditional promise in writing to accept a bill of exchange is shown, the promisor will be bound thereby. However, the language used must be such as to import an absolute promise to accept, and, unless the words used import a clear and unequivocal acceptance, no recovery may be had. First National Bank v. Commercial Savings Bank, 74 Kan. 606, 87 P. 746, 747, 8 L. R. A. (N. S.) 1148, 118 Am. St. Rep. 340, 11 Ann. Cas. 281. In that case, in which it was sought to hold a bank as having accepted, through certain telegrams, a bill of exchange in the form of a check, the court said: "A request upon a bank that it accept a check is a request for the creation of a legal relation between the holder and the bank, wholly without and beyond the purview of the paper. If such relation be established, it imposes upon the bank a liability to a party to whom it was not before bound at all, and it converts the privilege of the bank to pay if in funds into an absolute and unconditional duty to pay, no matter what may be the state of the depositor's account. Any one claiming to be the beneficiary of a contract of this kind independent of and collateral to the check must clearly show that the bank intended to make it. Neither law nor custom binds parties to the use of any set formula in arranging an acceptance. They may choose their own words. Brevity is not simply allowable, it is commendable; but in all cases there must be no doubt that an absolute promise to pay was made."

[2] In Myers v. Union National Bank, 27 Ill. App. 254, it is said: "One relying on a telegram as an acceptance, should see to it that the language used will, at least, fairly bear the meaning." We think that the transaction before us does not disclose an intention to bind the respondent to pay in any event and regardless of any signing by McIndoo. No specific or unconditional promise to accept a draft is shown. The respondent did not agree to "accept," but to "sign packing house acceptance." The word "sign" can hardly be said to be synonymous with the word "accept." It cannot be certainly said that the agreement was to sign as acceptor. From the face of the agreement it is just as plausible to say that the contract was to sign as indorser, which entails a very different responsibility, and this is much more plausible when the surrounding circumstances are considered. Upon the face of the instrument, the words "sign packing house acceptance" indicate something different from the ordinary agreement to accept unconditionally. The reference to McIndoo's requirements indicates that McIndoo is to order the goods. It would naturally appear that the acceptance they agree to sign is one tied up with the packing house business, and the natural inference is that the respondent agrees to sign some sort of an order given by McIndoo; or in other words, that respondent will sign something as surety for him.

[3] In accordance with the rule laid down in James v. E. G. Lyons Co., supra, the telegram here in question should be interpreted in the light of what preceded and what followed it. In examining the entire transaction, we find throughout the idea of suretyship or liability as an indorser, rather than direct primary liability, on the part of the respondent. In the first conversation with Irwin, in reference to the possibility of an order from McIndoo, Bishop, appellant's agent, stated that they "couldn't accept Mr. McIndoo's business without a packing house order," thus expressing the idea of obtaining security. In the first telegram of November 20, from Irwin to Bishop, it is stated that "McIndoo offers packing house acceptance payable out of Valencia crop next May," which not only carries on the idea of security but indicates a particular fund from which it is to be paid. In replying, Bishop says that Phillips will accept the McIndoo order but wants acceptance, and that he himself will "accept acceptance from McIndoo packing house," which seems to refer to the same sort of acceptance McIndoo had offered, and he goes on to request a wire from the packing house authorizing such terms. This further indicates that the order is to come from McIndoo and that security is wanted. The respondent's manager testified that, at the time the next telegram, the one upon which this action is largely based, was sent, McIndoo and Irwin came to the packing house and told him they wanted to see if the packing house would indorse Mr. McIndoo's order for some briquets and heaters, and Irwin then prepared the telegram. As has been said, the language then used indicates something different from "accept." The word "sign" is qualified by the words "packing house acceptance"; both together imply something other than the usual absolute acceptance; and the surrounding circumstances indicate that the transaction was based upon the fact that respondent would handle McIndoo's crop, and would sign a packing house acceptance rather than an "acceptance." Whether this takes the form of accepting an order from McIndoo, or of indorsing an acceptance made by McIndoo, the reference to a different kind of acceptance and to McIndoo's requirements seems to carry on the idea of some form of security for McIndoo, and points to secondary, rather than primary, liability. In his reply telegram, Bishop says he is glad to extend the courtesy of a different credit to McIndoo, but wants to be sure the change in date is satisfactory to this respondent. This indicates not only the giving of credit to McIndoo, but proper care

to have the consent of a surety. McIndoo and Irwin together then went to respondent and secured the telegram correcting the date; Bishop then sent in the order to his company; and the goods were shipped direct to McIndoo. The first expression to be found anywhere in the transaction, indicating anything to the effect of a primary obligation on the part of the respondent, appears in the letter dated November 24, 1925, sent to respondent by appellant, with a trade acceptance addressed to respondent, as drawee. The respondent replied with a request that the matter be handled in the manner other transactions of that sort for other growers had been handled, suggesting that appellant send a trade acceptance designating McIndoo as acceptor, with the respondent as indorser of such acceptance. The appellant replied that in conformity with this request they were sending trade acceptance made out to McIndoo, and they ask respondent to have this accepted by him, with its indorsement, inclosing a trade acceptance addressed to McIndoo, as payee. This not only indicates that the intention of respondent was to sign as indorser, which, as we have pointed out, is the idea of suretyship indicated throughout the transaction, but shows that the appellant either concurred in or accepted such intention. If it could be held that the original promise of respondent was a definite one to accept this bill of exchange, these subsequent letters show a changed agreement, and show that then, if not before, the minds of the parties met in an agreement that the respondent should indorse a trade acceptance. However, we think this final arrangement explains the promise and intention originally made and had by the respondent, which the evidence shows to have been at all times concurred in by appellant's agent, Bishop, and finally, if not originally, concurred in by the respondent directly. We conclude that such an unconditional promise as is contemplated by section 3216 of the Civil Code does not here appear, both because the language used is not sufficient to show a definite promise to accept a bill of exchange, and because the surrounding circumstances and the interpretation placed upon the agreement by the parties themselves show that a conditional signing or a form of suretyship was intended, it being intended that the bill of exchange should be signed by respondent as indorser, after the same had been accepted by McIndoo. This is borne out by the fact that the other part of the deal, that with the Phillips Heater Company, was put through on that basis; there being every indication that both deals were alike and that the same intentions prevailed and the same promises were made in both sales.

[4] The appellant further contends that the respondent is liable under the provisions of section 3218 of the Civil Code, because the trade acceptance was not, within twenty-four hours, returned to the appellant by the respondent, either accepted or nonaccepted, and that the respondent must therefore be deemed to have accepted the same. That section has no application to the respondent as to the last trade acceptance, because the respondent was not named as drawee therein. Neither does it bind the respondent upon the first trade acceptance sent by appellant, because of the subsequent action of the parties in agreeing upon a different procedure.

For the reasons given, the judgment is affirmed.

We concur: MARKS, J.; JENNINGS, J.

112 Cal. App. 333

ROBINSON et al. v. CONTRA COSTA COUNTY BUILDING & LOAN ASS'N.

Civ. 7400.

District Court of Appeal, First District, Division 1, California.

Feb. 27, 1931.

Rehearing Denied March 28, 1931.

1. Building and loan associations 🔑24.

Lease executed in behalf of building and loan association before issuance of license authorizing it to transact business was void (St. 1911, p. 607, § 15c, as added by St. 1925, p. 253, and p. 614, § 15).

2. Building and loan associations 🔑40.

Lease for offices was not "incidental or necessarily preliminary" to organization of building and loan association, warranting execution before issuance of license (St. 1911, p. 607, § 15c, as added by St. 1925, p. 253, and p. 614, § 15).

[Ed. Note.—For other definitions of "Incidental" and "Preliminary," see Words and Phrases.]

3. Building and loan associations 🔑40.

Void lease executed on behalf of building and loan association prior to issuance of license was not subject to ratification (St. 1911, p. 607, § 15c, as added by St. 1925, p. 253, and p. 614, § 15).

Appeal from Superior Court, Contra Costa County; A. B. McKenzie, Judge.

Action by Wilfred H. Robinson and another against the Contra Costa County Build-

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🔑For other cases see same topic and KEY-NUMBER in all Key Numbered Digests and Indexes ing & Loan Association. Judgment for defendant, and plaintiffs appeal.

Affirmed.

O. G. Foelker and R. O. Bordner, both of Oakland, for appellants.

Ralph H. Wight, of Martinez, and G. H. Elmore, of San Francisco, for respondent.

KNIGHT, J.

For a period of three months, commencing December 17, 1928, the defendant Contra Costa Building & Loan Association occupied and paid rent for certain offices in a building in Richmond, belonging to plaintiffs; and thereafter plaintiffs brought this action to recover the rental thereof for the succeeding five months, claiming that the same was due under a five-year written lease theretofore executed on behalf of said association by one E. B. Moore. The trial court held that the lease was not binding on the association, and accordingly entered judgment in its favor, from which this appeal is taken by plaintiffs.

Section 15c of the Building and Loan Commission Act (St. 1925, p. 253) provides in part as follows: "Before the articles of incorporation of any building and loan association, hereafter desiring to incorporate, under the laws of this state, shall be filed in the office of the secretary of state of the state of California, there must be attached thereto, the certificate of approval of the building and loan commissioner. * * *" And section 15 of said act (St. 1911, pp. 607, 614) provides: "It shall be the duty of the commissioner to require every such association, corporation or society coming under his supervision, to procure from him, *prior to the transaction of any business*, a certificate of authority or license to transact business in this state; and it is hereby made the duty of every association, corporation or society to comply with such requirement. * * *" (Italics ours.)

[1] The articles of incorporation of the defendant association, with the certificate of approval of the building and loan commissioner attached, were filed with the secretary of state on October 30, 1928, and on December 15, 1928, Moore signed the lease in question on behalf of said association; but the license which the association was required to obtain before it was authorized to transact "any" business was not issued until January 9, 1929. It would appear therefore, that under the law as declared by the Supreme Court of the United States in the case of McCormick v. Market Nat. Bank, 165 U. S. 538, 17 S. Ct. 433, 435, 41 L. Ed. 817, the lease was void. That case involved the validity of a lease executed on behalf of a national bank prior to the issuance to the bank of an authorization by the Comptroller of Currency "to commence the business of banking," and is similar in principle therefore to the case at bar; and it was held that the lease was ultra vires, and consequently void. The decision therein goes on to point out that, by the National Bank Act, a national banking association "'upon duly making and filing articles of association, and an organization certificate,' with the comptroller of the currency, 'shall become, as from the date of the execution of its organization certificate, a body corporate, and as such, and in the name designated in the organization certificate, shall have power' 'to adopt and use a corporate seal,' 'to have succession for the period of twenty years from its organization,' 'to make contracts,' 'to sue and be sued, as fully as natural persons,' to elect and dismiss officers, to make by-laws, and to exercise 'all such incidental powers as shall be necessary to carry on the business of banking.' 'But no such association shall transact any business, except such as is incidental and necessarily preliminary to its organization, until it has been authorized by the comptroller of the currency to commence the business of banking.'" Continuing, the court said: "The question upon which this case turned was whether a national banking association which, after having duly made and filed its articles of association and organization certificate with the comptroller of the currency, but not having received from him a certificate authorizing it to do banking business, enters with the owner of real estate into a contract of lease, for a term of five years, determinable at the end of any year by either party, of an office to be occupied by the association as a banking office, is bound by the lease, according to its provisions." And in declaring the lease to be void the court said: "Until the association has been authorized by the comptroller to commence the business of banking, section 5136 peremptorily forbids the corporation to 'transact any business' whatever, whether appertaining or not to the business of banking, 'except such as is incidental and necessarily preliminary to its organization.' The only business which it is permitted to transact is 'such as is incidental and necessarily preliminary,' not to carrying on, or even to commencing, the business of banking, but 'to its organization'; that is to say, such as is requisite to complete its organization as a corporation, which might doubtless include electing directors and officers, receiving subscriptions and payments for shares, procuring a corporate seal, and a book for recording its proceedings, temporarily hiring a room, and contracting any small debts incidental to the completion of its organization. To take a lease is certainly to 'transact business,' within the meaning of the statute; and a lease for a term of years, at a large rent, of offices to be occupied by the bank 'as a banking office, and for

no other purpose,' however necessary it might be for the transacting, or even for the commencing of banking business by a corporation whose organization had been completed, and which had been lawfully authorized to commence the business of banking, is in no sense incidental or necessarily preliminary to the organization of the corporation. * * * The lease sued on, therefore, was clearly prohibited by the very terms of the statute from which the association assumed to derive its power to execute the lease."

[2] In the present case said section 15 of the Building and Loan Commission Act doubtless contemplates the transaction of certain preliminary organization business prior to the issuance of the license by the building and loan commissioner, because the section provides that, in order "to procure such license, there must be filed with and approved by the commissioner, a certified copy of its * * * *constitution and by-laws* and all subsequent amendments thereto" (italics ours), which obviously cannot be adopted until after the association is organized. But, as held in McCormick v. Market Nat. Bank, supra, the execution of a lease extending over a period of years for offices to be occupied by the association for the transaction of its permanent business "is in no sense incidental or necessarily preliminary" to the organization of the association; and therefore, since it was executed prior to the date on which the association was authorized by law to transact any business, it is void.

Plaintiffs further contend, however, that the association subsequently ratified the lease, and consequently is bound by its terms. In this regard the record discloses the following facts: Moore, who was instrumental in promoting the organization of the defendant association and one of its five incorporators, negotiated with plaintiffs for the lease soon after the articles of incorporation were filed with the secretary of state; and, as stated, on December 15, 1928, he executed the same on behalf of the association. Up to that time there had been no meeting of the stockholders, nor any permanent organization effected, and consequently there had been no constitution or by-laws adopted nor any offices of the corporation created. Evidence was adduced to show, however, that the building and loan commissioner and two of the incorporators had requested Moore to act as secretary, and, furthermore, that said two incorporators had authorized him to "contract" for the premises in question. On December 18, 1928, the day after the association went into possession of the premises, the stockholders met and effected a permanent organization, including the election of a board of directors and the officers of the association, the personnel of which did not include any of the five original incorporators; and immediately following such permanent organization Moore turned over to the newly elected officers all of the records and documents in his possession, including the lease in question. But in this connection the trial court found that neither the directors nor the officers had any actual knowledge of the execution of the lease until just prior to the time the premises were vacated; and there is evidence to support such finding.

[3] Even assuming that, in the case of an ordinary private corporation, the foregoing circumstances would be legally sufficient to constitute a ratification of the lease on the part of the corporation, it is evident that in the present case it cannot be so held, because, as held in McCormick v. Market Nat. Bank, supra, "The lease sued on having been executed by the defendant, contrary to the express prohibition of the statute, which peremptorily forbade the corporation to transact any business, unless to perfect its organization, and thus denied it the capacity of entering into any contract whatever, except in perfecting its organization, the lease is void, cannot be made good by estoppel, and will not support an action to recover anything beyond the value of what the defendant has actually received and enjoyed. Central Transp. Co. v. Pullman's Car Co., 139 U. S. 24, 54–61, 11 S. Ct. 478 [35 L. Ed. 55]; Logan County Bank v. Townsend, 139 U. S. 67, 11 S. Ct. 496 [35 L. Ed. 107]." "The doctrine of ultra vires," says the court, "by which a contract made by a corporation beyond the scope of its corporate powers is unlawful and void, and will not support an action, rests as this court has often recognized and affirmed upon three distinct grounds: The obligation of any one contracting with a corporation to take notice of the legal limits of its powers; the interest of the stockholders, not to be subject to risks which they have never undertaken; and, above all, the interest of the public, that the corporation shall not transcend the powers conferred upon it by law. Pearce v. Madison & Indianapolis Railroad, 21 How. 441 [16 L. Ed. 184]; Pittsburgh, etc., Railway v. Keokuk & Hamilton Bridge Co., 131 U. S. 371, 384, 9 S. Ct. 770 [33 L. Ed. 157]; Central Transp. Co. v. Pullman's Car Co., 139 U. S. 24, 48, 11 S. Ct. 478 [35 L. Ed. 55]."

The judgment is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

112 Cal. App. 225

FLEMING v. BOARD OF TRUSTEES OF OAKVILLE SCHOOL DIST. OF NAPA COUNTY et al.

Civ. 4141.

District Court of Appeal, Third District, California.

Feb. 26, 1931.

1. Schools and school districts 🔑141(5).

Determination of school trustees that teacher's services were no longer desired *held* sufficiently formal to bind teacher, although no minutes of meeting were kept and no formal votes of members taken (Pol. Code, § 1609, subd. 5(i).

> The facts disclosed that at a timely meeting of the board of trustees, which was attended by all of its members, the question of re-electing the teacher was formally discussed; that a majority of the members orally declared themselves to be opposed to her re-election; that, in the presence of all the members, the clerk stated he would formally notify the teacher to that effect; that there was no objection to such procedure on the part of any member of the board; that the clerk thereafter formally notified the teacher in writing that her services were no longer desired.

2. Schools and school districts 🔑135(1).

Members of school board acting separately as individuals may not bind district to contract employing teacher (Pol. Code, § 1609, subd. 5(i).

3. Schools and school districts 🔑58.

Proceedings of school board *held* not invalid, although not formally recorded.

4. Schools and school districts 🔑141(5).

That no member of school board dissented from clerk's proposal to notify teacher her services were no longer desired *held* sufficient authorization for clerk to give notice (Pol. Code, § 1609, subd. 5(i).

5. Schools and school districts 🔑141(5).

That two school trustees signed clerk's notice informing teacher her services were no longer desired *held* evidence of authorization to clerk to give notice (Pol. Code, § 1609, subd. 5(i).

6. Schools and school districts 🔑141(5).

Performance of clerk's ministerial duty of notifying teacher her services were no longer desired required no definite authorization of school board (Pol. Code, § 1609, subd. 5(i).

Appeal from Superior Court, Napa County; Percy S. King, Judge.

Action by Helen L. Fleming against the Board of Trustees of the Oakville School District of Napa County and others. Judgment for defendants, and plaintiff appeals.

Affirmed.

Clarence N. Riggins, of Napa, for appellant.

Wallace T. Rutherford, of Napa, for respondents.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

This is an appeal from an order denying a petition for a writ of mandamus to compel a school board to permit the petitioner to teach in the public school of that district and to require the payment of her salary therefor.

The board of trustees of Oakville school district in Napa county consists of H. H. Carpenter, the duly elected clerk thereof; A. L. Lincoln; and Peter Del Bondio. All of the members of the board met at the office of the clerk on May 4, 1929, to pass upon the election of teachers for the ensuing year. The petitioner, Helen L. Fleming, had been previously elected and served as a probationary teacher in that district for the school year of 1928–1929. At the meeting of the board on May 4th, it was decided by a majority of the members of the board not to employ the petitioner for the following year. No minutes of this meeting were kept. No formal motion or vote of the members was taken or registered with respect to the employment of the petitioner. That particular subject was, however, discussed orally, and at least two of the members declared their opposition to her re-election. Following this determination of the board, the clerk then stated in their presence that he would notify the petitioner to that effect. On June 10, 1929, pursuant to the provisions of section 1609, subd. 5 (i), of the Political Code, a written notice, signed by the clerk and one other member of the board of trustees, was served on the petitioner, notifying her that her services as a teacher in that school district were no longer desired. This notice is dated June 8, 1929, and reads, in part: "Please be advised that at the conclusion of the present school term your services as teacher in the Oakville school will not be wanted any more."

The appellant asserts there was no formal decision on the part of the school board to terminate the petitioner's employment as a probationary teacher, and that she was therefore automatically re-elected as such teacher pursuant to the statute. Section 1609, subd. 2, supra, provides: "Teachers may be elected on or after May second for the next ensuing school year and each teacher so elected shall

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be deemed re-elected from year to year except as hereinafter specified."

The petitioner held herself in readiness to continue her services as a teacher in Oakville school district, and so notified the trustees. She was not permitted to resume her duties as teacher. This petition for mandamus was then instituted in Napa county to compel her reinstatement and the payment of her salary. The court adopted findings adverse to the petitioner on all material issues in the case and rendered judgment accordingly. From that judgment this appeal was perfected.

[1] The sole question for determination on this appeal is whether the action of the board of trustees with relation to the termination of the employment of the petitioner was sufficiently formal to bind her. We think the proceedings of the board were adequate. At a timely meeting of the board, which was attended by all of its members, the question of the re-election of Miss Fleming was formally discussed. At least a majority of the members orally declared they were opposed to her re-election. In the presence of all the members of the board the clerk then stated he would formally notify the petitioner to that effect. There was no objection to this procedure on the part of any member of the board. The clerk thereafter formally notified her in writing, as required by law, that her services were no longer desired. This notice was signed by a majority of the members of the board, to wit, the clerk and Mr. Lincoln. It was served within the time required by the statute. Subdivision 5 (i) of section 1609, supra, provides: "On or before the tenth day of June in any year the governing board may give notice in writing to a probationary teacher that his services will not be required for the ensuing school year."

We are of the opinion these proceedings were sufficiently formal to bind the petitioner.

There is no statutory provision of law requiring the meetings of school boards to be held at any specific time or place. There is no provision requiring the board to formally decide school matters by a vote of aye or nay. There is no provision requiring the minutes of its proceedings to be recorded. Construing a statute similar to that of California involving the validity of meetings held by school trustees, in upholding a contract of the board, it is said in Brown v. School District, 1 Kan. App. 530, 40 P. 826, 827: "The statute prescribes no special form or manner by which, and no particular place at which, the district board shall be convened, nor do we think it was intended or necessary that any formal call should be made for the purpose of legally convening a school district board. It is sufficient if all are present, * * * and that at least two of them agreed to make the contract in dispute."

The due determination of a board of school trustees to dispense with future services of a teacher is not invalid merely because the action of the board in that regard was omitted from the records of the meeting. 35 Cyc. 906 (c).

[2] It is true that the statute authorizes only "boards of school trustees" to employ or discharge teachers and transact the business of the school district. It follows that members of a school board acting separately as individuals may not legally bind the district to the obligations of a contract. This principle is determined in Cloverdale Union High School District of Sonoma County v. Peters, 88 Cal. App. 731, 264 P. 273, 276, where it is said: "Where power to employ a teacher is in a school board, a valid contract with a teacher cannot be made by members of the board without a meeting and formal action."

[3] This formal action, however, has never been held to require strict adherence to the technical procedure approved by "Roberts' Rules of Order." Nowhere has it been held that a business proposition must necessarily be decided by a school board by means of the formal vote of the members indicated by the signs aye or nay. Any other method of securing the definite decisions of the respective members is sufficient so long as it enables them to determine whether a majority of the members of the board favor or oppose the proposition. Nowhere has it been held the proceedings of a school board are invalid unless they are formally recorded. In the absence of a statute requiring this to be done, it is unnecessary. If all of the members of a school board are present, or have knowledge of the meeting and have an opportunity to attend, and a majority of the members of the board, after a formal discussion as to the advisability of employing or discharging a teacher, definitely, separately, and finally declare themselves as opposed to the election or discharge of the particular teacher under discussion, in the absence of subsequent action of the board to the contrary, their decision will amount to a valid binding determination of the board just as conclusively as though they had formally voted by means of the ordinary signs of aye or nay. The result is just as definite and certain. 43 C. J. 505, § 773.

This is precisely what occurred at the meeting of the board regarding the matter which is here in controversy. There can be no question in the present case that a majority of the members of the board separately, deliberately, and unequivocally decided, at a meeting in which the subject was formally discussed, that they did not desire to re-elect the petitioner for the ensuing year. Mr. Carpenter, the clerk, testified in this regard:

"Q. You are clerk of the Oakville School Board? A. I am.

"Q. Did the three trustees of the Oakville board meet * * * in your office on the 4th day of May of this year [1929]? A. Yes, they did. * * *

"Q. And at that time the three trustees were present. A. They were.

"Q. And you discussed several matters? A. Yes sir, including * * * the discussion of Miss Fleming's employment. * * * The question was brought about [regarding the election of] a teacher for the ensuing year and Mr. Del Bondio stated that he had quite a good deal of complaint about Miss Fleming * * * I also stated that I had complaints. I think it was Mr. Lincoln who said he thought that we should get a new teacher, a different teacher, for the next year, for Miss Fleming's room, in her place, and I stated I thought so, too. I agreed to it. There wasn't any objection raised to it. It was my understanding that it was unanimous and after the discussion had been completed I stated that I would notify Miss Fleming that she wasn't wanted for the next year as a teacher for the school. * * *

"Q. Were regular motions made and voted upon at the meeting? * * * A. No, not a regular vote. Matters were discussed and each one would give his opinion and we would agree. * * *

"Q. When the three trustees had expressed their opinion, why, a decision was made, is that the idea? A. Yes sir."

[4-6] The appellant asserts that the employment of the petitioner was not legally terminated for the reason that the clerk was not formally authorized to notify her of the action of the board to that effect. We are of the opinion the proceedings of the board amounted to a legal authorization for the clerk to notify the petitioner her services as a teacher of Oakville school were no longer desired. After the termination of her employment had been agreed upon at the trustees' meeting, the clerk then stated he would notify the petitioner her services were no longer desired. No member of the board dissented from this proposal. This statement was a natural suggestion of the clerk prompted by the decision to terminate her employment. It was a proposal to perform his duty and to fulfill the requirement of the statute. Silence on the part of the members of the board regarding this definite statement as to what the clerk proposed to do amounted to acquiescence and authorization on their part to send the notice. The board had definitely decided to dispense with her services. Moreover the names of two of the trustees were actually signed to the notice. This was itself evidence of an acquiescence and authorization to give the notice. Notifying the petitioner of this action of the board was a mere ministerial duty of the clerk. It required no definite authorization. The law requires it to be done as a part of the act terminating the employment. The delivery of this written notice to the petitioner on June 10th is conceded.

Regarding the authorization of the board for the clerk to serve this notice, Mr. Carpenter testified:

"Will you please state just what was stated at the end of the discussion as to the advisability of hiring Miss Fleming for the ensuing year? A. I said I would have to notify her that her services were not wanted for the ensuing year.

"Q. You stated that to the other two members of the board? A. I did.

"Q. That you would do that? A. I did.

"Q. Was there any objection made by either one of them? A. No objection at all."

From the foregoing evidence it seems clear the services of the petitioner as a probationary teacher in Oakville school district were formally terminated by decision of the board of trustees. The clerk duly notified Miss Fleming of such action by tacit authority of the board.

The judgment is affirmed.

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112 Cal. App. 194

MORTENSEN v. LOS ANGELES EXAMINER.

RICHARDSON v. SAME.

Civ. 4252, 4253.

District Court of Appeal, Third District, California.

Feb. 25, 1931.

Rehearing Denied March 27, 1931. Hearing Denied by Supreme Court April 23, 1931.

1. Libel and slander 🔑42(1).

Truth and privilege of alleged libelous publication reporting judicial proceeding are not measured by legal sufficiency of charge made in the judicial proceeding (Civ. Code, §§ 45, 47, subd. 4).

2. Libel and slander 🔑19.

In determining whether publication is libelous, resort is first had to publication itself.

3. Libel and slander 🔑123(2).

Question whether publication is libelous is primarily for court to determine.

4. Libel and slander 🔑81, 86(1).

If publication is not libelous, neither inducement nor innuendo can make it so.

5. Libel and slander 🔑87.

In action for libel, allegations of falsity of charge must be as broad as charge itself.

6. Libel and slander 🔑42(1).

If report of divorce proceeding was truthful, in that it simply stated that person referred to had been designated as "co-respondent," statutory privilege against liability for libel in publishing report of judicial proceeding applied (Civ. Code, § 47, subd. 4).

In such circumstances the publication would be privileged under Civ. Code, § 47, subd. 4, since it is a well-known fact that, when a woman is referred to as a "co-respondent" in an action prosecuted by a wife against her husband, the general inference and the common and accepted meaning of the word is that the woman so named has been guilty of illicit relations, and that this is true, irrespective of whether the woman so named has in fact been made a co-respondent under the strict meaning of the language found in Code Civ. Proc. § 1019, and brought into action as a party thereto.

[Ed. Note.—For other definitions of "Co-Respondent," see Words and Phrases.]

7. Libel and slander 🔑42(1).

If publication reporting judicial proceeding is substantially true and is inaccurate only as to details, it is not libelous (Civ. Code, § 47, subd. 4).

8. Libel and slander 🔑42(1).

Publication reporting judicial proceeding would not be excluded from statutory privilege by reason of inaccuracy or error in naming paper or writing in which allegation alleged to be libelous appears (Civ. Code, § 47, subd. 4).

9. Libel and slander 🔑42(1), 54.

No action for libel lies if gist of alleged libelous matter is established, or if alleged libelous matter is truthful statement of judicial proceeding (Civ. Code, § 47, subd. 4).

10. Libel and slander 🔑80.

Complaint in action for libel for publishing report of divorce proceeding, stating that plaintiff was charged as co-respondent therein, *held* demurrable (Civ. Code, § 47, subd. 4).

The complaint in the libel action limited the action to the technical fact that no complaint, cross-complaint, or answer was filed in the divorce action, naming the plaintiff as a co-respondent, and that no summons or pleading was ever served on the plaintiff, making her a party to the divorce action, but the complaint did not allege that there was not an instrument in writing filed in the divorce action, charging the plaintiff with all the acts which the public would generally assume one to have committed in order to become a co-respondent.

11. Libel and slander 🔑97.

Sustaining demurrer without leave to amend to complaint in libel action not stating facts sufficient to constitute cause of action *held* not abuse of discretion.

There was no abuse of discretion, since the whole complaint was framed on the theory of the insufficiency of the form of the charge in the divorce proceeding to show that plaintiff was a co-respondent as stated by defendant in publishing report of the divorce proceeding, and not upon the untruthfulness of the substance thereof.

12. Libel and slander 🔑7(16).

False charge of being co-respondent in divorce action is libelous per se.

13. Libel and slander 🔑42(1).

Publication of truthful report that charge of being co-respondent had been made during trial of divorce action is within statutory protection against liability for libel (Civ. Code, § 47, subd. 4).

Appeals from Superior Court, Los Angeles County; Leon R. Yankwich, Judge.

Separate actions by Lucille Mortensen and Athalie Richardson against the Los Angeles Examiner. Judgment for defendant, and plaintiffs appeal. The cases were presented on appeal on one set of briefs and were considered as one case.

Judgments affirmed.

Randall J. Hood, of Los Angeles, for appellant.

Lawler & Degnan and Alexander T. Sokolow, all of Los Angeles, for respondent.

Mr. Justice PLUMMER delivered the opinion of the court.

The above-entitled actions are based upon the same publications made by the defendant, involve precisely the same points, are presented to us upon this appeal on one set of briefs, and are considered as one case. For convenience, however, we shall follow the procedure adopted in the briefs and consider by name only the case of Lucille Mortensen v. The Los Angeles Examiner, a corporation, it being understood, however, that whatever is said as to this case applies equally to the case of Athalie Richardson v. The Los Angeles Examiner.

At the time of the occurrences hereinafter referred to, the plaintiff was then Miss Lucille Johnsonbaugh, and thereafter married, and prior to the beginning of this action became known as Lucille Mortensen.

This appeal is taken from a judgment of dismissal entered upon an order sustaining a demurrer without leave to amend, interposed by the defendant to the plaintiff's complaint. The action is for damages on account of alleged libelous articles published in The Los Angeles Examiner, of and respecting the plaintiff.

The record shows that some time during the months of July and August, 1927, a certain action was being tried in the superior court of Los Angeles county, wherein Mrs. Madeline Irvine was asking a judgment for separate maintenance, and in which action James Irvine, Jr., had filed a cross-complaint asking for a divorce. In reporting the proceedings of this trial the Los Angeles Examiner, being a newspaper published in the city and county of Los Angeles, on the 29th day of July, 1927, published, among other things, the following: "Five Women Accused. Before the Irvine divorce suit got under way, following the completion of Mrs. Irvine's testimony, an additional pleading was filed in which the wife named five women as co-respondents. These women were: Mrs. Schylor, Miss Ruth Robinson, Miss Lucille Johnsonbaugh, Miss Ruth Baldwin and Miss Athalie Richardson." The account as to what was stated in Mr. Irvine's cross-complaint not being material here, it is omitted. This publication is set forth in count 1 of the complaint, and made the basis for the first cause of action. The complaint, as a separate cause of action, alleges that on or about the 1st day of August, 1927, the defendant published the following alleged defamatory and libelous matter:

"$500 a month alimony for wife granted. Four women rancher accused of associating with cleared by Judge Guerin's decision.

"James Irvine, Jr., millionaire Orange County rancher, was yesterday granted a divorce from Madeline Irvine as a climax to a bitterly fought and sensational trial. The decision was handed down by Superior Judge Walter Guerin. Briefly and tersely the judgment of the court found that Mrs. Irvine was guilty of cruel treatment toward her husband and that his charge that she associated with other men was true. At the same time the court held that Mrs. Irvine had failed to prove her charges of misconduct against Irvine. Thus was the good name of four women cleared.

"$500 a month alimony. Mrs. Irvine, the court stated, shall receive from Irvine $500 a month alimony for a period of five years beginning January 1, 1928. In the event that she remarries alimony shall be reduced to $250 a month. Mrs. Irvine was also allowed additional attorney's fees at $2500, making a total of $7500, paid to her counsel, Lewis Pink.

"Mrs. Irvine sued for separate maintenance, asking $5000 a month alimony, and alleging that her husband was possessed of many millions. She made a general charge of misconduct against him and at the opening of the trial she filed an affidavit setting forth the names of these women. Irvine, represented by attorneys Scarborough and Bowen, filed a cross-complaint for divorce. He charged that his wife caused him mental suffering by getting drunk and dancing in public places. He also charged that she had been indiscreet.

"'Charges Unproven.' Judge Guerin said in his judgment: 'I have carefully considered the evidence and there is a sharp conflict in the testimony. I find that the plaintiff wholly failed to establish any allegations in her complaint.'"

And for a third and distinct cause of action the complaint sets forth an alleged libelous publication which appeared in the Los Angeles Examiner on the 28th day of July, 1927, as follows, to wit:

"Four women accused by Mrs. Irvine. Millionaire husband attracted away from home, declares wife, asking $1000 a month.

"'Love ended.' Mrs. Madeline Irvine, who yesterday (in) court (said) four women caused husband to break marriage vows. Picture.

"Mrs. Madeline Irvine yesterday told the story of domestic unhappiness with James Irvine, millionaire son of the famous Irvine ranch land baron, and asked Superior Judge Walter Guerin to grant her separate maintenance with $1000 a month allowance.

"In her recital of marital storms, Mrs. Irvine named four young women, who, she charged, were responsible for her husband's asserted straying from his home hearth.

"Week-end party. Although the allegations were based for the most part upon suspicious circumstances, Mrs. Irvine produced a witness who made a direct accusation against Miss Lucille Johnsonbaugh. This episode, something like motion-picture comedy, occurred during a week-end party at the Irvine ranch and took place on the second floor of the house after all the guests supposedly had retired in the rooms to which they had been assigned.

"The witness, Mrs. F. Turley, said that she had been lingering in the hallway, having a chat with a companion, when she heard voices that indicated to her that Miss Johnsonbaugh was not in her own room.

"Stood in hallway. While standing in the hallway, the witness said, she discovered that her suspicions were well founded and gave testimony tending to show that a love-making episode had been carried on. Mrs.

Irvine's part in the legal row will be concluded this morning when she is cross-examined by attorney Scarborough, representing her husband, Attorney Lewis Pink, representing the wife, then will rest the separate maintenance suit."

By reference, the first, second, third, fourth, seventh, and eighth paragraphs of the first count set forth in the complaint were made parts of both the second and third counts contained in the complaint. The fifth and sixth paragraphs in the first count of the complaint contained all that is really vital to a determination of the correctness of the order of the trial court. These paragraphs are as follows:

"V. That said defendant, by said article, meant to state, publish and declare, and did publish, state and declare that this plaintiff had been named as a co-respondent in the action at that time pending in the Superior Court of the State of California, in and for the County of Los Angeles, wherein one Madeline Irvine was the plaintiff and James Irvine, Jr., was the defendant, in a separate maintenance suit in which action said defendant had filed a cross-complaint against said plaintiff for divorce, and further intended by the terms of said article so published, to state, publish and declare that this plaintiff was accused of being one of the five co-respondents in said article declared to have been named by said plaintiff in said proceedings; that the term 'co-respondent,' so used in said article, as aforesaid, does now, and at all times herein mentioned has had and possessed a well defined and well understood meaning, in that the same is understood to mean a woman or a man charged with adultery in a divorce suit or in a separate maintenance action, and as such proceeded against together with the defendant therein; that by thus designating this plaintiff in said article as being one of the co-respondents so named by said plaintiff Madeline Irvine in said proceedings, it was understood to mean, by those persons reading the said article, that this plaintiff was at that time being proceeded against by the said Madeline Irvine in said proceedings as a co-respondent of and with the said James Irvine, Jr., and that this plaintiff was by virtue thereof charged in said proceedings by said Madeline Irvine with having committed adultery with the said James Irvine, Jr., defendant in said proceedings.

"VI. That said article so published, as aforesaid, was false, untrue and defamatory; that said Madeline Irvine, plaintiff in said proceedings, at no time in said proceedings named this plaintiff as a co-respondent; that no copy of the complaint and summons in said action was ever at any time served upon this plaintiff; that this plaintiff was not a party to said proceedings; that the complaint in said action filed by said Madeline Irvine does not and did not name this plaintiff as a co-respondent; that no amendment to said complaint so charging this plaintiff with having committed adultery with the defendant therein was ever filed in said action; that in truth and in fact the said action instituted by Madeline Irvine was based and grounded upon the charge of cruelty and the acts of cruelty committed by the said James Irvine, Jr., defendant therein, to and toward the said Madeline Irvine."

The paragraphs of the complaint relative to the defamatory character of the publications, the injury suffered, etc., need not be set forth herein, as they appear to be in the usual form found in complaints based upon alleged libelous publications.

Two sections of the Civil Code are involved in this proceeding, section 45 thereof specifying that libel is a false and untruthful publication which has a tendency to expose any one to hatred, contempt, ridicule, etc.; and subdivision 4 of section 47 relative to privileged communications. This subdivision eliminates from the law of libel a fair and true report without malice, of a judicial, legislative, or other public official proceeding. Much learning and industry have been displayed by counsel in discussing the meaning of the word "co-respondent." In this particular, section 1019, Code of Civil Procedure, is mentioned as being the legal definition of the word. This section, however, does not contain the word "co-respondent"; it simply provides that when, in an action for divorce, adultery is charged against either party, and the person with whom such adultery is alleged to have been committed by such party is named in any of the pleadings, a copy of such pleading must be personally served on such named person, etc., and that the person so served shall have the right to appear and plead and be heard in the cause. About the most succinct definition of the word which we have found is that given in 13 C. J. 1236, to wit: "A person summoned to answer a bill, petition or libel, together with another respondent. This term is now chiefly used to designate the person charged with adultery with the respondent in a suit for divorce for that cause, and joined as a defendant with such party." Supporting the text a number of authorities are cited in the footnotes.

[1] Irrespective of the legal and technical definition of the word "co-respondent," it is a well-known fact that the general acceptation of the meaning of the word now is that a woman, when named as co-respondent, has been guilty of illicit relations with the man named in the action for divorce, and while technically the word relates to, and its more general use in pleadings means, a person named as a third party in an action for divorce, the general meaning of the word, and the general inference to be drawn from the

use thereof, is that the person named or referred to has been guilty of acts of unchastity, irrespective of whether such person has or has not, in the strict legal sense of the word, been made a party in an action prosecuted to obtain a divorce on the grounds of adultery. In other words, when a woman is referred to as a "co-respondent" in an action prosecuted by a wife against her husband, the general inference, and the common and accepted meaning of the word, is that the woman so named has been guilty of illicit relations, and that this is true irrespective of whether the woman so named has in fact been made a co-respondent under the strict meaning of the language found in section 1019 of the Code of Civil Procedure, and brought into the action as a party thereto. Thus, if a woman is named in any of the pleadings, or in any of the papers filed in an action, whether for divorce or for separate maintenance, as a co-respondent, the natural and usual conclusion to be drawn from such naming is that such person is of questionable character. We think the result is exactly the same, whether a person is named as a co-respondent in a complaint and answer, or an affidavit or a deposition, or any other instrument in writing which may become a part of the proceeding or record of the proceedings in an action pending between husband and wife, whether for divorce or for separate maintenance. The legal sufficiency of the instrument in writing to constitute the person a co-respondent in which the charge appears is wholly immaterial as to the effect thereof if it appears in such a manner as to give to the general public the impression that the person named is guilty of any of the acts above named. It is the fact of the charge, and not of the sufficiency thereof, that reflects upon the character of the person assailed. We make this preliminary statement because it goes to the very heart of the controversy involved in this action. If, in any of the papers, whether denominated a complaint, an answer, a cross-complaint, an affidavit or a deposition, filed in the action of Irvine v. Irvine, appears a charge against the woman named as being co-respondent, and the defendant, in its report thereof, stated that such a charge had been made, then and in that case the publication was privileged under the provisions of subdivision 4 of section 47, Civil Code. In other words, the truth of the publication, and its being privileged, are not measured by the legal sufficiency of the charge, if the charge is made.

[2-4] In determining whether the publication is libelous, resort is first had to the publication itself. If it is not libelous, the fact that it is unpleasant is of no moment, and the question of libel or no libel is primarily for the court to determine. If the publication is not libelous, neither inducement nor innuendo can make it so. The inducement may state the facts so as to disclose to the court the person intended, and the innuendo, to explain what is intended, and the usual intendment of the language. In the case at bar there is no need for inducement; the article itself states the names of the women. The innuendo sets forth the meaning and application of the word "co-respondent." From what we have stated it is apparent that the innuendo is of little moment in this case, save and except as coupled with the further pleading, which we will later consider, relative to the sufficiency of the charge of libel in this action.

[5, 6] Before considering further the sufficiency of the counts of the complaint which we have set forth in full, we may state that the law appears to be well settled that the allegations of the falsity of the charge must be as broad as the charge itself. In other words, it is not sufficient to allege that a charge of being a co-respondent is false and untrue, and then limit the meaning of this allegation by setting forth that in no complaint or answer filed in the action the charge of being a co-respondent does not appear, or that the person alleged to be libeled has not been made a co-respondent by reason of not having been served with any summons or complaint in the action, or brought into the action as a party thereto, as it might very well be true that the party alleged to be libeled by being named as a co-respondent has not been made a party to the action, has not been served with summons, but has been so characterized in some paper filed in the action, or even in the testimony adduced at the trial of an action. If named at all as a co-respondent in the action and publication thereof, if truthful in that it simply states that the person referred to has been so designated, the privilege accorded by subdivision 4 of section 47 of the Civil Code applies. The principles which we have laid down find support in the following cases: Bathrick v. Detroit Post, 50 Mich. 629, 16 N. W. 172, 45 Am. Rep. 63; Hearne v. De Young, 119 Cal. 670, 52 P. 150, 499; Snively v. Record Publishing Co., 185 Cal. 565, 198 P. 1; Chavez v. Times-Mirror Co., 185 Cal. 20, 195 P. 666; Newby v. Times Mirror Co., 173 Cal. 387, 160 P. 233, Ann. Cas. 1917E, 186; Davis v. Hearst, 160 Cal. 143, 116 P. 530.

[7-9] Again, if the article published is substantially true and is inaccurate only as to details which it relates, it is not libelous, nor would the publication be excluded from the protection afforded it by subdivision 4 of section 47 of the Civil Code by reason of any inaccuracy or error in naming the paper or characterizing the writing in which the allegation alleged to be libelous appears. Hearne v. De Young, supra; Skrocki v. Stahl, 14 Cal. App. 1, 110 P. 957. If the gist or the sting of the alleged libelous matter is shown to be true, or a truthful statement of the proceedings, no action lies. A restatement of

the charge is pertinent here. It is as follows: "Before the Irvine divorce suit got under way, following the completion of Mrs. Irvine's testimony, an additional pleading was filed in which the wife named five women as co-respondents." The gist of the alleged libel or the sting of the charge lies in the naming of the five women as co-respondents, not in whether the written instrument filed in the action was or was not correctly denominated as a pleading, or whether the five women were or were not technically named as co-respondents. If so named in any instrument filed, as we have stated, the mere inaccuracy or error as to naming of the written instrument becomes wholly immaterial. Likewise, if the five women were named as having illicit relations with the husband, then the characterizing of those having such relations as being co-respondents would constitute no inaccuracy or variation from a correct report of the proceedings sufficient to lay the basis of an action for libel.

[10] In the light of what we have said, we may now examine the sixth paragraph of the plaintiff's complaint, to-wit: "That said article so published, as aforesaid, was false, untrue and defamatory; that said Madeline Irvine, plaintiff in said proceedings, at no time in said proceedings named this plaintiff as a co-respondent; that no copy of the complaint and summons in said action was ever at any time served upon this plaintiff; that this plaintiff was not a party to said proceedings; that the complaint in said action filed by said Madeline Irvine, does not, and did not name this plaintiff as a co-respondent; that no amendment to said complaint, so charging this plaintiff with having committed adultery with the defendant therein, was ever filed in said action; that in truth and in fact the said action instituted by Madeline Irvine was based and grounded upon the charge of cruelty, and the acts of cruelty committed by the said James Irvine, Jr., defendant therein, to and toward the said Madeline Irvine." Here, the gravamen of the charge is limited to the fact that no complaint filed by the plaintiff charged the women named as co-respondents. That no summons in said action was ever served, and that the plaintiff here was not made a party in the action of Irvine v. Irvine. That no amendment to the complaint in the Irvine action was filed charging this plaintiff with having committed adultery, etc., the whole action being limited to the technical fact that no complaint, cross-complaint, or answer was filed in the action of Irvine v. Irvine, naming this plaintiff as a co-respondent, and that no summons or pleading was ever served upon this plaintiff making her a party to the action of Irvine v. Irvine. It does not appear, nor is it alleged that there was not an instrument in writing filed in the action of Irvine v. Irvine, charging the plaintiff with all the acts which the public would generally assume one to have committed in order to become a co-respondent. The whole complaint is based upon the narrow, technical, and circumscribed basis that the plaintiff in this action was not so denominated in particular pleadings filed in the Irvine action. And here, again, a narrow, limited, and technical meaning is given to the word "pleading," in order to lay the basis for an action of damages, and likewise prevent the truth of the publication to be shown, because, forsooth, the charge may have only appeared in an affidavit or a deposition, and not in such a manner as to bring it within the definition and meaning which counsel have attached to section 1019 of the Code of Civil Procedure. But little attention need be given to the second and third alleged causes of action; what we have heretofore said applies to them, but a reading of the second and third causes of action shows clearly that they are not libelous. All they do show in relation to the women charged, without naming them, is that the court held that the charges were unproven and were untrue. Nor does it appear from either count that the proceedings, a report of which was published, did not take place, and, the language being clearly not libelous, it is not possible, either by inducement or innuendo, to give the articles a sinister meaning which does not appear upon the face thereof. The whole case appears to be based, not upon the falsity of the imputation, but upon the untruthfulness of the publication of the form in which it was made, which led, we think, to the order of the trial court in sustaining the demurrer without leave to amend.

[11] From what we have stated, the conclusion is unescapable that the demurrer was properly sustained. The question then occurs: Has there been any abuse of discretion on the part of the trial court? Upon this question nothing further appears in the record than the simple order.

In the case of Philbrook v. Randall, 195 Cal. 95, on page 105, 231 P. 739, 742, we find the following: "It is the rule that the granting of permission to amend pleadings is a matter within the sound discretion of the trial court (Doolittle v. McConnell, 178 Cal. 697, 174 P. 305), and courts should allow amendment liberally (Gould v. Stafford, 101 Cal. 32, 35 P. 429; San Joaquin Valley Bank v. Gate City Oil Co., 170 Cal. 250, 149 P. 557), but, where the record does not show that leave to amend was asked for (Butler v. Burt, 6 Cal. Unrep. Cas. 917, 68 P. 973; Duvall v. White, 46 Cal. App. 305, 189 P. 324), there is no abuse of discretion nor ground for reversal especially where the record shows that several attempts at amendment had been made. [Citing a number of cases.] Where an order sustaining a demurrer is silent as to leave to amend, judgment may nevertheless be affirmed (citing cases) nor will error be presumed where the record fails to show that leave to amend was asked for and refused." Citing Aalwyn v. Cobe, 168 Cal. 165, 142 P. 79. See, also, Stewart v. Douglass, 148 Cal. 511, 83 P. 699.

In Hansen v. Carr, 73 Cal. App. 511, 238 P. 1048, 1051, we find the following: "The granting of leave to amend after a demurrer is sustained is, of course, a matter resting primarily in the discretion of the trial court. The refusal to grant such permission will not be disturbed upon appeal in the absence of a showing of abuse of that discretion. Kleinclaus v. Dutard, 147 Cal. 245, 252, 81 P. 516; Stewart v. Douglass, supra. Where, therefore, the record fails to disclose that leave to amend was requested, and that the application was denied by the trial court, we must assume that no offer of an amendment was made, or otherwise we would be asked to hold that there was an abuse of discretion on the part of the trial court in denying something that was never sought until after the appeal was taken." (Citing a number of authorities.)

In Whyte v. City of Sacramento, 65 Cal. App. 534, 224 P. 1008, 1012, this court had before it the same question, and there said: "The privilege of amending, after trial of the issue of law raised by demurrer is not one of right, but one resting in the discretion of the trial court. * * * If the plaintiff desired again to amend, she should have applied to the court below, and if refused, exception should have been taken. It is too late to make the point for the first time in this court, when nothing appears on the record to show an abuse of discretion"—citing a number of cases.

We do not need to review the cases cited by appellant relative to amendments further than to state that an examination of them shows that they are readily distinguishable from the case at bar. There, in each case, the complaint was held to have stated a cause of action. Here, the complaint as filed and presented to us upon appeal is subject to a general demurrer as not stating facts sufficient to constitute a cause of action, for the reasons which we have hereinbefore set forth, which may be succinctly stated as follows: It does not appear that the plaintiff was not charged with being a co-respondent in an instrument in writing filed in the case of Irvine v. Irvine, nor does it appear that the imputation of being such is alleged to be untrue. The whole complaint is framed upon the theory of the insufficiency of the form of the charge, and not upon the untruthfulness of the substance thereof.

[12, 13] In addition to the authorities which we have cited showing the absolute insufficiency of such allegations, we may refer to 36 C. J. 1273, where the subject of immaterial inaccuracies is treated. That a false charge of being a co-respondent in a divorce action is libelous per se may be admitted, but the publication of a truthful report that such a charge has been made during the trial of an action is clearly within the protection afforded by subdivision 4 of section 47 of the Civil Code.

The judgments are affirmed.

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111 Cal. App. 688

LINDSAY-STRATHMORE IRR. DIST. v. WUTCHUMNA WATER CO. et al.

Civ. 114.

District Court of Appeal, Fourth District, California.

Feb. 11, 1931.

Rehearing Denied March 9, 1931. Hearing Denied by Supreme Court April 10, 1931.

1. Mandamus ⚷133.

Mandamus is proper remedy where stockholder in mutual water corporation is improperly denied proportionate share of water.

2. Waters and water courses ⚷252.

Mutual water company stockholder's right to water need not be appurtenant to particular lands (Civ. Code, § 324).

3. Constitutional law ⚷121(2).

Waters and water courses ⚷216.

Amendments permitting irrigation districts to acquire stock of water companies apply to irrigation districts organized prior to amendments and do not impair obligation of contract (St. 1897, p. 258, § 15, as amended by St. 1927, p. 23; Const. Cal. art. 4, § 31, as amended in 1926; Const. U. S. art. 1, § 10, and Amend. 14, § 1).

St. 1897, p. 258, § 15, as amended by St. 1927, p. 23, provided that irrigation districts could acquire and hold stock of corporations owning water and water rights, for the purpose of acquiring water and water rights and other property necessary for their uses. Const. Cal. art. 4, § 31, as amended in 1926, was a constitutional provision to the same effect preceding the enactment of the statute.

4. Constitutional law ⚷121(2).

Legislature, in enacting amendments or statutes relative to organization, powers, and administration of municipal or other public corporations, does not make contract with individuals embraced within corporation, within federal Constitution (Const. U. S. art. 1, § 10, and Amend. 14, § 1).

5. Waters and water courses ⚷228.

Powers of irrigation district, regarding management, are not limited to law existing when district is organized.

6. Waters and water courses ⚷228.

Irrigation district may construct irrigation system, buy existing water system, enlarge its system, and increase its assessments to acquire and operate such additions.

7. Constitutional law ⚷42.

Water company, without showing injury, could not complain that allowing irrigation district to hold stock in mutual water company impaired obligation of contract between landowners of district and district (St. 1897, p. 258, § 15, as amended by St. 1927, p. 23; Const. Cal. art. 4, § 31, as amended in 1926; Const. U. S. art. 1, § 10, and Amend. 14, § 1).

8. Mandamus ⚷133.

Mandamus to enforce rights of irrigation district as shareholder in mutual water company *held* properly granted, notwithstanding that when contract resulting in purchase of shares was entered into such purchase was not legal (St. 1919, p. 661; St. 1897, p. 258, § 15, as amended by St. 1927, p. 23; Const. Cal. art. 4, § 31, as amended in 1926).

> In December, 1924, irrigation district contracted to buy shares of the capital stock of certain mutual water companies; it being agreed that until such water rights were purchased the district should lease from seller the right to use the water at an agreed rental. St. 1897, p. 258, § 15, as amended by St. 1927, p. 23, and Const. Cal. art. 4, § 31, as amended in 1926, providing that irrigation districts could acquire stock in water companies, were not passed until after contract was executed; but St. 1919, p. 661, was in effect at the time, and expressly authorized an irrigation district to acquire water rights by lease. Only that part of the contract relating to the lease of the rights was carried out prior to the time the law was changed.

9. Waters and water courses ⚷252.

Articles of incorporation of mutual water company restricting use of water to land "owned or possessed" by stockholders did not exclude owners of land in irrigation district which was stockholder in water company.

> The amended articles of incorporation of the water company provided that no water of the company should be used on any other land than such as may at the time be "owned or possessed" by its stockholders. The irrigation district owned no land, but claimed the water rights on behalf of the owners of land in the irrigation district.
>
> [Ed. Note.—For other definitions of "Own" and "Possessed," see Words and Phrases.]

10. Waters and water courses ⚷224.

Irrigation district owning stock in water company has legal title to stock, but landowners within district are beneficial and equitable owners thereof.

11. Waters and water courses ⚷252.

Resolution of water company's board of directors restricting use of water so as to discriminate against irrigation district, a shareholder, *held* void as effecting discrimination.

> The resolution was adopted more than two months after the stock was issued to the irrigation district. The resolution restricted the use of the water of the mutual water company to certain land, but provided that such rule should not apply to the use of such water by stockholders on land on which the water was then used or had been used in the past which would deprive the irrigation district of its rights as a stockholder. Had the resolution been effective, it would have worked a complete change in the purpose for which the corporation was formed.

12. Corporations ⚷54.

Corporate by-laws must be reasonable.

13. Corporations ⚷54.

Corporate by-laws must operate equally upon all persons of same class.

14. Mandamus ⚷178.

Mandamus judgment in water rights dispute specifying proper proportion of water due irrigation district, *held* not void for uncertainty, although details of method of distributing water were omitted.

Appeal from Superior Court, Tulare County; Erwin W. Owen, Judge.

Mandamus by the Lindsay-Strathmore Irrigation District against the Wutchumna Water Company and another. Judgment for petitioner, and Wutchumna Water Company appeals.

Affirmed.

Walter M. Gleason, of Oakland, for appellant.

Sloss & Ackerman, of San Francisco, W. G. Irving, of Riverside, and Power, McFadzean & Crowe, of Visalia, for respondents.

BARNARD, P. J.

This is an appeal from an order and judgment of the superior court of Tulare county in a proceeding brought by the Lindsay-Strathmore Irrigation District, seeking the issuance of a writ of mandate to compel the Wutchumna Water Company to deliver to the petitioner, certain water from the main canal of said water company. It appears that the Kaweah river, shortly after it emerges from the foothills of the Sierra Nevada Mountains, divides into two channels at a point known as "McKay Point." Below that point the northerly channel is known as the St. Johns river and the southerly channel is known as the Kaweah river. Both of these channels run approximately parallel with each other in a general westerly direction, through the county of Tulare. These two channels traverse a large comparatively level delta area, comprising thousands of acres of land, which is known as the Kaweah Delta. The Wutchumna Water Company is a corporation of the type familiarly known as a mutual water company, although it is not strictly such a company, as its water is not appurtenant to any particular land. It was incorporated in 1872, its articles of incorporation beginning as follows: "We, the undersigned, being desirous of forming a corporation for the purpose of Agriculture and Irrigating and the construction and maintaining of ditches or canals to convey water to Visalia and other places in Tulare County, for the purpose of using the water conveyed therein, do hereby certify and declare as follows, viz.:"

The entire outstanding stock of this company is 91 shares, and its principal purpose is to distribute among its stockholders water diverted by it from the Kaweah river, pursuant to two distinct and long-standing rights of appropriation. By the first of these, a considerable portion of the flow of the Kaweah river is diverted into a large canal owned by the company and known as the Wutchumna ditch, which leads out of the northerly bank of the Kaweah river a short distance upstream from McKay point. This ditch runs in a westerly direction for several miles to a large storage reservoir, known as Bravo lake. Upon leaving this reservoir, said ditch flows in a southwesterly direction for about seven miles, when it crosses the St. Johns river and then continues in a westerly direction for approximately ten miles. The lands of the company's stockholders are scattered along the entire course of the ditch and are served by laterals and side ditches from the main canal. A short distance downstream from the point where this ditch crosses the St. Johns river, the company has a second diversion, known as Barton cut, where water is taken from the St. Johns river and added to the water flowing in the ditch just described. About a mile and a half southwesterly from Bravo lake and about six miles northeasterly from Barton cut is a point in the Wutchumna ditch, known as "Lee Drop."

The Lindsay-Strathmore Irrigation District is, and since 1915 has been, an irrigation district organized under the Irrigation District Act of California (St. 1897, p. 254), and amendments thereto. The district, which is entirely within the county of Tulare, embraces an area of about 16,000 acres, 9,000 acres thereof being planted to permanent crops, such as "oranges, citrus trees and deciduous fruit," which require irrigation during the irrigating season. Not having sufficient water to irrigate the land already in cultivation, and also for the purposes of securing additional water for the irrigation of lands within its boundaries, in December, 1924, the district made a contract with one H. R. Huebert whereby Huebert agreed to buy shares of the capital stock of certain mutual water companies, including the Wutchumna Ditch Company, and to sell and convey to the district the water and water rights represented by said shares. It was further agreed that until such water and water rights were purchased from Huebert by the district, the district should lease from him the right to use this water at an agreed rental, including the payment of all sums that Huebert should be required to pay as assessments to the several water companies. Pursuant to this agreement, Huebert acquired 18⅓ shares of stock in the Wutchumna Water Company. The purchase price of these shares was $93,921.96, and the irrigation district also paid to the water company $12,084.60 in assessments thereon. Since June 1, 1928, 16.33 shares of this stock have been issued in the name of the Lindsay-Strathmore Irrigation District. In order to receive its proportion of the water diverted from the Kaweah river by the water company, the irrigation district, at an expense of $62,000, constructed a pipe line and conduit from a point near Lee Drop to a tract of land owned by the district, known as the Rancho de Kaweah. While this construction work was under way, the Wutchumna Water Company on October 6, 1928, served upon the district a written notice stating that it was the established policy of the company "that none of its waters shall be diverted for non-riparian uses," and that it was not the intention of the water company to permit the district to divert any water from their ditches for use on nonriparian lands and any efforts to so divert water would be resisted to the utmost. On November 20, 1928, the district served on the water company a written demand that it deliver to the district at the point known as Lee Drop, 16.33/91sts of the water diverted by it from the Kaweah river, and that it construct a suitable headgate at the expense of the district for the diversion of such water.

On December 3, 1928, the irrigation district commenced this proceeding, seeking a writ of mandate to enforce its right to receive its proportion of water as a stockholder in the Wutchumna Water Company. Certain lower riparian owners asked permission to intervene in the action, in opposition to the claims of the district, and permission being denied, have taken another appeal, which is now pending. After a trial, judgment was entered declaring the irrigation district to be the owner of 16.33 shares of stock in the water company, and as such stockholder, entitled to receive at Lee Drop, $^{16.33}/_{91}$sts of the water flowing in the main canal from time to time. From this judgment, this appeal is taken.

[1] Mandamus is a proper remedy where a stockholder in such a corporation as the Wutchumna Water Company is improperly denied its proportionate share of water. Miller v. Imperial Water Co., 156 Cal. 27, 103 P. 227, 228, 24 L. R. A. (N. S.) 372. In that case the court said: "We have the case of a member of a corporation who is improperly precluded by the corporation from participating in the only practical right resulting from such membership, that of having water available for the purpose furnished at cost upon his land, in proportion to the amount of stock held by him. He is seeking to enforce a plain right based entirely upon his membership in a mutual water company, deprivation of which right would practically exclude him for the time from all privileges of membership, in a case where it must be held under the decisions, there is not a plain, speedy, and adequate remedy, in the ordinary course of law. It is one of the well-recognized offices of the remedy by mandamus to enforce the plain rights of stockholders or members of corporations in the absence of any other adequate remedy. * * * In the case at bar, the stockholder's right to have water furnished on his land is not based on any special contract entered into by him with the corporation, but is an inseparable adjunct of his membership, and it is a plain duty resting on the corporation in the exercise of its corporate functions to furnish him such water."

The right of a stockholder in such a corporation as the appellant is clearly described in the following quotation from 2 Weil on Water Rights (3d Ed.) § 1266: "Mutual companies are usually such that shares of stock represent rights to specific quantities of water, and the stockholder's right to a supply rests upon his stock and not upon his status as a member of the public, the company being formed to supply water to its stockholders only."

[2] Such rights are well recognized in California. Barton v. Riverside Water Co., 155 Cal. 509, 101 P. 790, 23 L. R. A. (N. S.) 331; Thayer v. California Development Co., 164 Cal. 117, 128 P. 21. While such a stockholder's right to water may be made appurtenant to certain lands (Civ. Code, § 324), not only is this not essential (Bank of Visalia v. Smith, 146 Cal. 398, 81 P. 542), but in the instant case, appellant concedes in its brief that the water it is diverting "is not appurtenant to any particular land."

[3-8] The appellant makes a general argument that for a number of reasons the respondent is not entitled to a writ of mandate, and then more specifically argues that the particular judgment entered in this case is void. It is first contended that the respondent is not a stockholder in the appellant corporation. On November 2, 1926, the following provision was added to section 31 of article 4 of the Constitution of this state: "Provided, further, that irrigation districts for the purpose of acquiring water and water rights and other property necessary for their uses and purposes, may acquire and hold the stock of corporations, domestic or foreign, owning waters, water rights, canals, waterworks, franchises or concessions subject to the same obligations and liabilities as are imposed by law upon all other stockholders in such corporations."

Thereafter, the Irrigation District Act (section 15) was amended to permit irrigation districts to acquire such stock (Stats. 1927, p. 23). Appellant contends that these amendments do not apply to any irrigation district organized prior thereto, because if they were construed to apply to such prior existing districts, they would be repugnant to section 10, article 1, and to section 1 of Amendment 14 of the Constitution of the United States, as impairing the obligation of a contract. Reliance is placed upon the case of Merchants' Bank v. Escondido Irr. Dist., 144 Cal. 329, 77 P. 937. In that case, the court was considering an amendment to section 17 of the Wright Act which attempted to give to the board of directors of an irrigation district, power to hypothecate all of the property of the district as additional security for bonds to be issued. Because the legal title only of such property is vested in the district and this legal title is held in trust for the landowners, who are the real beneficial owners of the property, it was held that the Legislature could not authorize the directors of a district to thus dispose of that property, without impairing the constitutional rights of the landowners. However, in referring to the case just mentioned, the Supreme Court in the later case of La Mesa, etc., Irr. Dist. v. Halley, 197 Cal. 50, 239 P. 719, 723, used the following language: "While the conclusion was, we think, correct as applied to the facts of that particular case, it is being attempted by the respondents herein to give to its language an application far beyond the intendment of the court in that decision. It was not our intention in that case to hold that, as to the general powers of irrigation districts, or as to the methods of their management and conduct, or as to the method or manner of issuing bonds for the purpose of carrying on the work of said districts or fulfilling the purposes of their organization, such districts were to be limited or the people or property owners within the same confined to the precise terms of the statutes in force at the time of the organization thereof. Indeed, in later cases, and with respect to public agencies and utilities of the same general character as irrigation districts, the courts of this state have laid down a different rule."

Appellant contends that the La Mesa Case merely distinguishes between public rights and private rights, and that where private rights are involved, any such amendment impairs the obligation of a contract. It is argued that this constitutional provision against impairing the obligation of a contract had the effect of protecting the landowners in the respondent district from the obligations and liabilities which ownership of stock in such a corporation as the Wutchumna Water Company might impose upon them; and that, therefore, the amendments here in question, if construed to apply to irrigation districts established prior to their enactment, would be void. We are unable to agree with this contention. The amendments we are considering do not affect any vested rights, and go no farther than to enlarge the powers of irrigation districts along the line of one of the most important purposes of such a district, which is, to secure an adequate supply of water. Not only is the Legislature, in enacting amendments or statutes relative to the organization, powers, and administration of municipal or other public corporations, exercising powers of government and not making a contract with the individuals embraced within the territory covered by such a corporation (La Mesa, etc., Irr. Dist. v. Halley, supra), but this particular change in the law affected only the management of an irrigation district and the manner in which it might carry out the purposes for which it was organized. In such matters, an irrigation district is not limited to the law existing at the time the district is organized. The argument that this particular amendment might result in an increased expense to a landowner in the district over that contemplated when the district was formed, is by no means conclusive. It is well settled that an irrigation district has the power to construct an irrigation system, to buy an existing water system, or in various ways to enlarge its system, and to increase its assessments for the purpose of acquiring and operating such additions. More adequate service may well result in increased expense. To permit an irrigation district to acquire increased facilities through the purchase of stock in water companies, the equivalent of purchasing additional water rights or water systems, is no different in principle. Nor do we find any warrant in the authorities for the proposition that in thus dealing with one of the state's political subdivisions, a statutory amendment enlarging or limiting the powers of such a subdivision, is intended to apply only to subdivisions thereafter created, in the absence of a direct provision to that effect. A further consideration is that, in any event, no obligation of any contract with the appellant has been impaired, and in the absence of a showing of injury on its part, it may not be heard. Hooker v. Burr, 137 Cal. 663, 70 P. 778, 99 Am. St. Rep. 17; Hooker v. Burr, 194 U. S. 415, 24 S. Ct. 706, 48 L. Ed. 1046; Scheerer & Co. v. Deming, 154 Cal. 138, 97 P. 155. In this connection, appellant further argues that at the time the original contract was made by the irrigation district with H. R. Huebert, as above referred to, it was illegal for the district to acquire stock in the appellant company; and that this contract was such a fraud upon the landowners in the district that, under the familiar rule that a court will not issue a writ of mandate to assist in carrying out an illegal purpose, the writ must be denied—citing 38 Cor. Jur. 556; 16 Cal. Jur. 769. At the time this contract was entered into, section 15 of the Irrigation District Act expressly authorized such a district to acquire water rights by lease (Stats. 1919, p. 661). That portion of this contract was then legal, and that was the only part carried out prior to the time the law was changed. Conceding that such a writ of mandate as is here prayed for would not have been issued prior to the change in the law, it fully appears that at the time this writ was applied for, the acts sought to be coerced were not forbidden by law, and that they did not tend to aid an unlawful purpose.

[9, 10] The appellant next urges that the respondent irrigation district intends to furnish the water claimed to various landowners within the district, and that the district does not itself own or possess the lands on which the water claimed is to be used. It therefore justifies its refusal to furnish water to respondent by a clause in its amended articles of incorporation, which reads as follows: "No water of this company shall be used on any other land than such as may at the time be owned or possessed by its stockholders, or one or more of them. * * *"

The articles of incorporation of appellant were amended in February, 1914, by eliminating all reference in the original articles to "selling" water, and by adding a provision relative to furnishing water to its stockholders, which included the clause above quoted with a further provision, the whole of this part reading as follows: "* * * Provided, however, that no water of this company shall be used on any other land than such as may at the time be owned or possessed by its stockholders, or one or more of them, and provided further, that this corporation shall not use such water or its property as a public utility company, but solely for the use and benefit of its stockholders for the irrigation of their respective lands, and for watering their stock, domestic uses and other useful purposes for their benefit as a private use."

It seemes clear that these changes were made for the purpose of rendering it less likely that the corporation would be placed under the restrictions of the Public Utilities Act and subject to the regulation of the railroad commission. All of the changes are so worded as to make it clear that the corporation is merely distributing water to its stockholders, and is not in the business of selling water to the public. Not only is it apparent that this proviso was put into the amended articles for a purpose other than for the strict interpretation attributed to it by the appellant, but the words used, "owned or possessed," should be liberally construed. These words indicate no more than a limiting of the obligation to furnish water to those entitled to it through ownership of stock in the company, rather than an obligation to furnish water to the general public. It would be unreasonable to hold that they apply, in a highly technical sense, to land owned by the party holding the stock, rather than to land owned or possessed by the party who really owns such stock and who is entitled to the rights and benefits represented thereby. If a landowner entitled to a certain proportion of the water distributed by appellant should borrow money, giving a deed of trust upon his land as security therefor, and as further security should transfer his stock in appellant corporation to the trustee, it could hardly be held that he would be no longer entitled to receive the water represented by the stock. The same thing would apply if a minor should happen to own land entitled to such water, but the stock should actually stand in the name of his guardian. As was said by the Supreme Court in the case of Miller v. Imperial Water Co., 156 Cal. 27, 103 P. 227, 229, 24 L. R. A. (N. S.) 372: "The terms 'owning,' 'owner,' and 'owned' depend somewhat for their signification upon the connection in which they are used. They are not technical, but general terms, and are therefore liberally construed; 'the precise meaning depending upon the nature of the subject-matter and the connection in which' they are used."

While the legal title to the stock here in question rests in the respondent irrigation district, the beneficial and equitable owners thereof are the landowners within that district, whose funds have purchased the stock. Merchants' Bank v. Escondido Irr. Dist., supra; Tulare Irrigation District v. Collins, 154 Cal. 440, 97 P. 1124; Hall v. Superior Court, 198 Cal. 373, 245 P. 814; California Irrigation District Act, § 29. In distributing the water to the landowners within its boundaries, the respondent will be applying the water upon lands owned by the real owners of the stock in question. Under these circumstances, we think that such lands are owned or possessed by the "stockholders" of appellant "or one or more of them," within the meaning of the clause referred to.

[11-13] Appellant's main contention, in connection with its claim that the respondent is not entitled to any writ of mandate, is that, notwithstanding any stock it may own in the appellant corporation, the respondent is prohibited by a resolution adopted by appellant's board of directors from receiving any of the water claimed, since the respondent intends to put such water to a use prohibited thereby. This resolution was adopted on August 4, 1928, more than two months after the stock in question was issued to respondent by the appellant. This resolution recites that whereas, under the by-laws of the company, the board has the right to make rules and regulations governing the use of the water furnished, and whereas, it has been the long established policy of the company that the water it takes from the Kaweah and St. Johns rivers shall be used only on lands in the Kaweah delta or lands within the watershed of said rivers, it is therefore resolved that from and after this date, none of the water controlled by the company may or shall be used for any purpose whatever on any land situated outside of the Kaweah delta and not within the watershed of the St. Johns or Kaweah rivers. It is then further resolved that this rule shall not apply to the use of such water by a stockholder on any land on which such water is now being used, or on which at any time in the past, a present stockholder shall have used said water; and shall apply only to lands which have never been theretofore supplied with such water or on which a present stockholder has not in the past used said water.

Not only is there no evidence in the record to show that the lands within the respondent district are outside of the Kaweah delta and not within the watershed of the St. Johns or Kaweah rivers, but such evidence would not be conclusive, if it existed. Another phase of the controversy between the parties to this action was before the Supreme Court in the case of Consol. Peoples D. Co. v. Foothill D. Co., 205 Cal. 54, 269 P. 915. That case refers to shares of stock purchased by this respondent in several corporations, including this appellant, and the court there points out that this appellant is not a corporation organized for the purpose of furnishing water only to a particular district. The question then arises whether a change to such a purpose was accomplished by this resolution of the board of directors passed on August 4, 1928. It is appellant's theory that this board had authority to pass such a resolution because of the general powers in regard to the management of appellant's business, which was vested in the board by the by-laws of the corporation. The pertinent parts of these by-laws as they had existed for more than twenty years prior to the adoption of this resolution read as follows:

"Article V.—Powers of Directors. The Board of Directors shall have power to do all things which this corporation is empowered to do by law and to make all rules and regulations which they deem necessary for the government of this Company, and the use of its waters and ditches not inconsistent with the laws of the State of California * * *"

"Article VI.—Duties of Directors. It shall be the duty of the Board of Directors * * * to direct and provide means for distribution of waters, and to regulate and control the same and all canals, ditches and headgates belonging to this Company. * * *"

During all of that twenty years, article VII of these by-laws provided for the appointment of a general superintendent and then provided as follows: "It shall be the duty of said superintendent to take charge of and care for all the ditches, canals and structures and headgates of this Company, and to attend to all diversion of waters and the distribution thereof * * * and to turn out into the side ditch or ditches of the respective stockholders such portion of the waters flowing in the main canal of this Company as the number of shares of capital stock owned or leased by such stockholder bears a ratio to the whole number of shares of capital stock issued by this Company, unless otherwise directed by said Board, and to do all things in his power to promote the equitable distribution of the waters flowing through said main canal, among said stockholders."

The resolution of August 4, 1928, attempting to limit the use of water furnished to a certain area, if valid, works a complete change from the purpose for which the corporation was formed. Neither the original articles of incorporation, the amended article, nor the by-laws as they existed for more than twenty years, disclose any such purpose. While the by-laws conferred on the board of directors authority to make rules and regulations for the government of the company and the use of its waters, this authority is subject to general laws governing corporations, and it was beyond the power of the board to make arbitrary discriminations between different stockholders, or to so change its rules as to take away the beneficial interest of one stockholder by a new regulation which did not affect all other stockholders. While a corporation could have been organized for the purpose expressed in the resolution, as pointed out in Consol. Peoples D. Co. v. Foothill D. Co., supra, this corporation is not one of that kind. Moreover, as shown by the evidence and as indicated in this resolution itself, the practice of the corporation had been to the contrary. The uncontradicted evidence shows that more than one-third of such waters had for many years been used on lands which were not within the watershed named, and the resolution itself provided as follows: "Be it further resolved, that this said rule and regulation shall not apply to or govern the use of waters of this Company by a stockholder of this Company on any land or lands on which waters from the ditches of this Company is now being used in irrigation season, or, on which, at any time in the past, said present stockholders have used said waters, and shall apply only to lands which have never been supplied heretofore by the Wutchumna ditch or ditches or on which a present stockholder of this Company has not in the past used said waters."

Not only is a different previous policy here admitted, but a discrimination is thus made between a stockholder who at some previous time used water in a certain manner, or one now using it that way, and another stockholder, who, relying on the articles of incorporation and the by-laws and conditions as they always have existed, has purchased stock and at great expense made preparation to use the water in the same manner. Not only must by-laws be reasonable (2 Thomp. Corp. [3d Ed.] §§ 1099, 1100 and 1103; 14 C. J. 368), but they must also operate equally upon all persons of the same class (2 Thomp. Corp. [3d Ed.] § 1104; 14 C. J. 366). It would appear that the resolution in question was adopted by the board of directors for the sole purpose of excluding this respondent from the enjoyment of the rights represented by the stock already acquired, but whether or not this is true, the resolution is void so far as it attempts to interfere with the right of respondent to receive the proportion of water to which it was entitled by virtue of its shares of stock in the appellant corporation.

[14] In addition to its various arguments why respondent is not entitled to any writ of mandate, appellant directs its main attack against the judgment that was entered in this case, upon the ground that it is void for uncertainty. The vital portion of this judgment, as set forth by appellant, is as follows: "That said petitioner, Lindsay-Strathmore Irrigation District, as owner of said shares of said capital stock, is entitled to receive of and from said respondents Wutchumna Water Company and James B. Rivers, and to have delivered to it by them * * * into its * * * conduit leading from a point on the main canal of said respondent Wutchumna Water Company known as Lee Drop, situate in Section 2 in Township 18 South, Range 26 East * * * and that said petitioners do have and receive of and from said respondents, from time to time, and that said respondents deliver to said petitioner at said Lee Drop, 16.33 ninety-firsts (16.33/91sts) of all of the water from time to time flowing in the main canal of the said respondent, Wutchumna Water Company."

Appellant relies particularly upon two cases. In Wallace v. Farmers' Ditch Co., 130 Cal. 578, 62 P. 1078, a case involving a diversion from the Kaweah river, the court held that the judgment was invalid for uncertainty. In effect, the court held that it was impossible to tell from the findings or judgment how much each party was to get, and that no facts had been found which would enable the share of the respective parties to be computed. Also, in the case of Riverside Water Co. v. Sargent, 112 Cal. 230, 44 P. 560, a case involving the rights of two appropriators of water, the court found that the plaintiff was entitled to take all of the water, except what the defendant was entitled to take. And, further, that the defendant had theretofore diverted all of the water that a certain ditch would carry, during the irrigation season. Obviously, this was too uncertain and the court held that the lower court had neither fixed the quantity, nor had found facts giving the data from which the quantity could be calculated. Appellant further cites 14 Cal. Jur. 954, as follows: "A judgment or decree must be sufficiently definite and certain that it may be enforced and constitute an estoppel between the parties. It should contain a definite statement of the rights of the parties or a definite means of ascertaining them."

After stating this rule, California Jurisprudence continues as follows: "In a water rights suit involving the rights of several parties, the judgment should fix their respective rights as to quantity, time and manner of use, as definitely as the circumstances and conditions permit." Appellant then argues that the requirement of certainty and definiteness is especially necessary in mandamus cases, quoting the following from 16 Cal. Jur. 877: "The judgment, as well as the preliminary demand, should be for specific and certain relief, such as clearly defines the rights of the plaintiff, and distinctly fixes the obligation imposed upon the defendant."

In this same paragraph, this authority goes on to set forth the rule that where the duty sought to be compelled is defined by a particular statute, the rights of the petitioner are measured by such statute, and in case the statute specifies that officers shall have some discretion as to the method of carrying out the acts enjoined upon them, the judgment should merely direct the officers to perform the acts in accordance with the provisions of the law, and should not specify in what manner the acts are to be done. We think a similar rule applies in the instant case, and that since the board of directors of appellant had a discretion as to the method and manner of distributing water to the various stockholders of the corporation, the trial court was correct in not specifying the exact manner in which the water to which respondent is entitled should be delivered, but in merely directing that respondent's proper proportion of the water, as represented by its stock in the corporation, should be delivered to it. The court correctly left the details of the manner and method of distribution to the discretion of the directors, which, of necessity, must be exercised by this board, in accordance with the general rules of law.

Section 2 of article VII of appellant's by-laws made it the duty of the superintendent "to turn out into the side ditch or ditches of the respective stockholders, such portion of the water flowing in the main canal of this company as the number of shares of capital stock owned or leased by such stockholders bears a ratio to the whole number of shares of capital stock issued by this company." The judgment and writ of mandate in this case merely declared the right of the petitioner in accordance with that provision. The language of the judgment closely corresponds to the language of the by-laws and no reason appears why any more difficulty should be experienced now, in understanding the meaning thereof, than has existed in distributing water in accordance with this provision of the by-laws during the past two years. It will be noted that the portion of the judgment complained of merely orders that the respondent shall receive its proportionate share of the water flowing in the main canal, and specifies it is to be taken out at Lee Drop. This point is on the main canal, and it sufficiently appears that the water to be apportioned is the water that flows by that point. The discretion of the board of directors as to when the water shall be taken from the river, how long it shall be stored in Bravo lake, and when and in what amount it shall be allowed to flow past Lee Drop, is in no manner interfered with. The judgment is certain and definite as to the particular portion which respondent is entitled to receive, but it is so worded, in providing that respondent shall receive a certain proportion of all the water that from time to time passes this point, that it does not require that it shall receive its proportion continuously, as the water flows past that point, but under the double "time to time" provision it even permits the directors of the corporation, in their discretion, to rotate the water between several stockholders, providing only that respondent receive its just share; although of course this discretion on the part of the board would still be subject to the provisions of article VII of the by-laws and to the general law, which require that any such rotation be conducted on an equitable basis. Appellant argues that the phrase "all the water" might refer to water in the Wutchumna ditch which had not been diverted by the appellant, but which belonged to other parties. Not only is there no evidence of any water in this ditch not diverted by appellant, and all of the evidence points to the fact that there is no such other water, but the judgment sufficiently shows that it refers only to the water to which respondent is entitled by virtue of its ownership of shares of stock in the appellant corporation; and therefore that it applies only to such water as has been diverted by appellant for the purpose of distribution among its stockholders, in accordance with the purpose for which it was organized. The judgment herein, in referring to "all the water," means exactly what section 2 of by-law VII means in saying that each stockholder shall receive his proportion of "the waters." Appellant argues that the phrase "from time to time" leaves an uncertainty as to whether the water must be delivered continuously at Lee Drop at all times when water is flowing in the ditch, or whether it can be delivered intermittently, in accordance with a system of rotation. As we have already pointed out, the double use of this phrase clearly indicates that the judgment provides that the respondent shall receive its just share of water equitably with other stockholders, but that the details of distribution, particularly the matter of storage and proper rotation, is left to the discretion of the board of directors, which is as it should be.

Appellant also objects to the phrase "flowing in the main canal"; it being contended that the part of appellant's main ditch which is below and receives water from Barton Cut might also be considered a part of the "main canal," and that the judgment leaves it uncertain whether the proportion of water directed to be delivered to respondent at Lee Drop includes water diverted from the St. Johns river through Barton Cut, or whether it applies only to water taken from the Kaweah river through the first diversion and brought through Bravo lake. And, further, that it is uncertain as to whether or not various possible seepages above and below Lee Drop shall be taken into consideration. Irrespective of whether or not the respondent had an additional right to its proportion of water diverted by the appellant through Barton Cut, which is some miles below Lee Drop, the point where respondent's side ditch approaches appellant's main canal, we think this judgment is sufficiently clear and definite to show that it applies only to the water in appellant's main canal flowing past Lee Drop, and that it only provides that respondent shall receive its proportion of the total amount of water that flows by that point. We know of no rule of law under which respondent could be prohibited from claiming and receiving its rights as a stockholder to water taken under one diversion from a river, by the fact that it might also have additional rights, as a stockholder, to water from another diversion lower down on the same river. Not only is it not to be presumed that the court intended, by this judgment, to provide for an exchange whereby respondent, in lieu of any right it might have to water from the lower diversion, might take additional water from the upper diversion, but the "main canal" referred to is sufficiently identified by the reference to "Lee Drop." We conclude that the portion of the judgment complained of is sufficiently definite and certain to cover the purpose intended, which is, to secure for respondent that right as a stockholder which it had made preparation to receive, and that it does this without interfering with such details of management as are in the discretion of the board of directors of appellant, and that in an action involving water rights, as suggested by the rule we have quoted from California Jurisprudence, this is as definite as the circumstances and conditions permit.

While appellant raises another point, that the evidence does not support the judgment, its argument thereon goes entirely to suggested ways in which it considers the judgment uncertain, and the views we have expressed render a further consideration of the point unnecessary.

In addition to asserted errors of law which have already been covered in other connections, appellant contends that the refusal of the trial court to permit certain lower riparian owners to file a complaint in intervention in this action constitutes an error of law as against this appellant. The proposed intervention was based upon the claim that such lower owners, who claimed to be riparian to the St. Johns river, were entitled to benefits coming from an increase in the flow of said river caused by seepage from the Wutchumna ditch, below Lee Drop, into the river. It is appellant's theory that the proposed interveners were necessary parties to this action. A separate appeal from the order refusing permission to intervene was submitted with the appeal we are now considering, an opinion in which is being separately filed. If the conclusion we have reached in that appeal, to the effect that permission to intervene was properly denied, is correct, the point here raised is disposed of.

The order and judgment of the trial court are affirmed.

We concur: MARKS, J.; JENNINGS, J.

111 Cal. App. 707

LINDSAY-STRATHMORE IRR. DIST. v. WUTCHUMNA WATER CO. et al. (CUTLER et al., Interveners).

Civ. 113.

District Court of Appeal, Fourth District, California.

Feb. 11, 1931.

Rehearing Denied March 9, 1931. Hearing Denied by Supreme Court April 10, 1931.

1. Mandamus ⚷153.

In action to enforce rights of irrigation district as stockholder in water company, intervention of lower riparian owners, upon ground that if district obtained water rights it would use them in manner injurious to lower riparian owners, *held* properly refused (Code Civ. Proc. § 387).

Intervention was properly refused, since interveners were not "interested" in the controversy within meaning of Code Civ. Proc. § 387, providing that at any time before trial, any person having an "interest" in the matter in litigation, or in the success of either of the parties, or an interest against both, may intervene.

[Ed. Note.—For other definitions of "Interested," see Words and Phrases.]

2. Parties ⚷48.

Interveners are not permitted to enlarge scope of action (Code Civ. Proc. § 387).

3. Waters and water courses ⚷252.

In action to enforce rights of irrigation district as stockholder in water company, intervention which would add general issue as to title to certain water, not involved in action, *held* properly refused (Code Civ. Proc. § 387).

Appeal from Superior Court, Tulare County; Erwin W. Owen, Judge.

Mandamus by the Lindsay-Strathmore Irrigation District against the Wutchumna Water Company and another, in which A. R. Cutler and another seek to intervene. From an order refusing to permit the complaint in intervention to be filed, A. R. Cutler and another appeal.

Affirmed.

Walter M. Gleason, of Oakland, for appellants.

Sloss & Ackerman, of San Francisco, W. G. Irving, of Riverside, and Power & McFadzean, of Visalia, for respondent.

BARNARD, P. J.

The Lindsay-Strathmore Irrigation District filed an action in the superior court of Tulare county against the Wutchumna Water Company and James B. Rivers, seeking a writ of mandate to compel the delivery of certain water to which the irrigation district claimed to be entitled as a stockholder in the water company. The water company diverts a considerable portion of the water of the Kaweah river into what is known as the Wutchumna ditch, which runs in a general westerly direction. A short distance below the point of that diversion the Kaweah river divides into two channels, the northerly one being known as the St. Johns river, and the southerly one continuing as the Kaweah river. The St. Johns river flows in a westerly direction approximately parallel with the Wutchumna ditch, and only a short distance south of it. The complaint in this action alleges that the irrigation district is the owner of 16.33 shares of the capital stock of the water company, and that as such owner it is entitled to 16.33/91sts of all of the water from time to time flowing in the canal of said company; that it has constructed a side ditch for the purpose of receiving its share of such water, but that the water company refuses to deliver the same, and a writ of mandate is prayed for.

The Wutchumna Water Company filed its answer in this proceeding, and on the same day A. R. Cutler and L. E. Depew asked permission to be allowed to intervene in the action and filed their proposed complaint in intervention. These proposed interveners are the owners of certain lands which they claim are riparian to the St. Johns river, and which are situated between that river and the Wutchumna ditch, and below the point where the side ditch constructed by the petitioner approaches the main canal. Their proposed complaint in intervention alleges that they require the full flow of water of the St. Johns river for the irrigation of their lands; that the Wutchumna Water Company, by reason of long-standing water rights, diverts a portion of the water flowing in the Kaweah river and its branches; that when water is flowing in the Wutchumna ditch, the amount of water flowing in the St. Johns river past the lands of interveners is and has been increased by water seeping from said canal; that the irrigation district intends to take any water it may obtain as a stockholder in the water company out of the Wutchumna ditch at a point known as Lee Drop, about four miles upstream and easterly from the lands of the interveners; that if the district is permitted to take water from this ditch at said point, the quantity of water flowing in the ditch at lower points will be greatly reduced, and the seepage therefrom entering the St. Johns river will be greatly diminished, thus resulting in a diminished flow in the St. Johns river past the land of interveners; and that if the court should order the water company to deliver water to the irrigation district, such order would require the water company to violate and ignore the rights of the interveners. The prayer is that the irrigation district be enjoined and restrained from taking any water from the Wutchumna ditch above the lands of the interveners.

The trial court refused to permit the complaint in intervention to be filed, and from this order the proposed interveners have appealed. The sole question here presented is whether or not the appellants had such an interest in the controversy pending in the lower court as would entitle them to intervene therein.

[1-3] It fully appears that the original complaint herein was filed for the purpose of enforcing the rights of the irrigation district as a stockholder in the water company. It also appears that the appellants do not allege any interest in the shares of stock of the water company, but they seek to prevent an injury to their rights which they consider probable, if the water company should recognize and accord to the irrigation district its right as a stockholder. In other words, while the appellants are not directly interested in whether or not the irrigation district is fairly treated as a stockholder in the water company, they are seeking to enjoin the district from receiving its rights as such a stockholder, because of the manner in which it may use those rights when secured. Without considering the ultimate merits of the claims of appellants, we think they were properly excluded from this action.

Section 387 of the Code of Civil Procedure reads in part as follows: "At any time before trial, any person, who has an interest in the matter in litigation, or in the success of either of the parties, or an interest against both, may intervene in the action or proceeding."

It has been held that the interest which will permit an intervention must be of such a direct and immediate nature that the intervener will either gain or lose by the direct legal operation and effect of the judgment. In Horn v. Volcano Water Co., 13 Cal. 62, 73 Am. Dec. 569, the court said: "The interest mentioned in the statute, which entitles a person to intervene in a suit between other parties, must be in the matter in litigation, and of such a direct and immediate character that the intervenor will either gain or lose by the direct legal operation and effect of the judgment. * * * To authorize an intervention, therefore, the interest must be that created by a claim to the demand, or some part thereof, in suit, or a claim to, or lien upon, the property, or some part thereof, which is the subject of litigation."

In addition to other considerations, it may be said that the direct effect of such a judgment as is prayed for in the original complaint in this action would be to provide for the delivery of any water to which petitioner may be found entitled, at the point known as Lee Drop. This lies above the St. Johns river and exactly where the defendant's ditch has always been located, and any seepage therefrom would continue to enhance the flow of St. Johns river, so that appellants would neither gain nor lose by the entry of any such judgment. It seems apparent that if appellants are to be affected at all, it will be not by the direct operation of the judgment, but by an indirect effect thereof, namely, in the manner in which it is feared the irrigation district will later make use of such rights as a stockholder as it secures through the judgment. We think the matter here in litigation is not the water itself, and not directly the right to take water away from a particular area, but it is the right of a stockholder to secure its rights as such, and to receive the benefits of its stock. The appellants are not interested in that matter, but the interest which they seek to set up through allegations of threatened injury in their proposed complaint is consequential, and not direct. In La Mesa, etc., Irr. Dist. v. Halley, 195 Cal. 739, 235 P. 999, 1000, the court says: "The interest in the matter in litigation, as contemplated by the Code section, must be of such a direct and immediate character that the intervener will either gain or lose by the direct legal operation and effect of the judgment. Elliott v. Superior Court, 168 Cal. 734, 145 P. 101. The interest must be direct, and not consequential, and must be such an interest as is proper to be determined in the proceeding in which the intervention is sought. Isaacs v. Jones, 121 Cal. 257, 53 P. 793, 1101. The matter in litigation in the pending proceeding is whether or not the respondents have refused, without legal justification, to do that which the law specifically requires them to do, as duties resulting from their respective offices. Section 1085, Code Civ. Proc. The court in said proceeding is not concerned with the necessity or the propriety of authorizing or issuing said bonds. Those questions are for the determination of the officers and electors of the district. Assuming that mandamus is the proper remedy, we are then only concerned with the propriety of the refusal of the president and secretary to sign and attest the bonds as required by law. It is difficult to see how the petitioning interveners can gain or lose by any judgment which may be entered in that proceeding. If the writ be granted, the enforcement of the judgment would not directly affect their property interests. The bonds, when signed and attested, would not be a lien on their property, although, if thereafter sold, they may lead to the creation of a lien. Drumhiller v. Wright, 64 Cal. App. 498, 222 P. 166. Nor would compliance with the writ, if issued, create a cloud upon their title. If the respondents sign and attest the bonds they must be sold before the lands of the proposed interveners may be taxed to pay the principal and interest thereof. The sale will be contingent on obtaining a proper price after advertising for bids. The bonds may never be sold. The present plans for the acquisition of an additional water supply and a distributing system may be abandoned. It is clear that the interest of the petitioning interveners is remote and contingent and not of the direct and immediate character required by law. Elliott v. Superior Court, supra."

The matter here in litigation is whether or not the directors of the water company "have refused, without legal justification, to do that which the law specifically requires them to do." The real issue in this action is not whether the irrigation district has a right to take water out of a certain area. Perhaps many things, not involved in this case, would prevent such taking. The real issue in this action is whether the irrigation district has such a right as between it and the water company; that is, whether the board of directors have the right to prevent such taking by refusing to accord to the district its right as a stockholder. The right the petitioner claims as against the water company and its directors is not set up in the action as against any outsiders. The situation is somewhat similar to the one that obtained in the case of San Joaquin, etc., Irr. Co. v. Stevinson, 164 Cal. 221, 128 P. 924, 930. In that case the court said: "The action was not a suit in equity to determine the title to the water, generally, or one in which a general adjudication of such title could be made. It was a special proceeding for a particular purpose, namely, to condemn the Stevinson right for the benefit of the plaintiff as the purveyor of the public use. In such a controversy, third persons not interested in the land in subordination to or in common with the person whose right was sought to be taken, but claiming adversely, have no right to intervene under section 387 of the Code of Civil Procedure."

It is a general rule that interveners are not to be permitted to enlarge the scope of the action. McNeil v. Morgan, 157 Cal. 373, 108 P. 69; Wright v. Jordan, 192 Cal. 704, 221 P. 915; La Mesa, etc., Irr. Dist. v. Halley, supra. The proposed complaint in intervention, if allowed to be filed, would enlarge the scope of this action by adding to the domestic issue as to the right of a stockholder in a corporation, a general issue as to the title to certain water, and even this added issue is based upon what the stockholder might later do with the benefits accruing from its rights as such stockholder, if secured, while its actual right to receive such benefits is not attacked. The appellant particularly relies upon the case of Cache La Poudre Irrigating Ditch Co. et al. v. Hawley, 43 Colo. 32, 95 P. 317, 319. In that case the court held that the petition in intervention did not change the question before the court in any respect. In that regard the court said: "The issue between the plaintiffs and defendants, that is, the question to be determined, as presented by their pleadings, was the right of the plaintiffs to have turned into the canal of the ditch company a certain volume of water from the river. The petition of intervention did not change this question in any respect. True the intervener pleaded facts upon which it predicated a right to the subject-matter of controversy which are not stated in the original pleadings, and which, if established, would prevent the judgment which the plaintiffs seek, but that has not changed the original issue. It still remains as it was, i. e., are or are not the plaintiffs entitled to divert the water from the stream which they claim? In other words, although intervener predicates its right to the subject-matter of controversy upon which it relies for a judgment in its favor, and to defeat a recovery in favor of plaintiffs upon facts not stated in either of the pleadings of the original parties, yet the ultimate issue to be determined, the right to divert water from the stream, remains the same, and this appears to be the general rule by which to determine whether or not the intervener has injected a new issue into the case in which he is allowed to intervene."

While, in the case just cited, the ultimate issue remained the same, we find a different situation in the case before us. In the instant case, the appellants do not deny that the water company has a full right to divert its water from the river; and they do not deny that the irrigation district has a right, as a stockholder, to its proportionate share of that water, which, in fact, is the only issue involved in this action. The only claim of appellants is that if the irrigation district is granted its rights as a stockholder in the water company, it is then its intention to use the water thus obtained in a manner that would be injurious to appellants, and an indirect effect and an indirect interest is thus alleged.

We conclude that the appellants are not interested in the particular litigation between the original parties to this action, because the result thereof will not directly affect them. If they are correct in their contention, they cannot be disturbed by any process which may be issued upon a judgment in favor of the original petitioner, and against the original respondent. Porter v. Garrissino, 51 Cal. 559. If, in exercising any rights it may establish as a stockholder in the water company, the irrigation district should later impair any rights of the appellants, a separate and distinct controversy would then be presented.

For the reasons given, the order appealed from is affirmed.

We concur: MARKS, J.; JENNINGS, J.

COWART et al. v. UNION PAVING CO. et al.*

Civ. 261.

District Court of Appeal, Fourth District, California.

Feb. 19, 1931.

Rehearing Denied March 16, 1931. Hearing Granted by Supreme Court April 20, 1931.

1. Municipal corporations 🔑426.

School lands within improvement district should have been assessed where resolution of intention was silent as to assessment of such land (St. 1911, p. 739, § 20g, as added by St. 1929, p. 1658, § 11).

2. Municipal corporations 🔑425(3).

Railroad right of way could be assessed for public improvements, although title to right of way was deraigned through act of Congress providing for condition subsequent.

3. Municipal corporations 🔑297(1).

In determining whether majority property owners had protested improvements, area of properties to which parties protesting as owners did not show title *held* erroneously included (St. 1911, p. 734, §§ 6, 7, as amended by St. 1915, pp. 1465, 1466, §§ 3, 4).

4. Municipal corporations 🔑657(2).

Public street once dedicated cannot be abandoned except through proper legal proceedings.

5. Municipal corporations 🔑297(1).

Area covered by dedicated street could not be considered in determining whether majority property owners protested improvements, in absence of proof of abandonment (St. 1911, p. 734, §§ 6, 7, as amended by St. 1915, pp. 1465, 1466, §§ 3, 4).

6. Municipal corporations 🔑298.

Finding that protestants were owners of majority of property to be assessed for public improvement *held* unsupported (St. 1911, p. 734, §§ 6, 7, as amended by St. 1915, pp. 1465, 1466, §§ 3, 4).

7. Municipal corporations 🔑298.

Question of procedure on hearing of protests against public improvement is primarily within discretion of city council.

8. Municipal corporations 🔑513(7).

Finding that city council refused to give protestants any hearing on their protest to public improvement *held* unsupported.

9. Municipal corporations 🔑298.

City council's discretion in not extending scope of hearing on protest to proposed public improvement *held* not shown to have been abused, where record did not disclose what additional evidence protestants desired to offer.

10. Municipal corporations 🔑513(7).

Findings that, on appeal by property owners from improvement assessment, city council refused to grant hearing, and refused to consider evidence in support of appeal, *held* unsupported.

11. Municipal corporations 🔑513(7).

Finding that assessments for public improvement were arbitrary and confiscatory *held* supported.

> The undisputed evidence disclosed that the total of the assessments was slightly in excess of one-half of the market value of the property to be assessed, after the improvement was completed, that a number of the assessments equal the market value of the property assessed, and that more than 15 parcels were assessed at more than two and one-half times their market value.

12. Municipal corporations 🔑298.

In considering protest to public improvement, city council must make finding whether protests were signed by sufficient number of property owners (St. 1911, p. 734, §§ 6, 7, as amended by St. 1915, pp. 1465, 1466, §§ 3, 4).

13. Municipal corporations 🔑298.

Where protests against public improvement are signed by majority owners and city council fails to find in accordance with such facts, no further proceedings may be taken within six months, unless protests are overruled by four-fifths of council (St. 1911, p. 734, §§ 6, 7, as amended by St. 1915, pp. 1465, 1466, §§ 3, 4).

14. Municipal corporations 🔑513(7).

Finding that protests against proposed public improvement were signed by majority of property owners *held* unsupported.

15. Municipal corporations 🔑298.

Where sufficient protest is filed against proposed improvement, city council cannot proceed with any part of work for period of six months, unless four-fifths of council voted to overrule protest (St. 1911, p. 734, §§ 6, 7, as amended by St. 1915, pp. 1465, 1466, §§ 3, 4).

16. Municipal corporations 🔑488, 489(5).

That contractor had made public improvements *held* not ground for permitting improper assessments to stand, where contractor knew property owners were protesting.

Appeal from Superior Court, Kern County; Erwin W. Owen, Judge.

🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Hearing granted 14 P.2d 764.

Action by F. W. Cowart and others against the Union Paving Company and others. Judgment for plaintiffs, and defendants appeal.

Reversed, and new trial ordered.

Arthur M. Ellis, of Los Angeles, and Brittan & Brittan, of Bakersfield, for appellants.

John M. Chamberlin, of Los Angeles, and H. A. Postlethwaite, of San Francisco, amici curiæ in support of appellants.

Dorsey & Campbell and Emmons & Aldrich, all of Bakersfield, for respondents.

MARKS, J.

This is an appeal from a judgment of the Superior Court enjoining the appellants from proceeding to collect assessments levied under proceedings instituted under the Improvement Act of 1911 (St. 1911, p. 730 as amended), and from issuing any bonds under the Improvement Bond Act of 1915 (St. 1915, p. 1441). These proceedings were instituted by the city council of the city of Bakersfield by passing its resolution of intention, No. 503, whereby it declared its intention to improve Twenty-Fourth street between "M" street and Union avenue. The cost of the improvement was to be paid by an assessment levied upon the property within a district. This resolution of intention was passed on October 27, 1924. The respondents, who are owners of property within the district to be assessed to pay the cost of the improvement, filed written protests to the improvement, and vigorously protested at all other stages of the proceedings, and appealed to the city council from the assessment levied. All protests were overruled by the city council, and, while a few minor modifications in the assessment were made, it was confirmed in so far as the questions presented on the appeal were concerned.

After a trial lasting over two weeks, the court found in favor of the contentions of respondents, and issued a permanent restraining order against appellants enjoining them from issuing any bond or bonds in payment of the assessments on the properties of respondents, from levying or collecting any part of such assessments, and from asserting any claim in, or to, or upon, any of the property of the respondents, or any of them, by reason of the proceedings taken under and following resolution of intention No. 503.

The court found, among other things, that the owners of a majority of the property to be assessed had filed written protests against the proposed improvement, and against the area of the district to be assessed to pay for the same, which had not been overruled by a four-fifths vote of the city council; that the city council arbitrarily refused to allow respondents, or any of the other protestants, to introduce testimony to show that protests in writing were made and filed by the owners of more than one-half of the area of the property to be assessed, or in support of the grounds of such protests; and that the city council fraudulently and arbitrarily, and without due process of law, disallowed and overruled and denied such protests, all with the knowledge, approval and acquiescence of the Union Paving Company, which was the contractor which performed the work; that, upon the appeal from the assessment, the city council refused to give respondents, or any of them, a hearing upon such appeal, and refused to hear and consider any evidence in support thereof, and fraudulently, arbitrarily, and without due process of law, and with the knowledge and consent of the contractor, confirmed the assessments; that the assessments were arbitrary and confiscatory, and in many instances exceeded the market value of the property assessed. Appellants attack all of these findings as contrary to the evidence, and not supported by it.

Upon the hearing of the protests following passage of the resolution of intention, the city council overruled them, and found that they were signed by the owners of less than 50 per cent. of the area of the property to be assessed to pay the cost of the improvement. Appellants maintain that this finding of the city council was final and conclusive, and cannot be attacked in these proceedings. We do not need to base our conclusions on this contention, even if it were correct, because a careful review of the evidence shows that the finding is not supported by it.

Throughout the hearing by the city council upon the protests to the proposed work and improvement, it was assumed by all parties that the area of the property to be assessed was 854,960.76 square feet. The correctness of this assumption was attacked in the court below, and is attacked here by both appellants and respondents. One block within the district belongs to a public school district, and is and was used for school purposes. The school property has an area of 34,846 square feet. Respondents maintain that the total area within the district as assumed by the city council should be reduced by this amount. A right of way of the Southern Pacific Railroad Company crosses the district. At least a part of this right of way was granted to the railway company under an act of Congress passed July 27, 1866 (14 Stat. 292), wherein it was provided that the land to be granted should revert to the United States upon the condition subsequent of its failure to be used as railroad property. Respondents maintain that the area of this right of way should be excluded from the area of the district for two reasons, first, because of the nature of the grant to the railway company with the defeasance proviso contained, and, second, that the right of way of a railway company can neither be assessed for a public improvement nor sold upon default in payment of an assessment thereon.

Appellants contend that the school land was area within the district subject to assessment for public improvement, and therefore was properly included in determining the area of property to be assessed. They maintain that the railway right of way, included in the area which the city council considered in reaching its estimate of the number of square feet in the district subject to the assessment, was properly included therein. They also contend that an additional 53,777.74 square feet of the railway right of way lying in streets or alleys should be included as property to be assessed for the cost of the improvement, making the total area within the district subject to assessment 908,748.50 square feet.

[1] Section 20g of the Improvement Act of 1911, as added by St. 1929, p. 1658, § 11, provides, among other things, that, when any school land is included within a district to be assessed to pay the cost and expense of the improvement, and where there is no declaration made in the resolution of intention respecting its assessment, the city shall be liable for any sum thereafter assessed against it, and shall pay such assessment. Resolution of intention No. 503 was silent as to the assessment of the school land; therefore this land should have been assessed for the improvement, and the assessment should be paid by the city of Bakersfield. An examination of the assessment diagram and warrant confirmed by the city council shows that the school property, while bearing an assessment number, was not assessed for the improvement. This was contrary to the express provision of the statute. If the school property was assessed at the same rate as the property adjoining it on either side, the assessment would be approximately $3,000.

[2] Respondents contend that, since the title to the right of way of the Southern Pacific Railway Company was deraigned through an act of Congress providing a defeasance of title under certain conditions, the property was in effect that of the United States government and was subject neither to assessment nor taxation. In the case of Rio Grande Western Ry. Co. v. Stringham, 239 U. S. 44, 36 S. Ct. 5, 6, 60 L. Ed. 136, in which a similar grant was considered, it was held: "The right of way granted by this and similar acts is neither a mere easement, nor a fee simple absolute, but a limited fee, made on an implied condition of reverter in the event that the company ceases to use or retain the land for the purposes for which it is granted, and carries with it the incidents and remedies usually attending the fee."

A similar grant was considered in the case of Choctaw, O. & G. Ry. Co. et al. v. Mackey, 256 U. S. 531, 41 S. Ct. 582, 65 L. Ed. 1076, in which the Supreme Court reached a similar conclusion. In this case the question of the assessment of such railway property to pay the expense of a local improvement was involved. The court expressly upheld the right to assess the railway property for the benefits accruing to it from a local improvement.

Under respondents' second contention that the right of way of a railway cannot be assessed for public improvements nor sold upon default in the payment thereof, they have cited no authorities. The following cases are contrary to their contention, and support such assessments: Choctaw, O. & G. Ry. Co. v. Mackey, supra; Rutledge v. City of Eureka, 195 Cal. 404, 234 P. 82; McNeil v. City of South Pasadena, 166 Cal. 153, 135 P. 32, 48 L. R. A. (N. S.) 138; Los Angeles Pacific Co. v. Hubbard, 17 Cal. App. 646, 121 P. 306; Southern Pacific Co. v. Stibbens, 103 Cal. App. 664, 285 P. 374; and Los Angeles Railway Corporation v. Los Angeles County Flood Control District, 78 Cal. App. 173, 248 P. 532. We therefore conclude that the right of way of the Southern Pacific Railway Company was properly included within the property to be assessed. Under these authorities, and particularly under the authority of the case of Los Angeles Pacific Co. v. Hubbard, supra, we are of the opinion that those portions of the right of way of the railway company within the district, and within the area of streets or alleys, should also be assessed to pay for the improvement.

[3-6] The foregoing conclusion makes the total area to be assessed apparently 908,748.50 square feet. With this as a basis, in order to have a majority protest against the improvement, the protestants should own in excess of 454,374.25 square feet of property within the district. The maximum amount claimed by the protestants is 464,722.70 square feet. From this we must deduct the area of assessment No. 43 credited by respondents to Joe Ambrose or Mary Ambrose, his wife, or to both of them, as there is no evidence showing title to the property in either of them. A further deduction of 7,194 square feet must be made for property owned by Martha A. Mobley. She did not sign the protest. A further deduction of 21,780 square feet must be made for property lying in T street. There are, in the record, copies of two maps, one adopted by the trustees of the town of Bakersfield on July 23, 1875, and filed for record in the office of the county recorder of the county of Kern on August 17, 1875, and the other, adopted and declared the official map of the city of Bakersfield by its board of trustees on November 21, 1898, which show T street as a public street crossing the improvement district. There is no evidence that T street was ever abandoned. Its area was included by respondents in their protest,

and was also included by appellants and by the city council in their total estimate of the number of square feet to be assessed in the district. As far as the record before us goes, this area will have to be deducted from both the total area to be assessed within the district and the total area owned by the protestants. As this case will have to be tried again, counsel should determine whether or not this street was legally abandoned in order to determine the area protesting and the area to be assessed within the district. A public street once dedicated cannot be abandoned except through proceedings duly taken in accordance with the provisions of law. For the reasons given, we conclude that the finding of the trial court that the protestants were owners of a majority of the property to be assessed to pay the cost of the work and improvement to be done under the provisions of resolution of intention No. 503 is not sustained by the evidence.

[7-9] Appellants challenge the finding of the trial court that the city council refused to give respondents any hearing upon their protests to the proposed improvement and the area of the district. An examination of the record before us discloses the fact that, when the protests were called up for hearing by the city council, the protestants were present in person, and were represented by their attorney, who stated the grounds of the protest and requested that witnesses be sworn and examined. No witnesses were sworn, but the city clerk and the city engineer were interrogated by the attorney for the protestants as well as by the members of the city council. Approximately one-half hour was consumed by these proceedings. The protestants requested the privilege of presenting further evidence, which request was denied by the city council. While the evidence offered was not complete, we cannot say that no hearing was had upon these protests. The city council denied to protestants the right to extend the hearing, and excluded evidence in addition to that already before it. The question of procedure upon a hearing of protests is primarily within the discretion of the city council. The hearing in this particular case was short and summary. The record does not clearly disclose what additional evidence the protestants desired to offer. For this reason we cannot say that no hearing was had, nor can we conclude, upon the evidence before us, that the city council abused its discretion in not extending the scope of the hearing.

[10] Appellants attack the finding of the trial court that, upon appeal by respondents from the assessment, the city council refused to give them a hearing and refused to hear and consider any evidence in support thereof. The record shows that respondents were present at the hearing and were again represented by counsel. The proceedings were reported by a court reporter employed by respondents. The hearing lasted approximately two hours; the time being consumed with the taking of evidence from unsworn witnesses, and in arguments between the protestants, their attorney, and members of the city council. Under these circumstances we cannot conclude that the council refused to hear any evidence in support of the appeal from the assessment nor that it refused the protestants any hearing upon such appeal.

On the hearing of protests to a proposed improvement and the area of the district to be assessed, and of an appeal from the assessment, the functions of the city council partake of the judicial in their nature. Its members should approach these hearings, and act upon them, with the same open minds that a fair judicial proceeding requires of the judge and jury. They should be ready to base their conclusions upon the evidence presented, and administer justice between the necessities of the public on the one hand and the rights of the property owners on the other. If the evidence of the summary nature of these hearings were sufficiently developed, it might be an important circumstance, when considered with the unjust and confiscatory assessments finally levied, to show that these proceedings were held by the members of the city council, with preconceived ideas of the judgment to be rendered, which would indicate an abuse of discretion on their part amounting in law to constructive fraud on the property owners. Rutledge v. City of Eureka, supra; Cutting v. Vaughn, 182 Cal. 151, 187 P. 19; Spring Street Co. v. City of Los Angeles, 170 Cal. 24, 148 P. 217, 218, L. R. A. 1918E, 197.

[11] The court found that the assessments were arbitrary and confiscatory, and in many instances exceeded the market value of the property assessed. This finding is attacked by appellants as not being supported by the evidence. With this contention we cannot agree. The undisputed evidence shows that the total of the assessments is slightly in excess of one-half of the market value of the property to be assessed, after the improvement was completed. A number of the assessments equal the market value of the property assessed. The evidence further shows that more than fifteen parcels were assessed at more than two and one-half times their market value. This indicates that the assessments were both arbitrary and confiscatory. The language of the Supreme Court in the case of Spring Street Co. v. City of Los Angeles, supra, is particularly applicable here:

"Protests were filed to this so-called new assessment, urging that it was arbitrary, unjust, excessive, and illegal; but, after hearing, the council confirmed it in toto.

"The effect of the assessment so made is not and may not be questioned. It canceled every dollar of the $226,000 awarded by the court in the condemnation proceedings for the taking of this private property for a public use, under an implied omnibus finding that the property of every person whose lands fronted on Eighth street was benefited at least to the amount of his award in the condemnation proceedings for the taking of his property, and was also benefited just a little more, that little being the property owner's proportionate share of the expense of the city in the matter of its condemnation proceeding, which additional amount is contemplated by the suggestion contained in the report of the streets and boulevards committee 'that the balance of the amount to be raised be assessed equally per front foot on the land fronting on Eighth street.' Specifically, upon the property of the Hamburger Realty & Trust Company is imposed an assessment of $20,000, in cancellation of the judgment of the court of the value of its property taken for this public use, and $115.20 being its proportionate share of the expense to which the city was put in the doing of this thing. Thus, in practical effect, while real property of the plaintiff to the value of $20,000, as found by the court, is taken away from it for public use, and while the Constitution of the United States and of this state declares that this cannot be done without compensation to the owner, this plaintiff not only receives no compensation, but in addition to the loss of its property is compelled to pay $115.20 because the city has seen fit to take it. Thus plaintiff would have saved $115.20 if, upon the first intimation that the city designed to condemn its property under the laws of the land, it had hastened to make the city a free gift of it. And the same is true in the case of every other property owner having the misfortune to own lands fronting upon Eighth street. When finally we are told that this result has been accomplished under the Constitution and laws of the land, it becomes a matter of most serious importance to determine whether or not this can be true.

"It will not be amiss here to consider briefly the nature of the power exercised by the Legislature, and, under its direct authority, by its mandatories, in the matter of these so-called special assessments based on benefits. We need not be at pains to trace the development of the use of the power, nor yet is it important to refer it to any particular branch of the power of sovereignty—whether it be called the taxing power, the police power, or the power of eminent domain. Bearing in mind that with us all the power that any sovereign state ever possessed resides in the people acting through their Legislature, saving as that power is controlled or restrained by the Constitution, and as this power of sovereignty, excepting under the constitutional restraint, would permit, as was done in autocracies, the despoiling of the private citizen and the confiscation of his property, it is quite sufficient to refer to this fact for the origin of the power. Like numberless other powers which have in the past been exercised selfishly, cruelly, and unjustly, it is still a part of sovereignty, saving as it is denied, or repressed, or controlled, by the Constitution. That in certain aspects it bears a likeness to taxation is unquestioned, in that it is a charge in terms of money based upon the real property of the owner, which the owner himself is compelled to pay, or in default risk the seizure and sale of his holdings. That in certain aspects it partakes of the nature of eminent domain is manifest from the fact that if a man may be compelled to expend $1,000 for the improvement of the street upon which his property happens to front, there is a certain taking of that $1,000 for the public use. And, finally, that in other aspects it partakes of the nature of the exercise of the police power is obvious when consideration is paid to the construction of public sewers, drainage districts, and like works making for the benefit of the public health. Yet in no one, nor yet in all of these sovereign prerogatives can this particular power be said to rest under our form of government, since, if it be said that a special assessment is in strictness a tax, it does violence to our constitutional provision touching the uniformity of taxation. If it be said that this power is referable to the sovereign prerogative of the right of eminent domain, the answer is that with us the state cannot exercise that power without compensation made to the owner of the property taken. And whatever might be said of the ability to refer an assessment for a drainage system to the police power, the argument would fail utterly when applied to the opening and widening of streets, to irrigation districts, desert land reclamation, and similar forms of public control over lands privately owned. Indeed, to avoid doing violence to these constitutional limitations upon the power of the Legislature, it must be held, as it has so often been held, that a special assessment is not, in the constitutional sense, a tax at all. It is 'a compulsory charge placed by the state upon real property within a predetermined district, made under express legislative authority for defraying in whole or in part the expense of a permanent public improvement therein, enhancing the present value of such real estate, and laid by some reasonable rule of uniformity based upon, in the ratio of, and limited by, such enhanced value.' Hamilton, Law of Special Assessments, § 56. The improvement must have a certain public character, and this we find conspicuously in street improvements, and less conspicuously in reclamation district assessments. Were it not for this recognized characteristic, it would be justifiable to order any owner of any vacant lot to build thereon and to build a prescribed structure, since under the theory of benefits it could successfully be urged that the enhanced value of the land covers the cost of the structure compulsorily imposed upon it. It may be said that the interest of the public would demand that a building lot in the heart of a business district of a city should not be left vacant, its improvement tending to increase business and to enhance the values of surrounding property in which the public is interested. But so far such a public interest has not been considered adequate in support of such an exaction. That the return to the property owner by way of benefit is, under our system of government, the basic foundation upon which this right rests, becomes apparent from the consideration that, if we are not able to say that the owner for the specific charge imposed is compensated by the increased value of the property, then most manifestly we have a special tax upon a minority of the property owners, which tax is for the benefit of the public and which tax is special, unequal and ununiform.

"Therefore the compensating benefit to the property owner is the warrant, and the sole warrant, for the Legislature itself to impose the burdens of these special assessments. It has been a matter of profound regret to this court, and indeed to every court, which has been called upon to consider the question, that in the application of this principle, theoretically equitable, practical operations have shown grave wrong and injustice to be done. With ceaseless reiteration the courts have deplored these unjust exactions and extortions. With tiresome repetition have they advised the lawmakers of methods for the exercise of the power more in consonance with equity and fair dealing. Reclamation District v. Birks, 159 Cal. 233, 241, 113 P. 170. But the result here and elsewhere has been that these suggestions, instead of being received as guides, directing a more equitable exercise of the power, have been treated as though they were invitations to an excessive use of the power, in any effort to see just how far the legislative agents and mandatories might go in their taking of private property without compensation, until told by the court that they had passed the outermost bound of law and reason.

"That bound has been reached and passed by the assessment in this case. * * * Applicable to this assessment is the language of the Supreme Court of Vermont [Allen v. Drew, 44 Vt. 174], speaking through the learned Mr. Justice Redfield, when it says: 'We have no doubt that a local assessment may so transcend the limits of equality and reason that its exaction would cease to be a tax, or contribution to a common burden, and become extortion and confiscation. In that case it would be the duty of the court to protect the citizen from robbery under color of a better name.' * * *

"It is not sought by respondents to defend this assessment upon its merits. The defense is merely that the property owners had their day in court before the city council, their petitions and protests were denied, and the action of the council, in the absence of fraud, will be held conclusive. But to this we answer that the action of the council in the particulars to which this assessment is here subjected to attack is not conclusive, under the principle declared in Chase v. Trout, 146 Cal. 350, 80 P. 81, and reaffirmed in Schaffer v. Smith, 169 Cal. 764, 147 P. 976, and that the assessment here in question does not come within the principle of **Lambert v. Bates**, 137 Cal. 676, 70 P. 777."

On August 11, 1924, the city council of the city of Bakersfield passed and adopted its resolution of intention No. 499, declaring its intention to have improved portions of M street and Twenty-Fourth street. The work to be done on Twenty-Fourth street was the same as that described in resolution of intention No. 503, and the exterior boundary of the district to be assessed to pay for the improvement described in resolution of intention No. 503 was the same as the exterior boundaries of the district to be assessed to pay for the work under resolution No. 499, except that the boundaries of the district described in resolution No. 499 were extended southerly on each side of M street along the work which was omitted in resolution No. 503. Four blocks of paving on M street, and property on each side of this improvement, described in resolution No. 499, was omitted from resolution No. 503.

September 2, 1924, was fixed as the date for the hearing of protests to the proposed work or improvement and the extent of the district to be assessed to pay the cost and expense thereof. On this date, protests largely signed by the owners of property within the assessment district were filed with, and presented to, the city clerk. A resolution, overruling these protests, in which it was recited that the protests were signed by the owners of approximately 49.5 per cent. of the property to be assessed, was proposed, but its adoption was defeated by a vote of, two for the resolution, to five against it. A further hearing on these protests was continued until the meeting of the city council held on September 8, 1924. The minutes of the meeting of September 2, 1924, contained a reference to the resolution which had been defeated, and it was recited that "the council proceeded to consider a protest filled by approximately 49.5 per cent. of the area of the district." Counsel for appellants maintain that this was a finding on the part of the city council that the protests were not signed by the owners of a majority of the area to be assessed. With this we cannot agree. The minutes evidently attempted to state the substance of the proposed resolution overruling the protests which was defeated by the vote which we have indicated.

On September 8, 1924, the protests were again considered by the city council. This hearing resulted in the adoption of the following resolution:

"Be it resolved by the Council of the City of Bakersfield, as follows:

"Whereas: The Council of the City of Bakersfield has heretofore initiated proceedings for certain street improvements in Street District No. 499, and

"Whereas, all proceedings for the proposed improvements up to and including the Notice of Improvement were regularly had and taken in accordance with the law in such cases made and provided, and

"Whereas, the Council of the City of Bakersfield finds that the property owners of the property in the district to be assessed for said improvement do not desire the improvement at the present time,

"Now therefore be it resolved by the Council of the City of Bakersfield, that all proceedings and each and every proceeding heretofore had and taken in the matter of the proposed street improvements in Street District No. 499, in the City of Bakersfield, be and each and every one thereof, is hereby repealed, vacated, set aside, annulled and abandoned."

Interesting questions are presented by the situation thus appearing in this case. The proceedings instituted under resolution of intention No. 499 were abandoned after protest by a large number of property owners. The city council failed to find directly whether or not the protests were signed by the owners of a majority of the property to be assessed, although the resolution raises the inference that there was a majority protest. The trial court found that it was a majority protest. On October 27, 1924, the city council passed its resolution of intention No. 503 whereby it initiated proceedings for the improvement of a considerable majority of the work described in its resolution of intention No. 499. Two questions in this connection present themselves for our consideration: First, what is the effect of the failure of the city council of the city of Bakersfield to find upon the question of whether or not the protests were signed by a majority of the owners of the area to be assessed under resolution No. 499; second, if these protests were signed by the owners of such majority of the property, can the city council abandon the proceedings initiated by resolution No. 499 and proceed with the same improvement on a portion of the streets by instituting another local improvement proceeding? In answering this last question, it will be necessary for us to determine whether or not the finding of the trial court, to the effect that there was a majority protest filed against the work described in resolution No. 499, is supported by the evidence. We will consider these two questions in the order we have stated them.

Sections 6 and 7 of the Improvement Act of 1911, as amended by St. 1915, pp. 1465, 1466, provide as follows:

"Sec. 6. At any time not later than the hour set for hearing objections to the proposed work as provided in section three hereof, any owner of property liable to be assessed for said work may make written protest against the proposed work or against the extent of the district to be assessed, or both. Such protest must be in writing and be delivered to the said clerk of the city council, and no other protests or objections shall be considered. At the time set for hearing protests the city council shall proceed to hear and pass upon all protests so made and its decision shall be final and conclusive; provided, however, that when the protest is against the proposed work, and the cost thereof is to be assessed upon the property fronting thereon, and the city council finds that such protest is made by the owners of a majority of the property fronting on the proposed work, or when the protest is against the proposed work and the cost thereof is to be assessed upon the property within a district, and the city council finds that such protest is made by the owners of more than one-half of the area of the property to be assessed for said improvements, no further proceedings shall be taken for a period of six months from the date of the decision of the city council on said hearing, unless the said protest be overruled by an affirmative vote of four-fifths of the members of the city council. The words 'proposed work' as used herein, shall mean and include all the work described in the resolution of intention. The city council may adjourn said hearings from time to time.

"Sec. 7. If no protests or objections in writing have been delivered to the clerk up to the hour set for hearing provided in section three hereof, or when a protest shall have been found by said city council to be insufficient, or shall have been overruled, or, when a protest against the extent of the proposed district shall have been heard and denied, immediately thereupon the city council shall be deemed to have acquired jurisdiction to order the proposed improvements."

[12, 13] We have been cited to no decisions in the state of California in which these two sections have been construed under facts similar to those of the instant case. It seems clear to us, however, that the plain language of section 6 of the Improvement Act of 1911 as amended places a duty upon the city council, in considering protests, to make a finding upon the question of whether or not they were signed by the owners of more than one-half of the area of the property to be assessed. We do not believe that this duty can be successfully evaded if the protests were in fact signed by the owners of more than one-half of the area of such property. To permit the evasion of this section by the failure of the city council to make

a finding would defeat the very purpose of the latter part of the section which is to protect the property owners of a majority of the area to be assessed from having the proposed improvement forced upon them against their will and without their consent, unless its construction be so urgent and of such great public importance that four-fifths of the members of the city council shall vote in favor of the protests being overruled. We are of the opinion that, if the protests be signed by the owners of a majority of the area of the property to be assessed, and the city council refuses or fails to perform its duty of finding in accordance with such facts, and the protests are not overruled by the affirmative vote of four-fifths of the members of the city council, that then the bar raised by section 6 that "no further proceedings shall be taken for a period of six months" immediately comes into effect, and the city council has no jurisdiction to proceed with the work or improvement for such period. To give any other construction to sections 6 and 7 of the Improvement Act of 1911 as amended would in our opinion do violence to the plain language of the act and constitute judicial legislation.

Counsel for appellants strongly urge that, under the authority of Stege v. City of Richmond, 194 Cal. 305, 228 P. 461, 465, a contrary conclusion should be reached by us. We cannot so construe this case. An examination of it shows that the protests were not filed "against the proposed work or against the extent of the district to be assessed, or both." It clearly appears that the protestants "objected only to the time of the maturity of the bonds" to be issued to pay the cost of the improvement. "The issuance of such bonds is discretionary with the council under the bond act (Stats. 1915, p. 1441), and no opportunity for objection or protest to the issuance thereof is provided for by the terms of the act." Stege v. City of Richmond, supra, at page 314 of 194 Cal., 228 P. 461, 465. It therefore appears that in the Stege Case the question of the protest of the owners of a majority of the property to be assessed to pay for the improvements, against the proposed work or against the extent of the district to be assessed, was not presented, and was not considered by the Supreme Court. This case, therefore, cannot be considered as authority maintaining or supporting appellants in the instant case. As the city council of the city of Bakersfield failed to find upon this material issue, it failed to perform a clear duty which the law imposed upon it. There being no finding by the city council upon this question, the trial court was fully justified in going into the question of the sufficiency of the protests filed.

[14] We must next consider the question of whether or not the findings of the trial court that the protests against the proposed work and the extent of the district to be assessed as described in resolution No. 499 was signed by the owners of more than one-half of the area of the property to be assessed are supported by the evidence. The condition of the record before us has made the answer to this question difficult. Copies of all of the protests filed are not before us. The city clerk, while on the witness stand in the trial court, read one of the protests, and further read a number of names from other protests. The city engineer, while on the witness stand, testified as to the areas of various parcels of land within the district. The titles to properties of a number of the protestants were stipulated, and evidence was introduced as to the titles of other owners. At no place in the record, nor in the briefs, is there any attempt made to consolidate or summarize the testimony of these witnesses, which testimony covers many pages of the transcript. We have been compelled to check the testimony of each of the three witnesses with the other two and with the various maps in the record. This has consumed an undue amount of time, and has involved considerable unnecessary labor. However, we have reached the conclusion that this finding is not supported by the evidence.

It was assumed during the trial that the area of the property to be assessed consisted of 1,083,749.75 square feet. The maximum area of the property owned by the protestants, as claimed by counsel for respondents, after eliminating property clearly within dedicated alleys not subject to assessment, is 571,572.25 square feet. From this we must deduct 2,613.18 square feet under a stipulation of counsel in the court below that only one-half the area of the Hawkins and Braccamonte property be considered as protesting. We must further deduct 21,649.65 square feet in which there is no sufficient evidence of title in the protestants. We must further deduct 5,105.75 square feet in which it does not appear that the owners of the property signed the protest. Two parcels, lot No. 28 in block 191, and lot No. 25 in block B, as shown on the official map of the city of Bakersfield, to which we have referred, are each credited to two owners and their areas twice credited to the protestants, which requires that we also deduct 5,082 square feet from the maximum total of the area of the protestants which we have heretofore given. These necessary deductions total 34,450.58 square feet, which, when taken from the maximum of 571,572.25 square feet, leaves 537,121.67 square feet, or less than one-half of the total area of the property to be assessed. What we have heretofore said concerning the property included in the railroad right of way and in T street, in referring to the protests under resolution No. 503, will also apply to the protests filed under resolution No. 499. It may be that on a retrial of the case respondents will be able to furnish sufficient evidence so that the entire area of 34,450.58 square feet which we have eliminated from the area protesting should be counted as legally protesting. As the case must be retried, we strongly suggest that the protests be introduced in evidence, and that the evidence be so consolidated that the trial court and appellate court, if the case be again appealed, may be able to arrive at the total area of the property to be assessed within the district, and the total area protesting, without the considerable labor which we have been required to devote to the investigation of this question here. If counsel for respondents had heeded the repeated admonitions of the trial court, their record would be in a more satisfactory condition.

[15] Counsel for appellants seriously contend and confidently maintain that a protest of the owners of a majority of the area of the property to be assessed under resolution No. 499 will not defeat the proceedings instituted by resolution No. 503 because of the lesser amount of the work to be performed under the latter resolution. They have cited a number of cases from other jurisdictions which sustain this contention, but none from California. Section 6 of the Improvement Act of 1911 as amended provides that "the words 'proposed work' as used herein, shall mean and include all the work described in the resolution of intention." The protests provided for in this section are directed either against the proposed work or against the extent of the district. If "no further proceedings shall be taken for a period of six months," in the event a majority protest is filed, and the protest be against the "proposed work" which is defined as "all the work described in the resolution of intention," we believe this section means just what it says, and that the city council has no jurisdiction to proceed to do any part of the work for a period of six months, unless four-fifths of its members vote to overrule the protests. To place any other construction on the section would permit a city council to omit any fractional part of the proposed work it saw fit and proceed with the improvement. If four blocks of the work can be omitted, as was done in the present case, four feet could be omitted in some other case. This might result in the oppression of the property owner and the confiscation of his property.

[16] An amicus curiæ has urged upon us the theory that, since this is an equitable action, a court of equity cannot deprive the contractor of the fruits of his labor after it has been performed. In the cases cited by him, which lend color to this argument, the property owners did not protest the proceedings before the city council at all stages where the law gives them such an opportunity. In the instant case, respondents protested vigorously, and whenever the opportunity was presented, urged to the best of their ability almost every legal ground of protest. This fact was known to the contractor. It also knew of the protests to resolution No. 499 and the action of the city council thereon. We cannot conceive why, under these circumstances, the doctrines of equity should be applied any more strongly in favor of the contractor than they should be in favor of the property owner. The act of the contractor in filing his bid and in signing his contract was entirely voluntary. The assessment placed upon the property of the protestants was involuntary as far as they were concerned and against their will and without their consent and over their vociferous and repeated protests. Counsel urges that the contractor may lose some money invested in making the improvement. We reply that, if the assessment stands, many of the property owners will have their property confiscated. As we have observed, a number of parcels of property are assessed for amounts equaling their market values, and a number of others for amounts more than two and a half times their market values. Under these circumstances, if the equities of the case are involved, they should be invoked in favor of the property owner who is in danger of losing his property without receiving any compensation therefor.

A number of other questions are presented by the parties in their briefs. It will not be necessary to extend this opinion further by a consideration of them, as the judgment must be reversed, and they will not necessarily arise upon a new trial.

Judgment reversed; new trial ordered.

We concur: BARNARD, P. J.; JENNINGS, J.

211 Cal. 635

PACIFIC INDEMNITY CO. v. MYERS, City Controller, et al.

S. F. 14111.

Supreme Court of California.

Feb. 25, 1931.

Rehearing Denied March 26, 1931.

1. Statutes 🔑205.

Both sections of statute dealing with subject of discharge of bail were to be considered in arriving at legislative intent (Pen. Code, § 1305, as amended by St. 1927, p. 1386, and § 1306, as amended by St. 1929, p. 1872).

2. Municipal corporations 🔑871.

Law relating to refund of bail to surety within one year after forfeiture in case of subsequent conviction *held* unconstitutional as authorizing gift of public moneys (Pen. Code, § 1306, as amended by St. 1929, p. 1872; Const. art. 4, § 31).

> Pen. Code, § 1306, as amended by St. 1929, p. 1872, provides that, if defendant at any time within one year after entry of summary judgment against surety is returned into custody and is subsequently convicted of highest offense charged in complaint, information, or indictment, the principal amount of judgment, less all charges resulting from pursuit, capture, and return of defendant, should be repaid to surety, provided that surety file with his application for refund an affidavit that absence of defendant was not with his connivance.

3. Bail 🔑79(1).

Constitutional law 🔑205(2).

Statutes 🔑79(1).

Law relating to refund of bail to surety on conviction of defendant within one year *held* unconstitutional as lacking uniformity and granting special privileges (Pen. Code, § 1306, as amended by St. 1929, p. 1872; Const. art. 1, § 21; art. 4, § 25).

4. Constitutional law 🔑42.

One not within class whose constitutional rights are invaded by alleged discrimination cannot complain respecting validity of law.

5. Constitutional law 🔑42.

Constitutionality of statute may be raised by any one whose interests are affected when no member of injured class can complain.

6. Constitutional law 🔑42.

City controller and treasurer could attack validity of statute relating to refund of bail to surety on subsequent conviction of defendant (Pen. Code, § 1306, as amended by St. 1929, p. 1872).

> Since controller and treasurer of city are under bond to audit and pay out money intrusted to their custody only upon lawful demands, they were personally interested in attempted exaction under the statute warranting attack on constitutionality, in view of fact that sureties or exsureties discriminated against by law were in no position to raise question.

7. Constitutional law 🔑42.

Presumption of validity of statute may be attacked by litigant whenever it is material to case.

In Bank.

Original proceeding in mandamus by the Pacific Indemnity Company against John S. Myers, as Controller of the City of Los Angeles, and another.

Peremptory writ denied, and alternative writ discharged.

Holbrook, Taylor, Tarr & Horton, of Los Angeles, for petitioner.

Everett W. Mattoon, S. V. O. Prichard, and Robert A. Cushman, all of Los Angeles, for respondents.

SHENK, J.

This is a proceeding in mandamus to compel the controller and treasurer, respectively, of the city of Los Angeles to draw a warrant for and pay to the petitioner the principal amount theretofore paid by the petitioner in satisfaction of a judgment on a forfeited bail bond entered against the petitioner pursuant to sections 1305 and 1306 of the Penal Code. The matter is submitted on a general demurrer to the petition and briefs filed by the petitioner and by amicus curiæ, the county of Los Angeles.

It appears from the petition that on or about the 29th day of April, 1929, there was pending in the municipal court of the city of Los Angeles a criminal proceeding entitled the People, etc., v. Charles F. Clark, wherein the defendant was charged with a violation of the Wright Act, a misdemeanor; that the defendant therein had entered a plea of not guilty and was admitted to bail in the sum of $1,700; that the petitioner executed a bail bond in the sum required and the defendant was released from custody pending his trial; that when the cause was regularly called for trial on May 21, 1929, the defendant did not appear and his bail was declared forfeited; that on September 16, 1929, ninety days having elapsed from and after the declaration of forfeiture, the city prosecutor appeared before the court and upon a sufficient showing and motion a summary judgment was entered against the surety; that thereafter on January 10, 1930, the surety paid the principal amount of the bond and interest and the same was deposited by the clerk of the court with the treasurer of the city; that within one year after the entry of the summary judgment, solely through the efforts of and at the sole expense of the petitioner herein, the defendant Charles F. Clark was returned to the custody of the chief of police of said city, and said defendant was on August 11, 1930, duly and regularly convicted of the highest offense charged against him in the complaint; that thereafter, on August 26, 1930, pursuant to notice, the petitioner moved the court for an order to refund to the petitioner the principal amount of said bond pursuant to section 1306 of the Penal Code; that concurrently with said notice there was presented to the court the affidavit of the attorney in fact of the petitioner to the effect that the absence of the defendant Clark had not been with the connivance of the petitioner; that upon this notice and showing the court entered an order requiring the respondent controller herein to draw his warrant on the city treasurer in the sum of $1,700 payable to the petitioner, and that the respondents herein, after demand duly made, have refused to comply with said order of court, basing their refusal on the alleged unconstitutionality of certain provisions of the next to the last paragraph of said section 1306 of the Penal Code.

Said section 1306 contains the following final paragraphs:

"Payments made to a city, city and county, or county, by reason of a summary judgment shall be paid into a bail bond trust fund in the treasury of such city, city and county, or county, and properly designated with the title and number of the criminal action out of which such judgment arose. If at any time within one year after entry of such judgment the defendant in the criminal action is returned into custody and is subsequently convicted at any time of the highest offense charged in the complaint, information or indictment upon which such defendant was admitted to bail, the principal amount of such judgment, less all charges resulting from the pursuit, capture and return of the defendant, including rewards paid, shall be repaid, in the same manner as are all other payments to such surety; provided, that the surety file with his application for refund under the provisions of this section an affidavit that the absence of the defendant was not with his connivance. Such payment is hereby made a proper charge against such trust fund account in the treasury of any city, city and county, or county. The board of supervisors or other legislative body of the city, city and county, or county shall provide by resolution for the maintenance of records in the appropriate offices showing the amount of disbursements by said city, city and county, or county, resulting from the pursuit, capture and return of the defendant, including payment of rewards, and shall provide for a report thereon to the treasurer of the city, city and county, or county, within thirty days after the return to custody of such defendant.

"If the defendant is not so returned within one year after the entry of the summary judgment, the amount of said judgment shall thereupon be deposited in the general fund of the city, city and county, or county, and all liability for the return thereof shall terminate."

It is contended that the foregoing portion of section 1306 is in contravention of section 1 of the Fourteenth Amendment to the federal Constitution, providing that no state shall deny to any person within its jurisdiction the equal protection of the law; section 11 of article 1 of the state Constitution providing that all laws of a general nature shall have a uniform operation; section 21 of article 1 providing that no citizen, or class of citizens, shall be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens; section 25 of article 4 providing that the Legislature shall not pass local or special laws in any of the following cases, that is to say, "twenty-sixth, remitting fines, penalties, or forfeitures, thirty-third, in all other cases where a general law can be made applicable"; and section 31 of article 4 prohibiting the Legislature from authorizing any gift of public money.

In view of these contentions it is well to note the various statutory enactments on the subject of discharge of bail and forfeiture. From 1905 until 1927, section 1305 of the Penal Code provided that, if, within twenty days after the entry in the minutes of the court of the order of forfeiture of the bail, "the defendant and his bail appear and satisfactorily excuse his neglect," the court might direct the forfeiture to be discharged upon such terms as appeared to be just. During the same period of time, section 1306 of the same Code provided that, if the forfeiture be not discharged as provided in section 1305, the district attorney might, within twenty days after such forfeiture, proceed by action against the bail upon the undertaking. In 1927, section 1305 was amended (St. 1927, p. 1386) so as to enlarge the time from twenty to ninety days for the return of the defendant after the declaration of forfeiture, and a discharge of the forfeiture upon a satisfactory showing of excuse from neglect on the part of the defendant and nonconnivance on the part of the bail. This amendment was construed by this court to require a concurrence of excusable neglect and nonconnivance before the bail was entitled to apply for a discharge of the forfeiture. Seaboard Surety Corp. v. Municipal Court, 208 Cal. 596, 283 P. 289.

Section 1306 was also amended in 1927 (St. 1927, p. 1385) to provide as follows:

"When any bond is forfeited, if the court which has declared the same forfeited has civil jurisdiction to render judgment in an action arising upon a contract of similar nature and amount ninety days after such forfeiture, if the same has not been set aside, it shall enter a summary judgment against each bondsman named in such bond in the amount for which such bondsman shall have bound himself; if the court declaring such forfeiture has not jurisdiction to give judgment in an action arising upon a contract of similar nature and amount, said court ninety days after such forfeiture, if the same has not been set aside, shall deliver to the district attorney of the county in which said court is located said bond, together with a certified copy of its order declaring the same forfeited, and immediately thereafter said district attorney must file said bond and said certified copy of forfeiture in a court having jurisdiction to render judgment in an action arising upon a contract of similar nature and amount. The court in which said bond and certified copy of forfeiture shall be so filed shall forthwith enter a summary judgment against each bondsman named in such bond in the amount for which said bondsman shall have bound himself.

"A dismissal of the indictment or information after the default of the defendant shall not release or affect the obligation of the bail bond or undertaking.

"Within five days after said judgment becomes final the district attorney or other civil legal adviser of the board of supervisors shall demand immediate payment of said judgment. If the judgment remains unpaid for a period of ten days after demand has been made, he shall forthwith cause a writ of execution to issue and be levied upon the property of the judgment debtor and shall take any other steps necessary to collect said judgment."

[1] Section 1305 was not amended in 1929, but in that year section 1306 was amended (St. 1929, p. 1872) by adding thereto the final paragraphs first above quoted. A consideration of both sections is appropriate in arriving at the legislative intent in dealing with the subject of discharge of bail and forfeitures. Seaboard Surety Corp. v. Municipal Court, supra. It was the obvious intention of both sections to provide some relief to the bail after forfeiture upon return of the defendant to custody. It is therefore pertinent to inquire what relief has been and what relief has not been accorded the bail and whether constitutional requirements have been observed as between bail under the same circumstances.

Under section 1305, as above noted, the bail may be discharged if the defendant is returned within ninety days and a showing is made excusing the defendant's neglect and of nonconnivance on the part of the bail, whether or not the defendant is convicted. Under section 1306 the bail is sought to be relieved in the absence of a satisfactory excuse on the part of the defendant and upon an ex parte showing of nonconnivance on the part of the bail, but the defendant must be returned within one year and be convicted of the highest offense of which he was charged. In the one case excuse of the defendant and nonconnivance of bail must concur. In the other, the excuse or the neglect of the defendant is not required. On what ground such a refinement in the showing favorable to one bail and not to the other, can be made is difficult to discover, and none has been suggested.

Under neither section is any relief from forfeiture accorded cash bail or bail furnished after conviction. Cash bail, it is argued by the petitioner, may properly be excluded from consideration for the reason that as between the state and the defendant the cash bail is deemed to be the defendant's personal property (Mundell v. Wells, 181 Cal. 398, 184 P. 666, 7 A. L. R. 383), and a return of forfeited cash bail might be deemed a reward to the defendant arising out of his own wrong. But a defendant released on his own cash bail may be innocent of any wrongdoing. His absence may be entirely excusable, yet he is afforded no relief under section 1306. Furthermore the bail, other than cash bail, furnished after conviction and to which the court has decided the defendant is entitled pending appeal, is accorded no relief whatever from forfeiture. It is no answer to say that bail before conviction in certain cases is a matter of right under the Constitution while bail on appeal is a matter of right only in other specified cases and in still others is discretionary with the court under the statute. Pen. Code, § 1272. In either or any case the bail is in accordance with law. Bail furnished after conviction was accorded the same consideration under the statutes from 1872 to 1929 as bail furnished before conviction. No sufficient reason appears why the bail in the one case should be entitled to relief and be denied it in the other.

It also appears that under the amendment in 1929 of section 1306 the defendant must be convicted of the highest offence charged before relief from forfeiture may be granted. It is argued by the petitioner that this is a valid classification for the reason that the showing thus required insures that the public interest has not been prejudiced by the absence of the defendant when otherwise the public interest would be prejudiced if the defendant is acquitted or is convicted of a lesser offence or is dismissed. It is true that a delay in bringing a defendant to trial often results in a loss of evidence or a failure of justice for other reasons. But it cannot be said that the public interest is not as often subserved by the acquittal of the defendant found to be innocent as by conviction of a guilty one.

[2] The petitioner insists that the amendment of 1929 is valid because, when viewed in its proper light, it is not a provision for the relief of the bail after forfeiture but in reality is a public aid statute in the nature of offering a reward to an ex judgment debtor, and that the reward is not obtainable until after conviction of the highest offense, just as under section 1547 of the Penal Code the right to the reward is conditioned upon the conviction of the defendant. But when the amendment of 1929 is considered in the nature of a reward, the following curious situation develops: The right to the reward is not available to the person who returns the defendant unless that person happens to be the ex judgment debtor. It therefore strikingly appears that the former bail and now ex judgment debtor is entitled to the reward notwithstanding he has done nothing whatsoever to bring about the return of the defendant. In such case the payment of the money is not a reward for services rendered, but is clearly a gift of public moneys in contravention of section 31 of article 4 of the Constitution.

[3] Therefore, considered as a measure for the relief of bail after forfeiture, the amendment of section 1306 in 1929 attempts to classify those who furnish a bail bond before conviction and to afford them relief and those who furnish a bail bond after conviction and denies them any relief. The contract of bail is essentially the same in both cases, namely, an undertaking that, if the defendant does not appear when required, the amount of the bond shall be forfeited. No good reason appears why one should be favored as against the other. We fail to discover any natural, intrinsic, or constitutional distinction between those favored and those disfavored. Again, as has been seen, we have an attempted classification of those who furnish bail for a defendant who is subsequently convicted of the highest offense charged, and who are favored, and those who furnish bail for a defendant who is subsequently convicted of a lesser offense or who is acquitted or dismissed. All of which we deem to be contrary to the provisions of the Constitution requiring uniformity of operation of the statute and prohibiting the granting of privileges to one class of citizens not granted to others upon similar terms.

Considered as an offer in the nature of a reward, as contended for by the petitioner, we find set apart as the parties solely entitled to the reward those who are ex judgment debtors, regardless of whether they have effected or contributed to the return of the absconding defendant, contrary to the constitutional provision prohibiting special laws in favor of a particular class arbitrarily selected from those maintaining the same relation to the subject of the law and prohibiting special laws remitting penalties and forfeitures.

[4-7] It is contended by the petitioner that neither the respondents herein are, nor the county of Los Angeles appearing as amicus curiæ is, in position to raise the question of the unconstitutionality of section 1306, for the reason, it is argued, that neither the city nor the county are injured, but in fact are benefited by the statute, even if the same be unconstitutional. In this connection the petitioner relies on the general rule that one not within the class whose constitutional rights are invaded by an alleged discrimination cannot complain, and many authorities are cited in support of the general rule. Counsel for the petitioner, however, do not dispute the existence of the rule, referred to by both parties as an exception to the general rule, that when no member of the injured class can complain the question may be raised by any one whose interests are affected. But it is insisted that the so-called exception to the general rule is not here applicable. We think that it is, for several reasons. First, it is apparent that the sureties or exsureties discriminated against are in no position to raise the question. They are not entitled to any relief from forfeiture under the statute as it now reads, and no proceedings need be taken against them after forfeiture and payment thereunder. Secondly, if the amendment of section 1306 in 1929 be invalid, the title to the money now in the treasury of the city is vested in the municipality under the former part of the section as amended in 1927 and as continued in force in 1929, if the two provisions be severable. And lastly, the respondents are under bond to audit and pay out money intrusted to their custody only upon lawful demands. They are thus made personally interested in the attempted exaction under the statute. The presumption of the validity of the statute may be attacked by a litigant whenever it is material to the case. If the statute is offensive to the Constitution it is "no law at all." Quong Ham Wah Co. v. Industrial Acc. Com., 184 Cal. 26, 31, 192 P. 1021, 1023, 12 A. L. R. 1190. We think the amendment in 1929 of section 1306 falls within that category and is invalid. But the provisions of the amendment are clearly severable from the provisions of the section in force prior to the amendment and continued in force, for there is no indication in the statute or otherwise that the Legislature would not have left the section as enacted in 1927 undisturbed if its attempt to relieve some arbitrarily selected sureties from the rigors of a forfeiture had not been undertaken. We are not apprehensive, therefore, that bail bonds in pending proceedings will be jeopardized by the determination herein, as suggested by counsel for the petitioner.

The peremptory writ is denied, and the alternative writ is discharged.

We concur: WASTE, C. J.; RICHARDS, J.; CURTIS, J.; SEAWELL, J.; LANGDON, J.

211 Cal. 670

SUTRO HEIGHTS LAND CO. et al. v. MERCED IRR. DIST.

Sac. 4290.

Supreme Court of California.

Feb. 25, 1931.

Rehearing Denied March 26, 1931.

1. Appeal and error 🔑1149.

Supreme Court may correct error appearing in findings.

2. Appeal and error 🔑758(3).

Party assailing findings on appeal must point out in brief particular evidence upon which he relies as being insufficient to support findings.

3. Waters and water courses 🔑263.

Property owners acquiescing in construction of canals could not enjoin irrigating district from operating them nor have them abated.

> Evidence disclosed that plaintiffs or their predecessors in interest had deeded rights of way for canals as constructed on their lands and that at about time district was constructing canals plaintiffs were engaged in selling campaign of their lands which they had divided into 40-acre tracts, and plaintiffs, for some time before and while canals were being constructed, urged and demanded that defendant district complete construction of canals at as early date as possible so that plaintiffs could successfully sell their lands.

4. Waters and water courses 🔑224.

Irrigation district is agency of state, and use to which water owned and controlled by district is put is "public use."

5. Nuisance 🔑82.

Where property owner expressly consents and importunes taking of land by public corporation for public use, he cannot enjoin continuance of use or abate use as nuisance.

6. Eminent domain 🔑280.

Property owners, by grant of rights of way and other acts indicating consent to construction of canals, were estopped from claiming damage for seepage reasonably to be anticipated (Const. art. 1, § 14).

7. Waters and water courses 🔑263.

In property owners' action against irrigation district to enjoin water seepage and for damages, evidence warranted court's finding district had not damaged plaintiffs.

8. Waters and water courses 🔑262.

Under statute, irrigation district must provide for drainage made necessary by operation of irrigation system (St. 1907, p. 569, §§ 1, 2).

9. Mandamus 🔑15.

Before writ of mandate will issue to compel public agency to perform act involving expenditure of money, it must affirmatively appear there are funds available for purpose (Code Civ. Proc. § 1085).

10. Waters and water courses 🔑262.

Irrigation district need not, under statute, provide drainage facilities, the expense of which is beyond its financial ability to meet or pay for (St. 1907, p. 569, §§ 1, 2).

11. Mandamus 🔑15.

Where irrigation district had done all that could be reasonably required with money available and resources of district, as regards drainage, no writ of mandate would lie to compel district to furnish drainage to plaintiffs' land (St. 1907, p. 569, §§ 1, 2; Code Civ. Proc. § 1085).

12. Mandamus 🔑7.

Writ of mandamus is equitable remedy and will not always issue as matter of right.

In Bank.

Appeal from Superior Court, Merced County; Stanley Murray, Judge.

Action by the Sutro Heights Land Company and others against the Merced Irrigation District. From the judgment, plaintiffs appeal. Affirmed.

Hatfield, Wood & Kilkenny and Treadwell, Van Fleet & Laughlin, all of San Francisco, for appellants.

Downey, Brand, Seymour & Dunn, of Sacramento, A. L. Cowell, of Stockton, and Stephen W. Downey, of Sacramento, for respondent.

CURTIS, J.

The complaint in this action asks for an injunction against the defendant prohibiting it from permitting water to flow or seep through its canals upon plaintiffs' lands, for the abatement thereof as a nuisance, and for damages alleged to have been already sustained by reason of seepage of water upon plaintiffs' said lands. By a separate cause of action plaintiffs also ask that defendant be compelled to install a drainage system for the purpose of relieving plaintiffs' lands from the water which the plaintiffs allege has been caused to flow thereon through seepage from the canals of the defendant.

Plaintiffs allege in their complaint that they are the owners in severalty of three tracts of land, being parts of a tract of land formerly owned by Louis Titus and commonly known as the Titus ranch, all of which last-named tract, except the southwest one-fourth of section 18, township 7 south, range 11 east, M. D. B. & M., lies within and is a part of the Merced irrigation district. The lands of the plaintiffs are practically contiguous, and are in the extreme southwest portion of the district, and comprise 2,500 acres or thereabouts.

The defendant is an irrigation district organized under the General Irrigation Act of 1897 (Stats. 1897, p. 254) and acts amendatory thereof. It comprises about 180,000 acres of land, and is situated in the county of Merced.

In their complaint the plaintiffs allege that the defendant, the Merced irrigation district, during the year 1922 constructed certain canals over and upon the lands of plaintiffs and particularly a certain canal known as the McCoy canal, the McCoy spillway, the Arena canal or spillway, and certain branches thereof, for the purpose of the carriage of water for the irrigation of the land within the said district, and also for the purpose of spilling the surplus water in the canals of said district into certain natural and artificial drainage beyond the boundaries of said district. The complaint then continues, and it is alleged therein:

"That the said land of the plaintiffs is extremely sandy in character and the canals so constructed and operated by the said district were and are likewise constructed through land of loose, sandy nature, and the said district constructed the said canals with banks made entirely of loose, sandy material, and so constructed the said canals that the banks were raised extremely high and the water in said canals was carried above the natural surface of the ground and against the loose, sandy banks of said canals, and ever since said time the said defendant has carelessly and negligently, and entirely disregarding the rights of the plaintiffs, maintained and operated the said canals so constructed in such a careless and negligent manner, and has carried water in the said canals and above the natural surface of the said ground and against the said sandy banks of said canals, and has carelessly and negligently permitted the said water to escape from the said canals and through the sandy banks thereof and to flow in large quantites outside of the said canals and through, over and upon the said lands of the plaintiffs, and to seep through the said banks in large quantities, and into and under the lands of the said plaintiffs; and the said defendant has carelessly and negligently failed to in any way control the said water or to confine the same within the said canals and has carelessly and negligently failed to properly line the said canals or to otherwise prevent the same from flowing and seeping out of the same, as aforesaid, and as a result thereof large quantities of water have so flowed and seeped out of the said canals and formed lakes and ponds upon the surface of the said lands of plaintiffs, and raised the water table in the said lands in other places on the same so near to the surface as to water-log the same and destroy the same for the growth of crops to which the same were otherwise adapted, and so as to kill and destroy the crops already growing thereon, and so as to make the said lands utterly unfit for agricultural purposes.

"That the said defendant still maintains and operates the said canals and threatens to continue to maintain and operate the same and threatens to continue to carry large quantities of water through the said canals, and to carry the same against the said sandy banks of the said canals, and threatens to and will, unless enjoined by this court, continue to permit the same to seep and flow out of the said canals and through the banks thereof and into, over and upon the said land of the plaintiffs, and to still further flood and water-log the said land and raise the water table under the same; and the said trespasses of the said defendant are and will be continuous and will gradually entirely destroy the said property, and the whole thereof, and render the same entirely unfit for agricultural purposes, and will prevent the said plaintiffs from growing any crops whatsoever upon the same, and will also cause noxious growths upon the same, and will cause salts to accumulate upon the surface thereof, permanently injuring and destroying the same; and the said acts of the defendant interfere with the comfortable use and enjoyment of the said property and constitute a nuisance and a continuing trespass thereon."

Then follow allegations as to the damage sustained by the respective plaintiffs.

To these allegations the defendant made certain denials and admissions. It also set up a number of affirmative defenses, and pleaded the statute of limitations. Upon the issues thus made by the pleadings the case went to trial and at the conclusion of the evidence the trial court made and filed its findings of fact pursuant to the issues made by said complaint and the amended answer thereto, including the affirmative defenses of the defendant. These findings are voluminous, and are entirely too lengthy to be set forth in full herein. They are in favor of the defendant on every issue made by the pleadings, with one apparent exception which we will later mention. The court found:

That for more than ten years prior to the year 1922, the Crocker-Huffman Land & Water Company had owned an extensive canal system in said county, and as early as 1913, with the knowledge and acquiescence of the predecessors in interest of the plaintiffs, they had constructed a certain canal known as the Arena spillway as a part of their canal system. In January, 1922, the defendant district purchased from the Crocker-Huffman Land & Water Company its said canal system, including said Arena spillway, and has continued to and is now using said system as it was used prior to its purchase by defendant. That the predecessors in interest of plaintiffs owned in one tract the said lands through which said Arena spillway was constructed and the lands now owned by the plaintiffs, and described in their complaint, from a date prior to 1910 continuously to the year 1921, and knew of the character of the land through which said Arena spillway canal was constructed and the manner of its construction and use, and acquiesced therein and controlled the water therein and diverted water therefrom and used the water so diverted during all of said period of time. That, after the purchase by the defendant district of the Crocker-Huffman Company, said district constructed in August, 1922, a portion of the McCoy canal; between March 1st and August 1st of the same year the district constructed a canal known as the Stockman canal through the lands of the plaintiffs; between March 1st and July 10, 1923, the district constructed a canal known as the McCoy extension from the end of the McCoy canal through certain portions of plaintiffs' lands. During the same period of time the district constructed certain laterals leading from said canals on and across the lands of the plaintiffs, also the Arena relocation, a portion of which was constructed on and through the lands of the plaintiffs. These canals and laterals were, and each of them was, so constructed for permanent use of the district, in the manner and place, and with full knowledge and acquiescence, and at the request and upon the urge of the plaintiffs and the then owners of the land over which the same respectively were constructed, and the manner of use and intended use by defendant of each of said water conduits was at all times known to the plaintiffs, and plaintiffs have at all times demanded and insisted upon the use of said canals and laterals for the delivery by defendant, as such irrigation district, of water for irrigation purposes to their respective lands. "That the said plaintiffs at all times knew of the character of the soil, as to being loose or close in texture, through which each of said conduits was so constructed and the nature of the banks and bottom of each of said conduits and of their resistance to water flowing in said conduit, and said plaintiffs and all persons owning the land through which said conduits and each of them were built knew that defendant intended to use permanently for the public use of said district, each of said conduits as so constructed as a part of its distributing system of canals to distribute water for irrigation of land in said defendant district, including the lands described in plaintiffs' complaint, and the said defendant has with the knowledge of plaintiffs and each of them, since the construction of each of said conduits, respectively, continuously, uninterruptedly, notoriously, adversely and with the acquiescence of the plaintiffs, and each of them, and under a claim of right against the whole world, used the said conduits as a part of the distributing system of canals to distribute water for irrigation of land in said defendant district, including the lands described in plaintiffs' complaint, and the service of the public use to serve which said defendant was organized, and the said conduits and each of them were at the time of their construction and at all times, necessary to said public use for which said defendant was organized and necessary in order that the said defendant could supply water with which to irrigate the lands within the boundaries of said district including the said land described in the plaintiffs' complaint, all of which facts were at all times herein mentioned known to the plaintiffs.

"That it is not true that the land described in said complaint is extremely sandy in character nor that it is any more sandy in character than many more large areas in defendant district and in other portions of the State of California, and particularly in the San Joaquin Valley in said state, which are and for many years have been irrigated by means of canals constructed of the same kind of material and located in the same manner as the canals constructed by defendant as aforesaid. That it is true that the said canals were constructed of the material of the soil through which said canals were built, and that such canals are commonly and usually built through such material in the San Joaquin Valley and that it would not have been practicable or feasible to have built or operated said canals otherwise than as the said canals were built and used as aforesaid. That it is not true that defendant so constructed said canals, or any of them, that the banks thereof were raised extremely high or any higher than was necessary to provide in a reasonable and customary and proper manner for the irrigation of the lands to be irrigated from said canals, including the said lands described in said complaint, or any higher than is usual and proper in construction of canals in and through lands of the character of the lands described in said complaint. That it is true that the lands described in said complaint are portions of a certain tract of land formerly owned by Louis Titus and commonly called the Titus ranch, comprising the land shown on the map attached to defendant's answer as being subdivided into lots designated by numbers enclosed in circles; that all of said tract except the southwest quarter of section 18 is, and ever since the 8th day of December, 1919, has been within and a part of the Merced Irrigation District; that said tract has a general slope from northeast to southwest, but has an undulating surface and consists of a series of ridges and swales of varying width; that said ridges and swales do not run in a uniform direction and are not continuous lengthwise across said tract, but said swales are of spoonlike or saucerlike formation so that water accumulating therein cannot escape therefrom except by evaporation or sinking into the soil, and said ridges are broken in certain places by depressions or are crossed by certain of said swales; that in order to provide for the irrigation of as much of said tract as practicable, including the lands described in said complaint, it was necessary to, and defendant did, with the acquiescence of plaintiffs and each of them, construct said canals along certain of said ridges except where it was necessary to cross certain of said depressions or certain of said swales, or to follow or to run on lot lines or approximately parallel to lot lines, and at such places it was necessary to, and defendant did, with the acquiescence of plaintiffs, construct fills to carry said canals across said depressions or said swales, and defendant, at the request of plaintiffs, did change locations so as to run on lot lines or approximately parallel to lot lines. That it is not true that the water in said canals was or has been or is carried above the natural surface of the ground except where said water was so carried with the acquiescence or at the request of plaintiffs and where it was and is necessary so to do in order to convey water across the depressions or the swales crossed by said canals as aforesaid."

The court then finds that the defendant has never carelessly or negligently maintained or operated said canals and laterals located upon plaintiffs' lands, nor has it carelessly or negligently permitted any water to escape from said canals or laterals nor to drain or seep through the banks of said canals or laterals upon the lands of the plaintiffs. Continuing, the court finds: "That it is not true that as a result of any unlawful or improper acts of defendant, or as a result of the omission of any duty or duties of the defendant, large quantities or any quantities of water have flowed or seeped out of any canal or canals of the defendant and formed lakes or ponds upon the surface of the lands described in said complaint, or any of said lands or raised the water table in said lands, or any of them, in other places on the same, or at all, so near the surface as to water-log the same or to water-log any of said lands or destroy the same for the growth of crops to which the same were otherwise adapted, or so as to kill or destroy the crops already growing thereon, or any crops, or so as to make said lands, or any of them, utterly, or at all unfit for agricultural purposes."

A further finding of the court was to the effect that said canals and laterals were designed and constructed in a workmanlike manner, with due care, skill, and prudence and in accordance with plans properly drawn and such as are customarily and usually adopted for the construction of canals through lands of the nature and topography of said Titus ranch for the irrigation thereof, and that the seepage from said canals has been only in such quantities as is usual and unavoidable from canals constructed as aforesaid in and through lands of the nature and topography of the Titus ranch.

As accounting at least in part for the high-water plane under the lands of the plaintiffs the court found that during the years from 1922 to 1926 large quantities of water delivered upon the Titus ranch for irrigation purposes had seeped and percolated through and from said lands so irrigated into the ground water in and under said Titus ranch, and that many of the persons to whom said water was delivered for irrigation purposes, carelessly and negligently caused and allowed large portions of the water so delivered to them in certain of said years to run into certain swales or depressions and accumulate therein, thus causing the ground water in and under said Titus ranch to rise during the spring and summer of each of said years; furthermore, that plaintiffs' lands are underlaid with a thick layer of impervious material known as hardpan, at a depth of from six inches to two feet below the bottoms of some of the swales and depressions, and at a depth of from six inches to four feet below the surface of much of the remainder of said land; that due to the location of the Titus ranch being lower in elevation than the lands to the north and east thereof, water used in irrigating the higher lands, or at least a considerable portion thereof, seeps and flows down to the lands of the plaintiffs, and thereby causes the water plane, underlying said lands, to rise and stand at a higher level than it otherwise would, especially during the spring and summer months of each year, and that the use of water for irrigation in said territory to the eastward and northeastward of Titus ranch has continued and increased each year from and since the year 1922, and that as a result thereof the flow of ground water to and into the lands of the plaintiff has continued as aforesaid, except as said ground water has been controlled by the defendant, as set forth in other portions of said findings. As a further reason for the rise of the water underlying plaintiff's said lands, the court found that during the year 1892 the then owner of section 9, township 7 south, range 11 east, described in the complaint, being a portion of the lands now owned by one of the plaintiffs, sunk an artesian well about 300 feet deep near the center of said section 9 and developed from said well a large flow of water, and ever since said time said artesian water has been permitted to flow from said well and has maintained a large lake in the depression surrounding said well; that the water from said well is strongly impregnated with alkali, and ever since said year 1892 the water from said well has seeped and percolated into the soil westward from said well. As this well is located near the easterly boundary line of the Titus ranch, the seepage therefrom would extend into the soil of a large portion of said ranch.

As a final finding on this phase of the case, the court found that defendant had not damaged the lands of the plaintiffs, or the lands of any of said plaintiffs in the particulars set forth in plaintiffs' complaint, or in any of said particulars, or in any other manner, or in any amount, or at all.

In response to certain of the affirmative defenses interposed by the defendant, the court found that the plaintiffs and their predecessors in interest had executed and delivered the following conveyances to rights of way over and across the land described in plaintiffs' complaint, for the construction, maintenance, and operation of canals and laterals for the purpose of conveying water for irrigation purposes:

(1) Agreement between John W. Mitchell and the Merced Canal Irrigation Company, dated May 21, 1885, whereby the said John W. Mitchell purported to grant to said company, its successors and assigns, the right of way for the purpose of constructing ditches, canals, flumes, pipes, and conveyances for water through and across all of the lands described in said agreement, which said lands include the lands described in the complaint as belonging to the plaintiffs. As this agreement contains direct words of grant, it will be referred to hereafter as a deed.

(2) Deed from East Side Investment Company, dated April 24, 1922, to Merced irrigation district, a right of way sixty feet in width for the construction of the McCoy canal, and right of way fifty feet in width for the construction of the Stockman canal over portions of the lands of the plaintiffs and substantially along the routes of said canals as they were subsequently constructed over the land described in said deed.

(3) Deed between said parties of the same date, of right of way fifty feet in width for the Stockman canal over other lands, now owned by the plaintiffs and described in the complaint, on a portion of which the said Stockman canal was subsequently constructed and is now maintained.

(4) Deed from Lyon & Hoag, a corporation, one of the plaintiffs herein, to the Merced irrigation district, dated May 3, 1922, of a right of way fifty feet in width for portion of Stockman canal as the same was subsequently constructed over a part of the land described in the complaint.

Upon the question of the statute of limitations set up in the defendant's amended answer, the court found that each and every cause of action stated in the complaint was barred by the provisions of subdivisions 1 and 2 of section 338, and subdivision 1 of section 339 of the Code of Civil Procedure.

[1] As before noted, the court apparently found in favor of plaintiffs as to one of the issues made by the pleadings. This finding is found in paragraph XVIII of the findings. We are satisfied that there is a clerical error in this finding as it appears in the record before us, in that the word "not" in the first line of said finding was inadvertently placed therein when said findings were prepared. Each of the parties herein agrees that such is the fact. Under our power to make findings, we undoubtedly have the authority to correct an error appearing in the findings, so that they will conform to the evidence as shown by the record. Finding XVIII is therefore corrected by striking out the word "not" in the first line thereof, and as corrected said finding is hereby made the finding of the court. It is as follows: "That it is true that during the years 1921 and 1922 the plaintiffs herein and each of them represented repeatedly to defendant that they respectively were interested in certain portions of that certain tract of land known as the Titus ranch, and shown on the map attached to defendant's answer and marked 'Exhibit "A",' including the lands described in said complaint, and the plaintiffs repeatedly urged, and each of them repeatedly urged, defendant to hasten the construction of canals to and through said Titus ranch to provide water for the irrigation of all the lands therein which were included within defendant district; and said plaintiffs and each of them offered to and did cooperate with defendant in removing objections to defendant's use of the rights of way selected by defendant for certain of said canals; that plaintiffs and each of them at all times well knew that all the land in said Titus ranch was of a sandy nature and that said ranch contained numerous swales and depressions, and that the ground water in said Titus ranch was at all times near to and at certain times higher than the bottoms of certain of

said swales and depressions; that plaintiffs and each of them knew the plans of defendant for the construction of said canals and of the necessity of constructing said canals with high banks across said swales and depressions in order that all of said land might be irrigated; that plaintiffs and each of them at all times knew that defendant had no funds with which to pay for lining any portions of said canals with concrete and would not have funds for that purpose for many years after the construction of said canals, and plaintiffs and each of them at all times well knew that defendant had planned a graudual development of a comprehensive system of drainage; that notwithstanding their knowledge of the facts aforesaid, plaintiffs and each of them repeatedly urged defendant during the winter and spring of 1923 to complete certain canals constructed by defendant in said Titus ranch in the year 1922 for permanent use of defendant in supplying water for the irrigation of lands in said district, including the lands described in said complaint, and repeatedly urged defendant to hasten the delivery and continue the delivery of water in 1923 and 1924 through said canals as the same had been so constructed; that defendant, in response to said urgings of plaintiffs and each of them, did hasten the construction of said canals and the delivery of water to said lands, including the lands described in said complaint as urged and requested by plaintiffs, and did construct said canals as urged by the plaintiffs at the places and in the manner so urged by plaintiffs and by each of them, and with the soil through which said canals were constructed, and defendant believed, and was led by the aforesaid repeated urging of plaintiffs and each of them to believe, that the plaintiffs and each of them would consider that any damage that might be caused by the seeping or breaking of water from said canals would be necessary and incidental to the development of said Titus ranch by means of irrigation from said canals; that defendant would not have constructed said canals or any canals to said lands described in said complaint, and would not have constructed said canals with high banks across said swales and depressions except for said repeated urging of plaintiffs and each of them, and unless it had understood and believed that plaintiffs and each of them would consider the construction of said canals aforesaid as the full performance of defendant's duty to plaintiffs and to other owners of land to be irrigated from the said canals."

Before passing to the consideration of the questions arising from the appeal from the judgment, denying plaintiffs' prayer for an injunction and damages, we will set forth the nature and character of plaintiffs' second cause of action, in which they ask for a mandatory injunction directing and commanding the defendant to forthwith construct and install suitable drainage works to drain the lands of the plaintiffs and to remove therefrom water brought thereon by the defendant.

In their second cause of action, the plaintiffs incorporate all of the allegations of the first cause of action and make them a part of their second cause of action. They then allege that one of the purposes for which the defendant was organized was that of supplying drainage to the lands within the district, and particularly lands which would require drainage on account of the irrigation carried on by the district, and that all of plaintiffs' lands within the district are entitled to be supplied with drainage facilities; that the district has levied assessments and voted bonds in part for the construction of drainage works, and has constructed numerous such works within the district; that it now has on hand certain funds available for that purpose; that the defendant has constructed no works for the drainage of plaintiffs' lands except one well which is inadequate, and that, in order to restore plaintiffs' said lands to their natural condition and make them capable of growing crops, it will be necessary to line said canals with concrete, and construct and operate such wells as shall reduce the water table under all parts of plaintiffs' lands to a depth of at least ten feet below the surface of said lands, and to keep it at said level; that defendant will, unless enjoined by this court, apply said funds, available for drainage purposes and raised for that purpose, to other uses and purposes, thus depriving plaintiffs of the drainage facilities to which they are entitled; and that plaintiffs have demanded that defendant construct said drainage works, but defendant has refused said demand, except the one well mentioned above.

To the allegations contained in this cause of action, the defendant in its amended answer to the complaint made answer consisting of certain admissions and denials, and a further recitation of facts as to the drainage conditions existing in said district, and the efforts made by the defendant to remedy these conditions, and, as the court's findings follow in all substantial respects the allegations of the answer, it will not be necessary to separately state these allegations, but we will pass to the findings of the court in response to the issues made by the pleadings in this cause of action. Preliminary to statement of facts as found by the court, it might be well to state that the defendant admits that it is under obligation, in so far as the funds of the district will permit, to provide for drainage facilities for all lands within the district, which are in need of drainage by reason of the irrigation operations of the district. The court found: That immediately after its organization the defendant, during the years 1920, 1921, and 1922, caused studies and investigations to be made in order to formulate a comprehensive plan for the control of ground water and the drainage of lands of the district injuriously affected thereby. That such a plan was adopted, and in pursuance thereof defendant purchased certain drainage canals and works theretofore constructed, and installed within the district thirty-five drainage wells and pumping plants in such locations within the district as the drainage engineer of the district determined would be most effective in controlling the ground water and preventing its flow into and upon the lands in the westerly and southwesterly portions of the district. These wells and pumping plants were installed prior to the 31st day of March, 1924, and were operated during the irrigation season of 1924 and thereafter. Six additional wells and pumping plants were installed during the seasons of 1925 and 1926, and fourteen during the following season, all located to the eastward and northeastward of the lands of plaintiffs and so located in the judgment of the board of directors of the defendant and of its engineers as to be most effective in controlling the ground water within the district and to prevent the flow of as much thereof as possible toward the lands in the westerly and southwesterly portions of the district. That up to September 30, 1926 (the complaint in this action was filed October 26, 1926), the district had expended in carrying out its drainage plans the sum of $495,978.63. During the following year, the district spent for the same purpose $172,561.13, and its budget for the year beginning September 30, 1927, contains estimated items of expenditure in the sum of $288,048.24 for drainage purposes and lining of canals. The amount of $495,978.63 mentioned above includes the sum of $130,000 for canal lining; and the item of $172,561.13, expended for drainage purposes during the year ending September 30, 1927, includes $40,000 paid out for canal lining.

Then follows the following finding: "That all drainage pumping plants have been operated since their installation whenever necessary for the control of ground water; that thereby great quantities of water have been prevented from flowing into the lands described in the complaint, and if it should be considered and determined by the board of directors of defendant district that for the best interests of said district further drainage works than as aforesaid are required, defendant will, as funds can be obtained from time to time for that purpose, install additional drainage works or adopt other practicable means of controlling the ground water in the district, to such an extent as may be practicable, fair and equitable, and for the best interests of said district, everything considered."

A further finding of the court is to the effect that none of the lands of the plaintiffs are entitled to be supplied by defendant with facilities for drainage, except such facilities as may from time to time be found necessary by the board of directors of the defendant in pursuance of the comprehensive plan for the control of ground water adopted by the district; that the district had on hand at the commencement of this action no funds available for drainage purposes; that the district since the commencement of this action has raised no money for the purpose or available for drainage purposes, except such money as has been expended by the district for that purpose. In addition to the foregoing, the court also made the following findings:

"That it is true that defendant has done all that it could reasonably and fairly and equitably do for the drainage of plaintiffs' said lands and the control of the ground water flowing therein and thereto, with the funds available for that purpose, and that the money heretofore expended by defendant for the control of ground water and canal lining as set forth was all the money that could have been fairly and equitably expended for that purpose. * * *

"That it is not true that defendant has refused to construct drainage works for the lands described in the complaint. That it is not true that defendant has constructed only one drainage well for the benefit of the land described in the complaint. That it is true that defendant has made provision for the drainage and protection of said lands in accordance with the best, fair and honest judgment of the board of directors and the necessities and funds of the district."

Upon the findings thus made by the court, judgment was entered that plaintiffs take nothing by said action and that defendant recover its costs. From this judgment the plaintiffs have appealed.

[2] The first attack upon the judgment is that the findings are not supported by the evidence. Some eight different assignments are stated in plaintiffs' brief in which they claim the evidence is insufficient. This statement is brief and does not attempt to do more than assign the grounds upon which plaintiffs rely in support of their contention that the evidence is insufficient.

Plaintiffs have not indicated in their brief any particular testimony on which they rely in support of their contention that the findings are not supported by the evidence, nor have they pointed out, or attempted to, any lack, defect, or deficiency in the evidence on the part of the defendant which would render it subject to plaintiffs' attack. Plaintiffs' brief contains a comparatively short general résumé of the evidence without a single reference to the reporter's transcript and with the mention of the names of only three witnesses out of the forty or more witnesses who testified during the trial. In the place of an argument as to the facts of the case, the plaintiffs have inserted in their brief what purports to be the testimony in the case reduced to narrative form, consisting of some 165 pages of closely printed matter, preceding it with the following statement: "The main facts in the case are all established by positive engineering testimony of both parties, and it is without any material conflict. We recognize the burden that we are required to place upon the court in asking it to review the findings, and we do not wish to do so on a mere argument as to the facts, and have, therefore, carefully reduced the testimony of the witnesses for both parties to narrative form and, with the résumé which we have already made of it, that testimony we deem the best answer to the findings in the case."

In such a case it is not the duty of the court to discover, even if it were able to do so, the particular evidence upon which the plaintiffs rely. On the other hand, the decisions of this court are to the effect that this burden is with the party assailing the finding. In Duncan v. Ramish, 142 Cal. 686, 689, 76 P. 661, 662, where a like situation arose, the court said: "It is claimed that the findings are in many particulars unsupported by the evidence. The greater number of these objections are not presented in a manner that will warrant us in noticing them. * * * The court and counsel for respondent are left to discover, if they can, the particular point in which the evidence fails to support the respective findings. 'Under these circumstances we do not feel called upon to prosecute an independent inquiry in order to find out' in what respects the evidence is insufficient." In the case of Brovelli v. Bianchi, 136 Cal. 612, 613, 69 P. 416, we find a similar statement of the law in the following language: "The first point made is that the evidence does not sustain the findings. The evidence is not pointed out in the brief of appellant, and no suggestion made as to the respects wherein the evidence fails to support the findings or any finding. In such case we will not endeavor to discover the respects wherein the evidence is insufficient, but will presume that it supports every material finding of fact." Again this court, in the case of Kyle v. Craig, 125 Cal. 107, 116, 57 P. 791, 795, held as follows: "And, even if the specifications in the assignments of error were sufficient, counsel has not pointed out in his brief and called our attention to the particular finding or findings claimed to have no support in the evidence, and the particulars in which such finding is not supported by the evidence. In such case we do not deem it our duty to investigate the questions as to the insufficiency of the evidence." In Hayne on New Trial and Appeal, vol. 2, Revised Edition, § 278, p. 1544, we find the rule stated as follows: "And where briefs are filed it is the duty of counsel to present all that is material to the points involved. Thus in Williston v. Perkins, 51 Cal. 554, where the appellant's counsel in his brief made out a prima facie case of the insufficiency of the evidence to justify a finding of fact, and the respondent did not advert to the appellant's showing upon this point, the court modified the judgment, saying: 'If there be in the voluminous record on file any evidence going to support the findings in the respect referred to, the respondent should have pointed it out. It is not our business to institute a search to find it.' "

We feel that the language quoted from the foregoing authorities correctly states the situation in the present action. If there is any evidence or lack of evidence in the record which will sustain plaintiffs' contention that the evidence is insufficient to support the findings, they should point out this evidence to the court rather than to present us a voluminous document, purporting to contain the evidence of both parties to the action, and require this court to sift out of this mass of testimony that which may support the contention of the plaintiffs. Furthermore, the narrative of the evidence as prepared by the plaintiffs does not, it is evident, contain all the evidence of both parties to the action. The defendant calls attention to the fact that there is omitted therefrom all the cross-examination of plaintiffs' witnesses, and, by comparing it with the reporter's transcript, it appears that the larger part of defendant's evidence has not been included in plaintiffs' statement of facts. In fact, while more than thirty witnesses testified on behalf of the defendant, the testimony of only two of these witnesses is contained in plaintiffs' statement.

It is true that these two witnesses were engineers, and plaintiffs state in their brief that "the facts in the case are all established by positive engineering testimony," but there is nothing to show the court, unless we review the entire typewritten record in the case, that at least some of the other twenty-eight witnesses who testified for defendant did not either give "engineering testimony" or testimony which, while not strictly of that nature, was of such weight and character as to have a material bearing upon many of the issues of the case. For these reasons we find ourselves at great disadvantage in reviewing the points made by the plaintiffs in respect to the insufficiency of the evidence to support the findings. We have, however, carefully gone over the narrative statement of the evidence prepared by the plaintiff, with such other parts of the testimony as appear to have a material bearing upon the questions raised by plaintiffs' attack upon the findings.

[3] Among other findings the court found that the plaintiffs were barred from relief, either equitable or legal, because they or their predecessors in interest had deeded rights of way for the canals as constructed on their lands, or had consented or acquiesced in the construction of said canals. Plaintiffs do not question the execution and delivery of the deeds heretofore mentioned nor that they were bound by the terms thereof, with possibly one exception, nor that substantially all of the canals constructed on their lands were constructed upon rights of way acquired by defendant through said conveyances. Plaintiffs do contend that the deed from John W. Mitchell to the Merced Canal & Irrigation Company is not of any binding effect upon them, for the reason that its terms are so indefinite and uncertain as to render it void, and that it failed to specify any particular kind of canals that were to be constructed thereunder. We question whether either of these reasons constitute a valid objection to said deed. But, leaving out of consideration the Mitchell deed, the two deeds from the East Side Investment Company, and the one from Lyon & Hoag cover rights of way for substantially all the canals constructed by defendant upon plaintiffs' lands. Besides these deeds, the evidence shows without contradiction, and the plaintiffs so concede, that they consented to and acquiesced in the construction of all of said canals and laterals. At or about the time the defendant was constructing said canals, the plaintiffs were engaged in a selling campaign of their lands, which they had some time before divided into 40-acre tracts. It was necessary, in order to sell the lands to any advantage, to have water for the same, and the plaintiffs for some time before and while said canals were being constructed urged and even demanded that the defendant complete the construction of said canals at as early a date as possible so that plaintiffs could successfully wage their selling campaign. In fact, a statement appears in the record, which is not contradicted, that the plaintiffs brought an action against the defendant asking damages for the delay of defendant in the construction of certain of said canals. Having acquiesced in the construction of said canals, plaintiffs are now in no position to ask for an injunction prohibiting defendant from maintaining and operating them, nor to have the same abated as a nuisance.

[4, 5] The defendant, the Merced irrigation district, is an agency of the state, and the use to which water owned and controlled by it is put is a public use. The law is too well established in this state to require any extended citation of authorities that, where the owner of property acquiesces in, or even stands by and makes no suitable objection to, its use for a public purpose, he cannot thereafter enjoin the continuance of such public use. The latest case upon this subject is Conaway v. Yolo Water & Power Co., 204 Cal. 125, 266 P. 944, 946, 58 A. L. R. 674, in which this court said: "Where property is taken for a public use by a public service corporation and the owner of the property has not in an appropriate way objected to its being so taken, but has, by silence or quiescence, permitted the public use to be inaugurated and carried on for some period of time, he has thus waived or lost his right to proceed against such use of his property by ejectment or abatement." Other cases enunciating the same rule are Reed v. Oakdale Irrigation District, 46 Cal. App. 139, 142, 188 P. 832; Barton v. Riverside Water Co., 155 Cal. 509, 515, 101 P. 790, 23 L. R. A. (N. S.) 331; Miller & Lux v. Enterprise Canal & Land Co., 169 Cal. 415, 423, 147 P. 567, and Gurnsey v. Northern Cal. Power Co., 160 Cal. 699, 711, 117 P. 906, 36 L. R. A. (N. S.) 185. If mere acquiescence in the use of private land by a public corporation will work a waiver of a property owner's right to enjoin such use, the rule should be much more strictly drawn against one who has not only acquiesced, but has expressly consented and urged and importuned the taking of his land for such public use. In neither case will an injunction lie against such use of his property, nor will the court abate the use thereof as a nuisance.

In the case of Conaway v. Yolo Water & Power Co., supra, it was held that, "in such case, if he has suffered damage to his property * * * he is, of course, entitled to be compensated in damages." This brings us to a consideration of the question of damages which the plaintiffs contend they are entitled to by reason of the maintenance and operation of said canals upon their lands. Are the plaintiffs barred from recovering such damages by reason of the conveyances executed by them and their predecessors in interest, under which by far the greater, if not all, of said canals and laterals were constructed, and by their acquiescence and consent to the construction of all of said canals and laterals?

We have already referred to certain deeds executed either by the plaintiffs or their predecessors in interest, under which some of the canals complained of were constructed over the plaintiffs' lands. Besides these deeds conveying rights of way for specific canals named therein, there was the deed from John W. Mitchell, who owned the Titus ranch a long time prior to the time the plaintiffs acquired their lands. In this instrument Mitchell, who was the party of the second part, granted to the Merced Canal & Irrigation

Company, a predecessor in interest of the defendant, "and assigns the right of way for the purpose of constructing and using ditches, canals, flumes, pipes and conveyances for water through and across all the lands hereinbefore mentioned and all lands belonging to party of the second part situate in said county of Merced south of the Merced river." It is conceded that the lands referred to in this conveyance included the lands now owned by the plaintiffs in the Titus ranch. Plaintiffs claim that this deed is void for uncertainty, and for other reasons is invalid. We think none of these objections can be maintained, but we do not rest our decision in this case solely upon the effect of this conveyance. Aside from this deed, plaintiffs concede that they acquiesced and consented to the construction of all of said canals and laterals, both those which were constructed under express grants of rights of way therefor, and those which were not so constructed.

[6] Nevertheless, the plaintiffs contend that they are entitled to damages under the Constitution of the state, which provides that private property shall not be taken or damaged for public use without just compensation having been first made to the owner. Const. art. 1, § 14. Plaintiffs contend that they occupy the same position regarding their right to recover damages claimed to have been sustained by reason of the seepage from defendant's canals, as if, instead of securing grants of rights of way, and rights by acquiescence and consent, the defendant had by condemnation proceedings acquired the right to construct said canals over the lands of plaintiffs. In Sternes v. Sutter Butte Canal Company, 61 Cal. App. 737, 741, 216 P. 66, 68, it was held "that a grant of a right of way, in general terms, is the exact counterpart of whatever damages would be considered and determined by the court and allowed in condemnation proceedings." We think the same rule would apply when instead of a grant deed the landowner expressly agreed to the taking of his property for public use. In case private property has been taken by condemnation, the rule is that the owner has received in said proceeding all damages to his property which would be the natural, necessary, and reasonable incident to the taking thereof for public use. In case he has given his consent to such taking by deed, he is precluded from subsequently recovering any damage that he might have recovered in an action had the public use been taken by condemnation. Sternes v. Sutter Butte Canal Company, supra. We think the same rule applies where the private owner has, as the plaintiffs in this case have, expressly consented to the taking of their property for a public use. Particularly should this be so when, as in the instant case, the private owners have not only acquiesced and consented, but have importuned and demanded the construction of the public improvement upon their property.

Under these circumstances the plaintiffs, in respect to their right to recover damages for seepage of water upon their lands from defendant's canals, are in the same position as they would have been in had the defendant condemned the right to construct said canals upon plaintiffs' lands. If damages for seepage could be recovered in a condemnation proceeding, then the plaintiffs, having expressly given their consent to the construction of said canals upon their lands, are precluded from thereafter recovering any damages which they may have sustained from the seepage of water therefrom. In the case of Sternes v. Sutter Butte Canal Company, supra, this question was squarely before the court, with the result that the court held that damages for seepage was a proper item to be taken into consideration by the court in determining in a condemnation proceeding the extent and amount of defendants' damage. That part of the opinion in that case bearing upon this question is to be found on page 742 of 61 Cal. App., 216 P. 66, 69, and is as follows:

"That damages inflicted upon land not taken by seepage may be considered in condemnation proceedings seems clearly allowable. In Denver City Irr. Co. v. Middaugh, 12 Colo. 434, 13 Am. St. Rep. 234, 21 P. 565, the court thus expressed its views: 'In assessing damages in condemnation proceedings for lands taken for the purpose of constructing a ditch or reservoir thereon, injuries likely to result from seepage and leakage from such canal or reservoir would naturally be among the first items to occur to a jury.' Further: 'An examination of the reported cases shows that there is no substantial difference in the general rules applicable to the assessment of damages in condemnation proceedings, as announced by the courts of last resort, but in the application of such rules to particular cases the same uniformity has not been observed; still no case has been called to our attention which by any fair construction can be held to be in conflict with the conclusion that damages for seepage and leakage should have been determined in the first proceeding.'

"In the more recent case of Farmers' Reservoir & Irr. Co. v. Cooper, 54 Colo. 402, 130 P. 1004, the Supreme Court of Colorado uses the following language: 'In condemnation proceedings all damages, present and prospective, that are the natural, necessary, or reasonable incident of taking the property sought to be condemned, must be assessed.' It was there held that seepage, and damages resulting from seepage, constituted an incident to be considered by the court or jury whenever land was taken for a right of way to construct a canal."

We find nothing contrary to this decision. Plaintiffs have cited the case of Turpen v. Turlock Irrigation District, 141 Cal. 1, 74 P. 295, where the trial court expressly found that the canals were negligently constructed, and this court held that "damages caused by the seepage from faulty construction of the canal could not have well been anticipated, and were not included in the condemnation proceeding." Such damage was not the natural, necessary, and reasonable incident to the use and operation of said canal. In the present action the court found that the canals and laterals were constructed with care, skill, and prudence and in a workmanlike manner. Plaintiffs do not question this finding. The seepage therefrom was only in such quantities as was usual and unavoidable from canals of that character constructed over lands like the plaintiffs'. It was therefore but the natural, necessary, and reasonable incident to the use and operation of said canals. It was such damage as could be recovered in an action of condemnation. Quoting further from Sternes v. Sutter Butte Canal Company, page 743 of 61 Cal. App., 216 P. 66, 69, the court said: "It thus appears by an unbroken line of authorities, and also as well by good reasoning, that whenever a grant of a right of way is executed by a land owner he thereby estops himself from afterwards prosecuting any action for the past, present, or future damages that may have occurred, or reasonably be expected to occur, by reason of the necessary, natural, and ordinary use of the utility or public service for which the right of way is granted. And this includes the natural, reasonably to be anticipated, and ordinary injury resulting to adjacent land from seepage, if the land is of a character that admits of or may be reasonably expected to admit of such action of the waters taking place."

We have no question that the facts in this case bring it within the rule announced above. Plaintiffs concede that their lands were sandy and porous in character. They, and their predecessors in interest, well knew that canals constructed over them would cause more or less seepage. They did not in their conveyances of rights of way, or in any other manner, make any provision to protect themselves against such damages, or require of defendant that it construct any particular kind of canal or that the canals be constructed of any material different from the soil and materials through which they were built. Plaintiffs admit that they knew that said canals would seep large quantities of water unless they were lined with cement and that this knowledge was gained from reading a report prepared by J. D. Galloway, an engineer employed by the district to make investigations regarding the conditions in the district preparatory to the preparation and adoption by the district of plans for a comprehensive irrigation system. This report was prepared and presented to the district some time prior to June 23, 1921, as we find on that date Mr. Galloway presented a supplemental report to the board of directors of the district. We have been unable to determine the date of the original report. The supplemental report was filed almost a year before the two deeds of rights of way from the East Side Investment Company to the district were executed and about the same length of time before the date of the deed from the plaintiff Lyon & Hoag to the district. In none of these deeds is there to be found any provision for the lining of the canals or for the protection of the grantors from damage due to seepage. Considerable correspondence passed between the several plaintiffs and the district before and during the time the canals and laterals complained of were being constructed, and our attention has not been directed to a single line in this correspondence in which the plaintiffs or any of them expressed the belief, or in the slightest respect indicated that they expected the canals would be lined or constructed any differently than they were actually constructed. From these facts we can draw but one conclusion, and that is that the plaintiffs and their predecessors in interest at all times before and after they consented to the construction of the canals and laterals upon their lands knew that in all reasonable probability there would be seepage from said canals as a matter of course, and with this knowledge they executed said deeds to rights of way for said canals and in other ways already referred to acquiesced in, consented to, and demanded the construction of said canals and laterals across their lands. Under these circumstances it is apparent that the damage, if any, sustained by the plaintiffs by reason of seepage from said canals was "the natural, reasonably to be anticipated, and ordinary injury resulting to" their lands from the construction of said canals, and under the authorities above cited plaintiffs, by the grants of rights of way, and other acts indicating consent to the construction of said canals, are estopped from prosecuting any action for the recovery of such damage by reason of the said seepage from said canals.

Plaintiffs make the claim, however, that they and their predecessors in interest were led to believe by the defendant that they would be protected from any damage which might arise from seepage, and that said grants of rights of way and their acquiescence and consent to the construction of said canals were obtained under the belief that the defendant would line said canals with cement, and would install appliances for the drainage of said lands, should the same require drainage. This claim is based almost, if not entirely, upon the report of Engineer Galloway already referred to. This report, as we have seen, was prepared by Mr. Galloway for the district before the district began the construction of its irrigation system and for the purpose of providing a comprehensive plan under which the district could work and install an adequate and proper system for the irrigation of the lands of the district. In his report, Mr. Galloway emphasized the drainage problem as one of the serious problems with which the district would have to contend after its irrigation system was in operation. He mentioned, as the most feasible and practicable solution of the drainage problem, lining of canals to prevent seepage, excavation of open ditches, and installation of pumping plants lifting water from the lower strata. He estimated that it might be necessary to spend $750,000 for drainage purposes, and that this amount might be exceeded in the distant future. He expressly stated that the problem was one to be solved in the future. In a subsequent part of his report he placed the costs "for pumps, canals, etc., the sum of $350,000." It is not contended by plaintiffs that they had any promise or understanding, either direct or indirect, that the district would install any system for the drainage of their lands. If they placed any reliance or confidence in the report of Mr. Galloway, they had every reason to believe that there might be a certain amount of seepage from the canals, yet neither the plaintiffs nor their predecessors in interest made any attempt to have the district protect them from such damage. The grants of rights of way, as we have seen, were absolute in form, and contained no reservations or provisions which might be construed into an attempt to provide against damage from seepage, or as a requirement of the defendant to line its canals or to install any drainage facilities. When the plaintiffs were urging and insisting that the district hasten the construction of said canals so that they might secure water upon their lands, they gave no intimation that they were relying upon the Galloway report or upon any implied promise of the district that they would be given special protection from the results which they had every reason to expect would follow from the construction of earthen canals in which to convey the water to and over their lands. There is no evidence before us of a convincing character that either the plaintiffs or their predecessors in interest were influenced in any manner whatever by anything contained in the Galloway report.

[7] The court found that the defendant had not damaged the plaintiffs in the "particulars set forth in plaintiffs' complaint or any of said particulars, or in any other manner or in any amount at all." There is no question that the water plane under plaintiffs' lands is higher now, or was at the time of the trial, than it was in years previous and before the canals of the defendant had been constructed upon their lands. There was also ample evidence to support a finding that this rise in the underground water was largely due to seepage from defendant's said canals. On the other hand, there was evidence that long prior to the organization of the defendant district, and as early as 1904, the water plane under the lands of plaintiffs began to rise, due in part at least to the extensive irrigation system constructed and operated by the Crocker-Huffman Company upon their land to the north and east of the Titus ranch. G. S. Bloss, who owned the Titus ranch from 1904 to 1919, testified that there was a gradual rise in the water plane during the time he owned the ranch of about one foot a year. Other witnesses gave testimony corroborating this evidence. While there was evidence that, after defendant constructed its canals upon the Titus ranch, the rise in the water levels showed even a greater increase than in previous years, yet plaintiffs' own witness, H. L. Haehl, an engineer employed by the plaintiffs to make measurements and observations in regard to the water plane under the Titus ranch, testified in a number of instances that the measurements made by him showed a rise in this water plane of about one foot per year from 1920 to 1927. It will thus be seen that there is substantial evidence to be found in the record showing that the rise in the water plane in the Titus ranch showed no increase after the construction of defendant's canals over what it had been before the defendant began any of its irrigation projects.

Conceding that the evidence shows that there was some increase in this rise of water after the date defendant began its operations, there is ample evidence in the record to account for a material part, if not all, of said increase. In January, 1922, the defendant district acquired the irrigation system of the Crocker-Huffman Company. At that time there were only 52,000 acres of land under irrigation. The district immediately began to extend the irrigation system acquired by it not only to lands lying northeast and east of the Titus ranch, but into the Titus ranch itself. In 1924, there were 66,000 acres irrigated in the district; in 1925, 93,000; in 1926, 103,000; and in 1927, 112,000 acres. As we have seen, the plaintiffs' lands were located in practically the lowest part of the district, and necessarily they would receive an increased amount of underground water as irrigation was extended to the lands in other parts of the district. So whatever increase there was in the elevation of the water underlying the lands of the Titus ranch could be reasonably accounted for to a large extent by the increase in the acreage within the district brought under irrigation during this period of time. The court further found, and there was substantial evidence to support the finding, that the users of water on the Titus ranch carelessly and negligently caused large portions of water delivered to them for irrigation purposes to run into certain swales and depressions and accumulate therein, thus causing the ground water thereunder to rise during the spring and summer. The court also found that an artesian well installed on the Titus ranch and flowing a large stream of water had been permitted to flow during the period complained of and that the water from this well had contributed to a certain extent in causing the rise of water under portions of the Titus ranch. With this testimony before us we are unable to hold that the finding of the court that defendant had not damaged the plaintiffs finds no support in the evidence. On the other hand, it is apparent from the references herein made to the testimony that said finding finds substantial support in the evidence.

There are other specifications as to the insufficiency of the evidence, but they relate to minor matters and we deem it unnecessary to give them any special consideration, for the reason that, if we are correct in the views expressed above, these other questions are of no material importance. For the same reason we consider it unnecessary to pass upon the question as to whether the plaintiffs' cause of action is barred by the statute of limitations or to discuss other findings of the court made in response to said affirmative answer. If plaintiffs have failed to sustain the cause of action alleged in the complaint, as we have held they have, then it is of no consequence, in so far as this action is concerned, whether the alleged cause of action is or is not barred by the statute of limitations, or whether or not certain of the affirmative defenses were sustained by the evidence.

[8-12] Plaintiffs' second cause of action, in which they ask for a mandatory injunction requiring the defendant to install suitable drainage works to drain their lands and to remove therefrom the water brought to said lands by the defendant, is predicated upon an act of the Legislature entitled, "An act to provide for drainage by irrigation districts." Stats. 1907, p. 569. Section 1 of this act empowers an irrigation district to "provide for any and all drainage made necessary by the irrigation provided for" by the laws relating to irrigation districts. Section 2 of said act reads as follows: "Whenever it appears necessary, or proper, or beneficial to the lands affected thereby, to drain such lands or any portion thereof on account of the irrigation which has been done, or which is intended to be done under such laws, whether for the purpose of more beneficially carrying on such irrigation, or to protect such districts from liability by reason of such irrigation, whether the irrigation works have already been constructed or not, it shall be the duty of the board of directors to provide for such drainage, and said board and its officers, agents and employees shall do all necessary and proper acts for the construction, repair, maintenance and management of drainage work for such purpose."

It is the contention of the plaintiffs that the duty of an irrigation district to furnish drainage to lands within the district requiring the same is expressly enjoined upon it by this statute, and therefore such duty may be enforced by mandate of the court. Code Civ. Proc. § 1085.

There can be no question but that by this act of the Legislature, an irrigation district is given the power and authority to provide for drainage made necessary by the operation of the irrigation system installed and operated by the district. It is equally clear that this act makes it the duty of an irrigation district to provide for such drainage. Being a duty enjoined by law, it can be enforced by a mandate of court. Whether in a particular case a landowner in the district can invoke the aid of the court to compel the district to perform the duty imposed upon it by the statute would depend upon the facts of that particular case. There are two propositions at least which must be established before a court would be justified in issuing the mandate requiring the district to perform the duty of providing drainage. The first of these is that the landowner in the district must prove by satisfactory and sufficient evidence that his lands are in need of drainage made necessary by the irrigation operations of the district; and the second is whether the district is acting under the power conferred upon it by the statute and is doing all within its power to perform the duty enjoined upon it by the statute.

As to the first of these two propositions, we think there can be no question but that the plaintiffs have shown that their lands are in need of drainage by reason of the irrigation operations of the district. On a large part of the plaintiffs' lands the evidence shows that the underground water is so near the surface that neither trees, vines, nor ordinary crops can be profitably grown thereon. This high-water plane is shown to be due in the main to the irrigation of plaintiffs' lands and those of the district lying in their near vicinity and to the east and northeast of the Titus ranch. It is also shown that a certain amount of water seeps from defendant's canals and ditches and contributes to the rise of the water underlying plaintiffs' lands. Practically the only contributing cause to the rise of this water plane, not due to the acts of the district, is that which is occasioned by the artesian well heretofore mentioned. The defendant had no control over said well, but its influence upon the water plane was confined to only a small area adjacent to said well, and in itself constituted but a small factor in producing the general condition existing through plaintiffs' lands.

We will now pass to the second of the two propositions stated above, and in its consideration we will endeavor to determine what steps, if any, the defendant has taken toward discharging the duty enjoined upon it by the statute to drain plaintiffs' lands, and whether the same have been such as to constitute a reasonable compliance with the requirements of the statute. We have already referred to the report of Engineer Galloway, made before the district had begun any of its irrigation operations. In that report the question of drainage was given extended consideration, and the best means of draining lands of the character of those composing the district were outlined in said report with great care. Following the installation by the district of its irrigation system, as shown by the findings quoted above, large sums of money were expended by the district in the lining of its canals, so as to prevent seepage therefrom upon adjacent lands, and in sinking wells and installing pumps thereon for the purpose of extracting water that had as a result of the irrigation in the district flowed into and collected under the lands in certain parts of the district. No question is raised but that the means thus employed were suitable and proper for drainage purposes. The evidence further shows and the court finds that the district had at the time of the trial made provision in its annual budget for a large sum of money, amounting to $288,048.24, "for drainage purposes and lining of canals." It will be presumed that the same policy of raising money for the purpose of perfecting and extending its system of drainage has been followed by the district in succeeding years. At least there is nothing before us that the district has not done so.

But disregarding what the district may have since done, the evidence shows that up to the time of the trial it had followed a consistent, effective, and comprehensive plan for the drainage of the lands in the district, including those of the plaintiffs, and, with particular reference to the efforts of the district to drain the lands of the plaintiff of the underground water therein, the court found: "That the defendant has done all that it could reasonably and fairly and equitably do for the drainage of plaintiffs' lands, and the control of the ground water flowing therein and thereto, with the funds available for that purpose and that the money heretofore expended by defendant for the control of the ground water and the canal lining as set forth was all the money that could have been fairly and equitably expended for that purpose."

It is true that the district has not yet solved its drainage problems, nor has it installed sufficient and adequate equipment to thoroughly drain all of plaintiffs' lands. In fact, the evidence shows that, at the time of the trial, large bodies of plaintiffs' lands were injuriously affected by surface waters that had accumulated in and under said lands as a result of the irrigation of lands in the district. Plaintiffs insist that under the statute they are entitled to have their lands, if not absolutely, at least reasonably drained and freed from the water that has thus accumulated thereunder. Under a proper showing they would undoubtedly be entitled to this relief, but not under the facts proven in this proceeding. The plaintiffs are, of course, entitled to no greater right than any other landowner in the district whose lands are situated and affected similarly as those of the plaintiffs. There is evidence in the record, which we think is uncontradicted, that there are 50,000 acres of land in the district in need of drainage on the average more seriously than do the lands of the plaintiffs. If the plaintiffs are entitled to a mandatory injunction requiring the district to drain their lands so that they will be free from ground water injuriously affecting them, then the balance of the owners of the 50,000 acres of land, whose lands are entitled to drainage by the district, would be entitled to the same remedy by the courts; and if the plaintiffs are successful in this proceeding, then it would only be reasonable to expect the balance of the owners of lands similarly situated to seek enforcement of their rights. The result would be that the district would be forced at once to enlarge its drainage system by the lining of practically all its canals and ditches, and by sinking wells equipped with pumps sufficient to drain all of the 50,000 acres in the district entitled to drainage. According to the testimony of Mr. Means, an engineer and a witness for the defendant, canal lining would cost about $12,000 a mile, or between six and eight million dollars to line the canals of defendant in the sand area alone, and lining of canals without drainage works would not, according to Mr. Means, control the ground water. The evidence shows that the district is in no position to meet the cost of such extensive additions to its present drainage system. The district had at the time of the trial a bonded indebtedness of $16,000,000, and the entire assessed value of all property within the district was less than $23,000,000. Its tax rate was one of the highest in the state. To compel the district to immediately install the facilities and works necessary to drain all the land in the district requiring drainage would bring financial ruin upon the district and irreparable injury to the landowners in the district, including the plaintiffs. We do not believe that, under this state of facts, it was ever intended by those responsible for the enactment of the Drainage Act of 1907 that an irrigation district, situated as is the defendant in this action, should be compelled to work its own destruction by undertaking to provide drainage facilities for the district, the expense of which is beyond its financial ability to meet or pay for. In fact, before a writ of mandate will issue to compel a public corporation or agency to perform an act involving the expenditure of money, it must affirmatively appear that there are funds available for that purpose. Buschmann et al. v. Turlock Irr.

Dist., 47 Cal. App. 321, 190 P. 491; Nelson v. Anderson, etc., Irr. Dist. 51 Cal. App. 92, 196 P. 292, 293; Farris v. State, 46 Neb. 857, 65 N. W. 890.

In the Nelson Case, the court said: "By finding 16 it appears that there is no money available, and cannot be made available, for the immediate construction of lateral 3—1—2, under the law authorizing an assessment of 2 per cent. of the aggregate value of the lands within the district, as provided by chapter 291 of the statutes of the state of California enacted in 1919; and that the amount of money in said funds so created does not exceed the aggregate of the duly authorized and issued warrants of said irrigation district. As to when any of the funds of the district can be used for construction purposes, and what steps must be taken to authorize such use, have been discussed by this court in Buschmann et al. v. Turlock Irr. Dist., 47 Cal. App. 321, 190 P. 491, and need not here be repeated. And until these funds are available for the construction of the canals, ditches, and laterals authorized by the voters of the district, it is evident that this court can issue no mandate requiring the immediate undertaking of such work. It will be presumed that the directors of the district will expend the money for the purposes for which it has been raised, and the fact that the directors of the district were not able to complete the construction of the lateral referred to out of the moneys raised as the proceeds of prior bond issues does not authorize the issuance of the writ of mandate. It must be first shown that the money is available before its application can be directed. We do not deem it necessary to cite authorities upon this point."

Our conclusion, therefore, as to the second proposition stated above, is that the defendant district recognizes the duty imposed upon it by the statute and is endeavoring to comply with the requirements of said statute. While it has not succeeded in discharging this duty to its fullest extent, it has done all that could reasonably be required of it with the money available for that purpose, and which the resources of the district will permit. Under such a state of facts, the writ of mandate will not lie. The writ is an equitable remedy and will not always issue as a matter of right. As was said in Gammon v. McKevitt, 50 Cal. App. 656, 665, 195 P. 726, 730: "The writ of mandamus is not wholly a writ of right, but lies, to a considerable extent, within the sound judicial discretion of the court where the application is made; * * * and no court should allow a writ of mandamus to compel a technical compliance with the letter of the law, where such compliance will violate the spirit of the law." In California Jurisprudence, vol. 14, p. 178, the rule is stated as follows: "As in other cases, the propriety of issuing a mandatory writ is determined according to the particular circumstances, and issuance of it rests in the sound discretion of the court." The author cites in support of this text, Clough v. W. H. Healy Co., 53 Cal. App. 397, 200 P. 378.

The present action appears to have been thoroughly tried in the court below, the trial lasting about six weeks, and the reporter's transcript covering over 2,000 pages. Every phase of the drainage problems of the district was minutely gone into by each side through experienced engineers and able counsel. The trial judge visited the district and personally examined the lands therein and ascertained their condition in respect to drainage needs. He had the benefit of an inspection of the canals of the district, their susceptibility to seepage, and the facilities installed by the district for the purpose of overcoming this seepage and of draining the underground waters underlying the lands of the district. The case was also thoroughly argued before the trial court. The brief of the plaintiffs, who are the appellants, is, as stated therein, simply an answer to the argument made by the district before the trial court. That nothing additional was contained in the defendant's brief in this court to that presented to the trial court is indicated by the fact that the plaintiffs have filed no reply brief herein to the brief of the defendant. With these matters thus presented at the trial, that court refused to issue a mandatory injunction as prayed for by the plaintiffs. As we view the record before us, and as indicated in the views above expressed, we find no reason that would justify this court in holding that the trial court erred in its denial of said writ. We are therefore of the opinion that its action in that respect should not be disturbed by this court.

The judgment appealed from is affirmed.

We concur: WASTE, C. J.; SHENK, J.; RICHARDS, J.; SEAWELL, J.; PRESTON, J.; LANGDON, J.

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NAKAMURA v. BALISH et al.
L. A. 10943.

Supreme Court of California.
March 17, 1931

1. Appeal and error 🔑1010(1).

Where it was uncertain whether contract signed by individual was copartnership agreement, trial court's finding on sufficient evidence that it was firm transaction will not be disturbed on appeal.

> Written agreement sued on recited that individual defendant purchased from plaintiff, for $3,000, 100 acres lettuce, and that partnership was to give plaintiff 20 per cent. of net profits. Agreement was signed by individual defendant.

2. Sales 🔑340.

Seller could recover entire purchase price of crop, where buyer accepted delivery at agreed price (Civ. Code § 3311).

In Bank.

Appeal from Superior Court, Imperial County; J. S. Larew, Judge.

Action by W. S. Nakamura against Barney Balish and another, transacting business under the name of Balish Brothers. Judgment for plaintiff, and defendants appeal.

Affirmed.

Harry W. Horton, of El Centro, for appellants.

R. B. Whitelaw and Don C. Bitler, both of El Centro, for respondent.

PER CURIAM.

The defendants appeal from the judgment of the trial court in the plaintiff's favor for the sum of $3,000 for a lettuce crop upon 100 acres of land, alleged to have been sold and delivered to the defendants at the agreed price of $3,000, which the defendants have refused to pay. The answer of the defendants is a denial of the averments of the complaint, and consists, by way of further and affirmative defense, in certain averments as to the nature of the transaction out of which the alleged liability arose, which, however, the court, upon conflicting evidence, found to be untrue. The appellant filed an opening brief herein, to which the respondents have made no reply, nor have they made any response to the order to show cause herein why a respondent's brief has not been filed.

The alleged liability arose out of a written agreement in the following form:

"I, Barney Balish, this day bought from John Bunn and W. S. Nakamura for $3000.00, 100 acres lettuce at end of lettuce crop; Balish Bros. to give U. S. Nakamura 20 per cent net profits.

"B. Balish."

At the time the above agreement was signed, B. Balish drew and delivered to the sellers of the lettuce crop a check for $1,000 as a payment upon the purchase thereof, but on the following day procured the return of said check by a subterfuge and then tore it up and repudiated the transaction; whereupon this action was brought.

[1] The appellants upon this appeal contend that the transaction, as shown by the terms of the above agreement, was one between B. Balish personally and the sellers of the lettuce crop and was not a firm transaction. The agreement, it is true, purports to be the individual contract of Barney Balish, and his name alone is signed thereto. It, however, contains an important clause purporting to bind Balish Bros. to share the profits of the transaction with one U. S. Nakamura. It is thus rendered uncertain as to whether or not it is to be treated as a copartnership agreement, and the trial court upon sufficient evidence concluded it to be a firm transaction. This conclusion will not be disturbed upon appeal.

[2] The appellants further contend that the trial court was in error in rendering its judgment against the defendants for the entire purchase price of the lettuce crop, the contention in that regard being that the rule of damages governing such a transaction is that set forth in section 3311 of the Civil Code. The difficulty with this contention is that by the terms of said section it is made applicable to "the breach of a buyer's agreement to accept and pay for personal property," while in the instant case the plaintiff alleged, and the trial court found, that the defendants had accepted delivery of the lettuce crop at the time of the purchase thereof and at the agreed price of $3,000, no part of which had been paid. The evidence in the case, contained in a scant bill of exceptions, seems to be sufficient to sustain the foregoing finding of the trial court, and, this being so, the plaintiff would be entitled to recover in damages the purchase price of the personal property thus found to have been sold and delivered. There is, therefore, no merit in this appeal.

The judgment is affirmed.

112 Cal. App. 445

YOUNGER v. YOUNGER.

Civ. 7674.

District Court of Appeal, First District, Division 1, California.

March 11, 1931.

1. Divorce 🔑286.

Order of trial court granting wife alimony could not be disturbed, there being no affirmative showing of abuse of discretion.

> The bill of exceptions merely set forth the wife's affidavit, the order to show cause, and the order of the court. The order recited that, on the hearing, testimony both oral and documentary was introduced and considered, but none of such testimony was presented in the bill of exceptions.

2. Appeal and error 🔑758(1).

Appeal was regarded as abandoned, where appellant's only brief pointed out no errors.

> The appellant's opening brief, his only one, merely recited that he appealed from the order involved, without any attempt to point out error.

3. Appeal and error 🔑758(2)

Allowance of attorney's fees in divorce action was not reviewable, no error regarding it being pointed out.

4. Divorce 🔑240(3).

In wife's divorce action, unpaid medical bills incurred by wife prior to trial *held* properly admitted as bearing on financial ability and necessities of wife (Civ. Code, § 139).

> Civ. Code, § 139, provides that where a divorce is granted for an offense of the husband, he may be compelled to make such suitable allowance to the wife for her support during her life, or for a shorter period, as the court may deem just, having regard to the circumstances of the parties.

5. Divorce 🔑240(3).

In wife's divorce action, evidence of wife's support of adult invalid daughter was properly admitted.

6. Appeal and error 🔑882(10).

In divorce action, defendant could not complain of meager description of condition of adult invalid daughter, where defendant's objections prevented fuller description.

7. Divorce 🔑240(1).

Allowing wife $35 per week alimony in divorce action *held* not error under facts.

8. Evidence 🔑589.

Court, in weighing defendant's testimony in divorce action, could consider its contradictions by admissions of his answer.

9. Divorce 🔑239.

In divorce action, defendant's denial of plaintiff's allegations that community property consisted of undivided one-half interest in copartnership of approximate value of $25,000 merely denied such interest was community property and did not deny its value.

10. Divorce 🔑239.

In divorce action, denial that defendant was able to earn $400 per month, in answer to allegation that he was capable and did earn $400 per month, was admission that he earned $400 per month.

Appeal from Superior Court, Los Angeles County; Fletcher Bowron, Judge.

Action by Ida Louise Younger against William Raymond Younger for divorce. From the decree and from an order granting alimony, defendant appeals.

Affirmed.

I. Henry Harris, of Los Angeles, for appellant.

Randall & Bartlett and Alfred L. Bartlett, all of Los Angeles, for respondent.

GRAY, Justice pro tem.

Appeals by the husband in an action of divorce for desertion, from that part of the interlocutory decree awarding the wife the sum of $35 a week as permanent alimony and $100 as attorney's fees, and also from an order granting her, during the pendency of the first appeal, the sum of $25 a week alimony and additional attorney's fee for such appeal.

[1-3] As to the appeal from the order, the bill of exceptions merely sets forth the wife's affidavit, the order to show cause, and the order of the court. The order recites that, on the hearing, testimony both oral and documentary was introduced and considered, but none of such testimony is presented in the bill of exceptions. In the absence of an affirmative showing of an abuse of discretion, the order of the trial court cannot be disturbed. Webster v. Webster, 43 Cal. App. 772, 185 P. 863; Duffey v. Duffey, 79 Cal. App. 734, 251 P. 218. Since the opening brief (the only one on behalf of the appellant) merely recites that he appealed from the order, without any attempt to point out error, the appeal from the order will be regarded as abandoned. 2 Cal. Jur. 727. Likewise, no error is pointed out with reference to the first allowance of attorney's fees and this matter will not be reviewed.

[4] Medical bills incurred by the wife prior to the trial, but then due and unpaid, were properly admitted as a circumstance, which section 139 of the Civil Code required the court to consider. Lamborn v. Lamborn, 80 Cal. App. 494, 251 P. 943. They had a bearing upon financial ability, necessities, and health of the respondent.

[5, 6] Evidence of the wife's support of an adult daughter who was sick and unable to work was properly admitted. Anderson v. Anderson, 124 Cal. 48, 56 P. 630, 57 P. 81, 71 Am. St. Rep. 17. Appellant cannot complain of the meager description of the daughter's condition, because a fuller description was prevented by the sustaining of his objections to respondent's questions. Harp v. Harp, 136 Cal. 421, 69 P. 28.

[7-10] The husband—the only witness as to his financial ability and necessities—testified that he was a partner in a plumbing business, whose assets were $3,000; accounts receivable, $13,000; loss, preceding year, $7,700; and bank debt, $5,000. He further testified he draws as wages $60 a week and expends weekly the following sums: Treating customers, $5 to $10; room, $10; board, $15 to $20; automobile, $10; clothes $5; laundry, $5 to $10; doctor, $5; and pocket money, $10. Respondent argues that, since his testimony shows that his net salary (after deducting cost of treating customers and of automobile, both necessary to the business) is $40 a week, the court, in allowing his wife $35 a week alimony, must have erroneously rejected his uncontradicted and unimpeached testimony. "Undoubtedly, as a general rule, positive testimony as to a particular fact, uncontradicted by any one, should control the decision of the court; but that rule admits of many exceptions. There may be such an inherent improbability in the statements of a witness as to induce the court or jury to disregard his evidence, even in the absence of any direct conflicting testimony. He may be contradicted by the facts he states as completely as by direct adverse testimony; and there may be so many omissions in his account of particular transactions, or of his own conduct, as to discredit his whole story. His manner, too, of testifying may give rise to doubts of his sincerity, and create the impression that he is giving a wrong coloring to material facts. All these things may properly be considered in determining the weight which should be given to his statements, although there be no adverse verbal testimony adduced." Quock Ting v. U. S., 140 U. S. 417, 420, 11 S. Ct. 733, 734, 851, 35 L. Ed. 501. The addition of the items of expense show that their total exceed his wages by from $5 to $20 a week. He further testified that he had paid his wife $25 weekly as temporary alimony (presumably for over one and a half years before trial) and had paid $800 for her doctor's bill and $325 for his doctor's bill. The query naturally arises, if he could pay in the past $25 weekly, in addition to the doctor's bills, might he not be able to pay $35 in the future. He attempted to meet this by testifying that these payments were met by overdrawing his account with the firm in the sum of $1,800, but it is hard to see how this overdraft could be allowed by a firm of such small assets, heavy losses, and debts. The court, also, was entitled in weighing his testimony to consider its contradictions by the admissions of his answer. Bellus v. Peters, 165 Cal. 112, 130 P. 1186. His denial, in his answer, of plaintiff's allegations that the community property consisted of an undivided one-half interest in the copartnership of the approximate value of $25,000, merely denied such interest was community property and did not deny its value. Wolff v. Wolff, 102 Cal. 433, 36 P. 767, 1037. Likewise, in answer to the allegation that he "is capable and does earn the sum of $400 per month," he merely "denies that he is able to earn $400 per month." Such denial is an admission that he does earn $400 per month.

Appellant having failed to show any error, the interlocutory decree and order are affirmed.

We concur: TYLER, P. J.; CASHIN, J.

2

In the Matter of the Application of Ernest BOOTH for a Writ of Habeas Corpus.

Cr. 1124.

District Court of Appeal, Third District. California.

May 19, 1930.

Application for writ of habeas corpus.

Ernest Booth, in pro. per.

PER CURIAM.

Writ denied on the authority of People v. Middleton, 103 Cal. App. 135, 283 P. 976, certiorari denied by the Supreme Court of the United States, April 21, 1930, 281 U. S. 739, 50 S. Ct. 349, 74 L. Ed. 1153.

A petition for a rehearing of this cause was denied by the District Court of Appeal on May 26, 1930.

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114 Cal. App. (Supp.) 773

KOONZ v. COMFORT SUPPLY CO.

C. A. 462.

Appellate Department, Superior Court, Los Angeles County. California.

March 13, 1931.

1. Exceptions, bill of 🔑55(1).

Where trial court refuses to settle bill of exceptions, Appellate Department of Superior Court has no power to settle proposed bill.

2. Exceptions, bill of 🔑53(3).

Where trial court refuses to settle bill of exceptions, remedy is by mandamus.

3. Exceptions, bill of 🔑55(1).

Where trial judge refuses to allow bill of exceptions in accordance with facts, statute authorizes superior court to settle bill, including evidence added, subtracted, or incorrectly stated (Code Civ. Proc. § 988a).

> Code Civ. Proc. § 988a, provides that, if judge refuses to allow bill of exceptions in accordance with facts, party desiring bill settled may apply by petition to superior court to prove such bill, and, when proved and filed, it has same effect as if settled by trial judge.

4. Exceptions, bill of 🔑55(1).

To establish judge's refusal to allow bill of exceptions, appellant must show that bill substantially identical with bill presented to appellate court was timely presented below (Code Civ. Proc. § 988a).

5. Appeal and error 🔑901.

Trial court is presumed on appeal to have acted regularly, and facts showing irregularity must affirmatively appear (Code Civ. Proc. § 1963, subds. 15, 17).

6. Appeal and error 🔑938(4).

Bill of exceptions presumably contains all evidence material to rulings to which exceptions were reserved and which were specified therein (Code Civ. Proc. § 1963, subds. 15, 17).

7. Appeal and error 🔑938(4).

Conflicting evidence *held* insufficient to overcome presumption of regularity of bill of exceptions in showing all material evidence (Code Civ. Proc. §§ 988a, 1963, subds. 15, 17).

Appeal from Municipal Court of City of Los Angeles; W. D. McConnell, Judge.

Action by Herald E. Koonz against the Comfort Supply Company. From a judgment for plaintiff, defendants appealed, and filed a petition to prove a bill of exceptions.

Petition denied, and judgment affirmed.

Gallaudet & Hoffman, of Los Angeles, for appellants.

Leonard G. Shelton, of Glendora, for respondent.

McLUCAS, P. J.

This is an action brought to recover for services rendered. Judgment was granted to plaintiff in the sum of $356.98. Defendants appeal from the judgment.

Defendants filed a petition in this court to prove a bill of exceptions under the provisions of section 988a of the Code of Civil Procedure, alleging that the bill of exceptions, as settled by the trial judge, was not in accordance with the facts. Section 988a, in part, provides as follows: "If the judge in any case refuses to allow a bill of exceptions, or to certify to a transcript, in accordance with the facts, the party desiring the bill settled, or the transcript certified, may apply by petition to the superior court to prove the same. The application may be made in such mode and manner and under such regulations as may be prescribed by rules adopted for that purpose; and the bill, when proved, or the transcript, when prepared, must be certified by the judge of the superior court by whom said application is determined, and filed with the clerk of the municipal court, and when so filed, it has the same force and effect as if settled or certified by the judge who tried the cause." There being no rules adopted pursuant to the foregoing section, the applicants were advised to file a petition supported by affidavits, together with a copy of the bill of exceptions originally proposed by them, and to serve copies thereof on the respondent together with notice of the hearing. At the hearing, the petition being held sufficient, it was ordered that the petitioners be granted leave to offer proof of their proposed bill of exceptions, and the matter was referred to the presiding judge of this department to take testimony in reference to the bill of exceptions submitted by the petitioners, and to report the result of his proceedings. The report of the referee, containing a transcript of the proceedings before the referee, has been filed in this court.

[1, 2] Section 988a is similar in its provisions to section 652 of the Code of Civil Procedure, which reads as follows: "If the judge in any case refuses to allow a bill of exceptions in accordance with the facts, the party desiring the bill settled may apply by petition to the supreme court to prove the same; the application may be made in the mode and manner, and under such regulations as that court may prescribe; and the bill, when proven, must be certified by the chief justice as correct, and filed with the clerk of the court in which the action was tried, and when so filed it has the same force and effect as if settled by the judge who tried the cause." In so far as we are able to learn, section 988a, which was originally adopted in 1927 (St. 1927, p. 121), has received no interpretation from the appellate courts, although section 652 has frequently been reviewed by the higher courts. Under the authorities, this court has no power to settle a proposed bill of exceptions where the trial court has, for any reason, refused to settle a bill of exceptions. The remedy in case of such refusal is by mandamus. Keown v. California Pac. Realty Co., 207 Cal. 769, 279 P. 764.

[3, 4] The question has been raised as to whether this court has the power to correct, add to, or subtract from the evidence as stated by the trial judge in the bill of exceptions. In Estate of Dolbeer, 147 Cal. 359, 81 P. 1098, it was said that, as to the extent of the power of the Supreme Court under section 652, the construction of this section has been rather strict. It was further held that section 652 did not afford a remedy in respect to any exception allowed by the court, though the statements of the evidence in regard thereto may be incorrect, but section 652 was soon thereafter amended, changing the words, "an exception" to "a bill of exceptions." St. 1907, p. 716. Estate of Dolbeer, supra, being decided before the amendment of section 652, was based on the statute reading "an exception." Since the amendment of section 652, the question of the power of an appellate court to correct the evidence in accordance with the facts has not been raised. In Rauer's L. & C. Co. v. Templar Motors Co., 69 Cal. App. 782, 232 P. 464, a petition to prove a bill of exceptions was granted where the trial judge had stricken out a bill of exceptions including all the evidence taken at the trial. Section 988a was amended in 1929 (St. 1929, p. 858) so as to add the words "or to certify to a transcript," so that this section now applies to the refusal of a trial judge to allow a bill of exceptions or to certify to a transcript. It is clear that the Legislature intended to authorize the superior court to settle a bill of exceptions or transcript in accordance with the facts, including any evidence added to, subtracted from, or incorrectly stated in the bill of exceptions or transcript by the trial judge, where the trial judge has refused to allow a bill of exceptions or certify to a transcript in accordance with the facts. In order to establish such refusal, the petitioner must show that a bill or transcript identical in substance with that which he seeks to have settled by this court was presented to the trial court for allowance or certification at the proper time.

[5-7] The presumption on appeal is that the lower court pursued its authority regularly, and, if it is claimed that it did not do so, the facts showing irregularity must affirmatively appear. Estate of Wempe, 185 Cal. 557, 563, 197 P. 949. Where a bill of exceptions is contained in the record, it is presumed to contain all the evidence material to the rulings to which the exceptions were reserved and which were specified therein. Bedan v. Turney, 99 Cal. 649, 652, 34 P. 442. In Hyde v. Boyle, 89 Cal. 590, 26 P. 1092, it is said: "The settlement of a bill of exceptions is one of the duties imposed upon a judge by virtue of his office, and is to be performed by him under the sanction of his official oath. It is not to be presumed that he will in any instance so far violate his official obligation as either willfully or knowingly to insert in the bill any matter that is not properly there, or exclude therefrom any matter that should be inserted." There is a presumption that official duty has been regularly performed. Code Civ. Proc. § 1963, subd. 15. There is also a presumption that a judicial record, when not conclusive, does still correctly determine or set forth the rights of the parties. Code Civ. Proc., § 1963, subd. 17. Petitioners urge that the trial court failed to include in the bill of exceptions the grounds given for motion of nonsuit, also that the trial court included in the bill of exceptions certain testimony not given at the trial before motion for nonsuit. Exam-

ination of the transcript of the proceedings held before the referee discloses that the trial was had in November, 1929, and that there was no court reporter present. The testimony of the witnesses as to what occurred at the trial is either in hopeless conflict or their recollection is so poor as to make their testimony of little value. Many of the witnesses apparently testified from their recollection of the facts and not from their recollection as to what evidence was given at the trial, although cautioned by the referee to confine their testimony to the trial proceedings. In view of the strong presumption in favor of the bill of exceptions as settled by the trial judge, we are not prepared to hold that the conflicting evidence taken by the referee is sufficient to overcome that presumption. The petition is ordered denied.

It was stipulated in open court by counsel for appellants that the judgment should be affirmed in the event that the petition be denied. The judgment is ordered affirmed, with costs of appeal to respondent.

We concur: SHAW, J.; BISHOP, J.

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211 Cal. 619

BRIGGS et al. v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.

L. A. 12410.

Supreme Court of California.

Feb. 25, 1931.

As amended March 16, 1931.

1. Judges 🔑51(4).

Statute prohibiting judge from passing on his disqualification manifests legislative intention to apply to every possible case involving disqualification of trial judge (Code Civ. Proc. § 170, as amended by St. 1929, p. 958).

> Code Civ. Proc. § 170, as amended by St. 1929, p. 958, provides in part that no judge of a court of record who shall deny his disqualification shall hear or pass upon question of his own disqualification.

2. Judges 🔑51(4).

Statute prohibiting judge from passing on his disqualification *held* inapplicable to direct contempt proceeding (Code Civ. Proc. § 170, as amended by St. 1929, p. 958).

3. Contempt 🔑61(1).

Legislature could provide procedure for hearing and determination of cases of constructive contempt (Code Civ. Proc. §§ 1209–1222).

4. Judges 🔑51(4).

Statute prohibiting judge from passing on his disqualification *held* applicable to constructive criminal contempt proceeding (Code Civ. Proc. § 170, as amended by St. 1929, p. 958, and §§ 1209–1222).

5. Prohibition 🔑31.

Writ prohibiting judge from passing on his disqualification in constructive contempt proceeding was confined to particular judge who was respondent and not extended to superior court, which not only had jurisdiction over original matter, but had also other judges probably not disqualified.

In Bank.

Application by H. B. R. Briggs and others for writ of prohibition prayed to be directed to the Superior Court of Los Angeles County, and Frank C. Collier, Judge, to restrain further hearing in a proceeding for contempt.

Writ granted as against Frank C. Collier, Judge.

McAdoo, Neblett & Clagett and S. S. Hahn, all of Los Angeles, for petitioners.

Everett W. Mattoon and Robert W. Kenny, both of Los Angeles, for respondents.

PER CURIAM.

The petitioners applied for a writ of prohibition which had for its purpose that of restraining the respondent court, acting through the respondent judge thereof, from proceeding with a further hearing upon a certain contempt proceeding pending in said court; the petitioners contending that the aforesaid judge was disqualified to proceed further with the hearing of the cause by virtue of the provisions of section 170 of the Code of Civil Procedure (as amended St. 1929, p. 958) and of the action of the petitioners taken thereunder presenting such disqualification and of the action of said court and judge thereon. The petitioners in support of their application alleged, in substance, that on May 17, 1930, a contempt proceeding had ification and of the action of said court and before the said judge thereof through the filing of an affidavit charging the petitioners with contempt of court, in which affidavit there was set forth in thirteen separate counts thereof the details of the petitioners' alleged several contempts. In each of said counts the affiant purported to set forth a series of separate offenses alleged to have been committed by the petitioners through the publication, prior to said date, of certain articles and cartoons in the Los Angeles Record, a newspaper of general circulation, and of which newspaper the petitioners were and are the publishers and editors. That as to each of said counts it was stated by said affiant that the publications, statements, and cartoons set forth therein naturally tended and were calculated to and were made and published by the aforesaid publishers thereof with the purpose and intent that they should and would embarrass, impede, interrupt, obstruct, and intimidate the grand jury of said court then in session, and the members thereof, in its proceedings and in the performance of its duties, and interfere with, influence, sway, and control the proceedings of said grand jury, and interfere with, influence, sway, control, and intimidate any persons who might be called upon to testify as witnesses by said grand jury, hold up to ridicule and opprobium the investigation and proceedings then pending before said grand jury, and interfere with the orderly and due performance of its duty by said grand jury and the duties of the members of said grand jury as grand jurors, and with the orderly and due administration of justice. From the foregoing epitomy it sufficiently appears that a series of actual interferences with the due and orderly administration of justice in said court and before said grand jury were asserted to have occurred and to be still in course of occurring at the time the aforesaid accusations were filed, and with direct reference to proceedings then pending and undetermined before said court and grand jury. The petitioners herein proceed to aver that, pursuant to said accusations, and on May 17, 1930, an order to show cause had been issued out of said superior court directing the petitioners to appear in department 49 thereof upon June 2, 1930, then and there to show cause why they and each of them should not be punished for contempt of court; that the Honorable Frank C. Collier was during all of the times mentioned in said application and still is the judge of said court assigned to department 49 thereof; that on May 31, 1930, the petitioners, having been duly served with such order or citation, appeared in response thereto and filed with the clerk of said court a duly verified statement in writing, objecting to the hearing of such matter or the trial of any issue of fact or law therein before said judge, and purporting to set forth the fact or facts which were alleged to constitute the grounds of disqualification of such judge, and alleged that, by reason of the bias and prejudice of said judge, as set forth specifically in said statement, a fair and impartial hearing upon said contempt proceeding could not be held before him. It is not necessary for the purposes of the present hearing to enter into further detail as to the content of said statement.

On June 2, 1930, at the place and hour fixed by the court for a return upon its said citation, all parties interested being present in the aforesaid department of said court, and the Honorable Frank C. Collier also being present and presiding therein, and the court being duly convened, said Frank C. Collier caused himself to be sworn as a witness and thereupon proceeded to deny or explain specifically all of the material contents and contentions set forth in the petitioners' aforesaid statement and objections and having done so further proceeded to hold and determine that section 170 of the Code of Civil Procedure had no application to such a contempt proceeding as was then pending before said court and the said judge thereof, and he thereupon ordered the petitioners to appear before him on June 9, 1930, for such further hearing and determination of said contempt proceeding as might there and then be undertaken. That said Frank C. Collier thereupon stated in open court that his order continuing the matter until June 9, 1930, was made to enable counsel, if they so desired, to apply for and obtain a writ of prohibition, whereby the question of the applicability of section 170 of the Code of Civil Procedure might be determined by the Supreme Court and the correct rule established. The petitioners allege that the said court through the said judge thereof, and in violation of the provisions of section 170 of the Code of Civil Procedure, threatened upon said date to proceed with the further hearing of said contempt matter before the said court and the judge thereof, in alleged excess of the jurisdiction of the said court and judge so to do; wherefore they applied for the issuance of an alternative writ of prohibition herein.

In response to their application and to said writ, the respondents court and judge herein have appeared and have demurred to the petition, and have also presented answers thereto which, however, apparently raise no material issue of fact. The only issue of law thus presented is, therefore, as to whether the provisions of section 170 of the Code of Civil Procedure, especially as to the portion thereof embraced in the amendment thereto adopted in 1929 (St. 1929, p. 958), have application to contempt proceedings of the character of those brought under our review in this proceeding.

It is at the outset to be noted that the several and separate acts of contempt of court of which the petitioners were alleged by the terms of the original affidavit to have been guilty were each and all of the nature usually defined as constituting constructive criminal contempt, contained in articles and cartoons published at various times in said newspaper, and thus necessarily out of the immediate presence and hearing of said court and of the judge thereof, but which, according to the averments of the original affidavit presented and filed therein, consisted in a series of attempts to interfere unlawfully with the processes and proceedings of said court, constituting an actual and intended interference with the orderly administration of justice therein, and hence being such as to subject the petitioners herein to such summary proceedings for the punishment of contempt of court as are provided for in sections 1209 to 1222 of the Code of Civil Procedure. Whether or not the provisions of section 170 of the Code of Civil Procedure have application to such constructive criminal contempt is practically the only question which we are called upon herein to decide.

In the recent case of Blodgett v. Superior Court, 290 P. 293, this court had occasion to fully discuss and determine the question as to whether or not the provisions of section 170 of the Code of Civil Procedure, either as the same originally read or as it has been recently amended to read, could be given application to proceedings for the hearing and determination of direct contempts; that is to say, of contempts alleged to have been committed within the immediate presence of the court and of the judge thereof proceeding to summarily determine and punish such contempt. In deciding that the provisions of section 170 of the Code of Civil Procedure, either as it originally read or as it has been recently amended could not be given application to such a situation as that which was involved in the Blodgett Case, we were careful to confine the reasoning and conclusions of the court in that matter to cases of direct contempt. It is, however, the contention of the petitioners that, conceding the entire correctness of our reasoning and conclusions in that case as applicable to situations involving a direct contempt of court, the rule therein laid down is a rule of necessity wherein the inherent powers of courts of justice must be immediately set in motion to prevent and punish interferences with the due and orderly administration of justice when committed in the actual and immediate presence of the court, such drastic and summary action is not required to be applied with the same urgency in cases of constructive contempt. In support of this view we are pointed by the petitioners to an essential difference in the procedure provided by the statute to be applied to cases of direct as distinguished from constructive contempts. This distinction it is urged is given expression in the very terms of sections 1211 and 1212 of the Code of Civil Procedure. The first paragraph of the former section provides that, "when a contempt is committed in the immediate view and presence of the court, or judge at chambers, it may be punished summarily; for which an order must be made, reciting the facts as occurring in such immediate view and presence, adjudging that the person proceeded against is thereby guilty of a contempt, and that he be punished as therein prescribed." The second and concluding paragraph of said section provides: "When the contempt is not committed in the immediate view and presence of the court, or judge at chambers, an affidavit shall be presented to the court, or judge, of the facts constituting the contempt, or a statement of the facts by the referees or arbitrators, or other judicial officer." Section 1212 immediately follows, providing the procedure to be applied to contempt when not committed in the immediate view and presence of the court or judge. It is provided that "a warrant of attachment may be issued to bring the person charged to answer, or, without a previous arrest, a warrant of commitment may, upon notice, or upon an order to show cause, be granted; and no warrant of commitment can be issued without such previous attachment to answer, or such notice or order to show cause." Section 1217 of the same Code provides that, "when the person arrested has been brought up or appeared, the court or judge must proceed to investigate the charge, and must hear any answer which the person arrested may make to the same, and may examine witnesses for or against him, for which an adjournment may be had from time to time, if necessary." Section 1218 follows with the provision that, "upon the answer and evidence taken, the court or judge must determine whether the person proceeded against is guilty of the contempt charged, and if it be adjudged that he is guilty of the contempt, a fine may be imposed on him not exceeding five hundred dollars, or he may be imprisoned not exceeding five days, or both."

The courts of this state have had frequent occasion to pass upon the application of the foregoing provisions of the Code of Civil Procedure in cases of both direct and constructive contempt. As to the former it has been uniformly held that the inherent power of the court or judge thereof to deal summarily with an offender who by tumultuous or offensive conduct or by opprobrious or insulting language perpetrated in the immediate view and presence of the court or judge actually impedes or interferes with the due and orderly administration of justice in a pending cause may not be taken away or materially diminished by legislation. This subject was quite fully considered by this court in the case of Lamberson v. Superior Court, 151 Cal. 458, 91 P. 100, 101, 11 L. R. A. (N. S.) 619, wherein the earlier cases were reviewed and the unimpeded right of the court or judge to punish immediately and summarily a direct contempt was fully upheld, and in which case also it was declared that the judge was not and could not be disqualified from sitting in or hearing in direct contempt, even though the contempt itself consisted in imputations upon his motives and attacks upon his integrity. In so deciding the court quoted with approval the following apt language of Chief Justice Beatty in the case of In re Philbrook, 105 Cal. 471, 38 P. 511, 884, 45 Am. St. Rep. 59: "The law which in such cases makes us the judges of offenses against the court places us in an extremely delicate and invidious position, but it leaves no alternative except to allow the court and the people of the state, in whose name and by whose authority it acts, to be insulted with impunity, or to exercise the authority conferred by law for the purpose of compelling attorneys to maintain the respect due to courts of justice and judicial officers." In commenting upon the foregoing language, this court said: "Were the rule otherwise so that it was required that another judge should be called in to sit in the proceeding, the recalcitrant and offending party would need only to insult each judicial officer in turn until the list was exhausted, and thus, by making a farce of legal procedure, go scathless and unpunished." The court further quoted at length from the case of In re Shortridge, 99 Cal. 526, 34 P. 227, 229, 21 L. R. A. 755, 37 Am. St. Rep. 78, which, while a case of constructive contempt, went very far in denying the power of the Legislature to interfere materially with the inherent right of the court "to punish as a contempt an act, whether committed in or out of its presence, which tends to impede, embarrass, or obstruct the court in the discharge of its duties"; the court stating in conclusion that "the legislative department may regulate the procedure and enlarge the power, but it cannot, without trenching upon the constitutional powers of the court * * * fetter the power itself." In the latter case, however, it is to be noted that, as the record discloses, no issue as to the disqualification of the trial judge was presented, but that the language of the court above quoted had reference to a then recent legislative attempt to take away from courts altogether the power to punish as a contempt any speech or publication reflecting upon any court or any officer thereof unless the same was "made in the immediate presence of such court while in session, and in such manner as to actually interfere with its proceedings." It was this particular change in the wording of subdivision 13 of section 1209 of the Code of Civil Procedure which the court by its foregoing utterance declared to be beyond the scope of legislative power.

In the recent case of Hotaling v. Superior Court, 191 Cal. 501, 217 P. 73, 29 A. L. R. 127, this court made a careful review of certain cases dealing with the specific nature of contempt proceedings as being sui generis; as not constituting a civil action either at law or in equity, but being a separate proceeding of a criminal nature and summary character, wherein the court exercised but a limited jurisdiction; and as being a proceeding prosecuted by or on behalf of the people of the state for the protection of their courts of justice. In so doing the court defined the precise procedure to be followed in cases of constructive contempt. In certain other both early and recent decisions it has uniformly been held that the procedure to be thus employed in cases of constructive contempt must be most strictly pursued in order to give the court jurisdiction to make and enforce whatever orders it may enter therein. Ex parte Rickert, 126 Cal. 244, 58 P. 549; Fletcher v. District Court, 191 Cal. 711, 218 P. 391; In re Brambini, 192 Cal. 19, 218 P. 569; In re Wood, 194 Cal. 49, 227 P. 908. Bearing in mind the foregoing utterances of this court in seeking to interpret the provisions of sections 1209 et seq. of the Code of Civil Procedure relating to direct and indirect or constructive contempts, it must be conceded that both by these decisions and by the language of the statute itself a distinction may well be said to be created between these two classes of contempts, not as to the nature or even the effect of each, but as to the procedure to be employed in order to determine the fact as to the existence of each and the judgment in each instance to be arrived at and enforced. In cases of direct contempt there is in fact no procedure at all resembling that to be pursued in the course of civil or even criminal actions. The court in such cases acts immediately upon its own observation and knowledge, and administers instant and summary punishment. But a quite different method has been prescribed by the statute for the ascertainment, determination, and ultimate punishment in cases of constructive contempt—a method in fact which partakes of the nature of the usual procedure in both civil and criminal cases. The accusation is in the nature and form of a verified complaint. The warrant, citation, or order to show cause is the equivalent of a summons and must be similarly served. The alleged culprit becomes the defendant, and upon his appearance is entitled to present his answer or defense. The issues being thus made up, the court is required to hear and determine the same, to examine witnesses pro and con, for which purpose adjournments may be had from time to time. Upon the eventual submission of the matter, the court must determine, upon the answer and evidence taken, whether the person proceeded against is guilty of the contempt charged, and must enter its judgment accordingly. It would seem from the foregoing résumé of the terms of the statute relating to contempts that a clearly marked distinction is discernible between the instant and in a sense unique action of the trial court or judge in cases of direct contempt and the orderly and detailed procedure strictissimi juris prescribed in case of constructive contempt; a distinction which persists regardless of the gravity in each instance of the offense or of the intent, purpose and effect of the action or conduct of the offender.

[1-4] Bearing in mind this distinction, we are brought to a consideration of the provisions of section 170 of the Code of Civil Procedure as it existed originally and as it has been recently amended. This section of the Code in its original form provided that "no justice, judge or justice of the peace shall sit or act in any action or proceeding" in which there shall be made to appear any one or more of the several specified disqualifications so to do set forth in the subdivisions of said section. In its original form, the question of the existence of the particular disqualification urged by the objecting party or parties to the action was to be determined by the judge himself, and his determination thereof was final except upon the main appeal. While the statute stood in the above form, it was, as we have seen, decided by this court that the section could not be given application to cases of direct contempt, for the reason that so to do would be to approve a legislative interference with an inherent power in the courts, the existence and exercise of which in all its force was indispensable to the due and orderly administration of justice in the cause then pending in the particular court. It was not, however, as we have already seen, directly decided in any case that the section could not be given application to cases of constructive contempt, although it must be admitted that there were strong intimations in certain of our cases above cited to that extent and effect. In the year 1927 (St. 1927, p. 1403) however, section 170 was amended so as to read in its present form. The amendment to said section thus made went to the very substance of the subject-matter thereof by the taking away from the trial judge of any court of record, denying his disqualification, the power theretofore given to hear and determine the question of his own disqualification. It will be seen that the opening language of the section giving it application "to any action or proceeding" is broadened by the terms of the amendment so as to render the section as amended applicable to every case wherein the question of the disqualification of the judge of a court of record could arise. In the presence of the precise terms of this amendment to the section in question we are constrained to hold it to have been the legislative intent to thereby render said section applicable to every possible case involving a disqualification of the trial judge. We nevertheless adhere to the views expressed in our earlier decisions as to the inapplicability of this section of the Code, whether as it read originally or as it has been made to read by its aforesaid amendment, to cases of direct contempt, and we place our present conclusion upon the same ground as that expressed in our former opinions, viz. that of necessity the courts must be held to retain their ancient and inherent power to summarily deal with all cases of direct contempt committed in the immediate view and presence of the court directly effecting or intended to effect an interference with the due and orderly conduct of the causes then pending therein. We do not, however, perceive from the careful reading and consideration which we have above devoted to the language and content of sections 1209 et seq. of the Code of Civil Procedure that a like necessity for immediate and summary action on the part of the trial court or judge exists in cases of constructive contempt, since this class of contempts, under the precise wording of the above sections of the Code creating the same, are made to require for their determination and punishment a course of procedure similar, though it is true more summary than that prescribed for ordinary actions or proceedings of a civil or criminal nature involving pleadings, process, appearances, answers, the presentation of evidence and the continuances and delays incident to the trials of actions in general. We are unable to say that the Legislature was without power to provide such a procedure for the hearing and determination of cases of constructive contempt; and for an even stronger reason we are unwilling to hold that the Legislature by its recent amendment to section 170 of the Code of Civil Procedure was without power to prescribe the otherwise usual and salutary provision that the trial judge in such, as in all other cases save those of direct contempt, shall no longer be permitted to pass upon the question of his own disqualification. In thus concluding we have examined the many and conflicting decisions of the courts of other jurisdictions touching the inherent powers of courts and judges to deal with the subject of contempts, whether direct or constructive. The practically universal trend of decision favors the views we have steadfastly maintained as to the inherent and untrammeled power of trial courts and judges to deal summarily with cases of direct contempt; but as to constructive contempts, the trend of modern decision is toward upholding the exercise of legislative discretion in limiting the power of trial courts and judges to pass upon the question of their own asserted disqualification to hear and determine such causes. The recent amendment of section 170 of the Code of Civil Procedure is, we think, in accord with this trend, and we therefore hold it applicable to cases of constructive contempt.

[5] In directing the issuance of the writ herein, it is obvious that it should be confined in its application to the particular judge who is made a respondent herein, and only to the extent of prohibiting him from passing upon the question of his own disqualification, and should not be extended to the superior court, which not only has jurisdiction over the original action, but which has also numerous other judges, some of whom at least are probably not subject to the disqualifications urged against the particular respondent herein.

Let the writ as thus limited accordingly issue.

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211 Cal. 756

BARKER BROS., Inc., v. COATES et al

L. A. 10398.

Supreme Court of California.

March 17, 1931.

1. Reference 🔑99(2).

Where order of reference is properly made, findings of referee on whole issue stand as findings of court (Code Civ. Proc. § 644).

2. Reference 🔑8(1).

Order of reference *held* warranted in action to foreclose mechanics' liens, where examination of "long account" was necessary (Code Civ. Proc. § 639, subd. 1).

3. Reference 🔑8(1).

"Whole issue" in statute respecting reference is whole issue involved in accounting (Code Civ. Proc. § 639, subd. 1).

Code Civ. Proc. § 639, subd. 1, provides that, when trial of issue of fact requires examination of long account on either side, referees may be directed to hear and decide "whole issue" or report upon any specific question of fact involved.

4. Mechanics' liens 🔑285.

Defendants in action to foreclose mechanics' liens *held* not injured by broad terms of order of reference, where court amplified referee's findings by findings of its own.

5. Reference 🔑99(2).

Referee's findings did not determine whole case, and court could make its own findings and conclusions after reference for examination of "long account" (Code Civ. Proc. § 639, subd. 1).

6. Mechanics' liens 🔑157(7).

Statute requiring statement of materialmen and laborers to be verified *held* waived, where no verification was asked and no objection made upon that ground (Code Civ. Proc. § 1184).

In Bank.

Appeal from Superior Court, Los Angeles County; J. Walter Hanby, Judge.

Action by Barker Bros., Inc., against Mannette S. Coates and others to foreclose mechanics' liens. Judgment for plaintiff, and named defendant and another appeal.

Affirmed.

Superseding opinion, 289 P. 927.

Sparling & Teel and Courtney A. Teel, all of Los Angeles, for appellants Coates.

Culver & Nourse and Richard J. O. Culver, all of Los Angeles, for respondents Lounsberry & Harris.

W. Claire Anspach, of Glendale, for respondents L. W. Chase and others.

John F. Poole, of Los Angeles, for respondents Thomas Gordon and others.

G. H. Wende, of Glendale, for respondent Geo. C. McConnell.

Charles Murstein, of Los Angeles, for respondent Glendale Sash & Door House.

Glen Behymer, of Los Angeles, for respondents Barker Bros. and others.

PRESTON, J.

The questions raised on appeal are technical and without substantial merit. Certain causes of action were consolidated and tried together; these being claims for building materials and labor furnished and used in the construction of a five-unit bungalow on the property of the defendants Coates. The prayer was for judgment against the contractor and for the fixation of a lien upon the property of the owners for the several items found due. Issues were made up; the contractor defaulted; and, as to certain of the plaintiffs, judgment was given impressing a lien upon the property, from which the defendants Coates alone have appealed.

When the case came up for trial, the court of its own motion, and over the objection of appellants, referred it to one Robert E. Abbott, an attorney at law, as a referee. The language of the order is not in the record. The bill of exceptions recites, however, that the "court, upon its own motion, announced that a reference would be made to try any and all issues of fact and law arising under the issues made by the pleadings herein. * * *" The referee heard the evidence at length and reported the same to the court. The court conducted a hearing thereon, approved the findings of the referee, and amplified them by findings of fact and conclusions of law of his own. Although not expressly stated, apparently all the evidence taken by the referee was before the court, and he may have heard additional evidence.

[1-5] If said order of reference was properly made, the findings of the referee on the whole issue stand as the findings of the court, and the entry of judgment in such case becomes merely a clerical duty. Section 644,

Code Civ. Proc. It is plain, therefore, that the court in that case practically abdicates its position under the law in favor of a third person, and this should not be attempted without the full consent of the parties. But the record in this case shows that an examination of a "long account" was necessary; hence an order of reference by the court was warranted under the provision of section 639, subd. 1, of the Code of Civil Procedure, which authorizes a reference "when the trial of an issue of fact requires the examination of a long account on either side; in which case the referees may be directed to hear and decide the whole issue, or report upon any specific question of fact involved therein." The decision of the "whole issue" meant here is the whole issue involved in the accounting. Fredendall v. Shrader, 45 Cal. App. 719, 188 P. 580; Williams v. Benton, 24 Cal. 424; 22 Cal. Jur. 693.

The case is then reduced to this query: Why is not the order of reference good pro tanto to the extent allowed by the last-mentioned Code provision? The court below evidently treated it as having no more than that effect, approved the report of the referee in full, and proceeded to amplify his findings by findings of its own covering the issues respecting the rights of the parties.

The evidence in full has not been embodied in the bill of exceptions, but there is a concession found therein to the effect that plaintiffs "made prima facie proof of the matters and things alleged and set forth in the various complaints composing this consolidated action." We are therefore brought to the conclusion that, under the situation presented to us here, the appellants have suffered no injury by the broad terms of the order of reference made, for in effect the court did just what appellants intended that it should do—it heard and determined the cause. Under this construction the findings of the referee did not determine the whole case, and the court could make its own findings and conclusions. Clark v. Millsap, 197 Cal. 765, 784, 242 P. 918; Faulkner v. Hendy, 103 Cal. 15, 20, 36 P. 1021; Nat. Brass Works v. Weeks, 92 Cal. App. 318, 268 P. 412.

[6] Moreover, viewing the record as a whole, it is apparent that appellants have based practically their entire appeal upon the contention that it appears without contradiction that they demanded of the several materialmen and laborers that they furnish the owners with a statement in writing of all material supplied for and labor performed upon the structure, and in compliance therewith said parties rendered such statements promptly, but failed to verify them as required by section 1184 of the Code of Civil Procedure. But appellants' requests bore no special reference to that section, nor did they ask for a verification of the statements; further, upon getting the desired information, appellants made no objection thereto upon the ground that the statements were not verified or upon any other ground. Under this state of facts it must be held that the provisions of the statute were waived.

No further questions require discussion.

The judgment is affirmed.

We concur: WASTE, C. J.; SHENK, J.; RICHARDS, J.; SEAWELL, J.; LANGDON, J.; CURTIS, J.

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211 Cal. 771

LINBERG v. STANGO.

L. A. 10517.

Supreme Court of California.

March 19, 1931.

1. Torts 🔑22.

One injured by concurrent negligence of two tort-feasors can sue either or both for entire damage.

2. Negligence 🔑61(2).

It is no defense to one sued for negligence that another's negligence contributed to injuries of which complaint is made.

3. Automobiles 🔑244(6).

Evidence, in pedestrian's action for injuries sustained when struck by automobile while standing on sidewalk, *held* to sustain finding that defendant operated automobile in negligent and careless fashion.

4. Appeal and error 🔑1011(1).

Finding based on conflicting evidence cannot be disturbed on appeal.

5. Automobiles 🔑245(6).

Whether motorist striking pedestrian on sidewalk was negligent in attempting to pass in front of another automobile or in not stopping after he was hit by such automobile *held* for trial court sitting without jury.

6. Trial 🔑382.

Weight of evidence and inferences to be drawn therefrom are matters for trial court sitting without jury.

7. Appeal and error 🔑1012(1).

Determination of trial court sitting without jury of weight of evidence and inferences to be drawn therefrom cannot be disturbed on appeal.

8. Trial 🔑404(2).

Finding may be regarded as one of fact, although mistakenly placed among conclusions of law (Code Civ. Proc. § 633).

9. Trial 🔑404(2).

Purported conclusion of law ordering judgment for pedestrian struck by automobile in sum of $1,509 *held* finding of fact (Code Civ. Proc. § 633).

10. Damages 🔑132(7).

$1,509 damages for broken arm, broken hip, injuries about neck and back, and abrasions on lower limbs, causing medical expense of $535, *held* not excessive (Code Civ. Proc. § 956a, as added by St. 1927, p. 583).

In Bank.

Appeal from Superior Court, Los Angeles County; L. T. Price, Judge.

Action by Gus Linberg against Angelo Stango. Judgment for plaintiff, and defendant appeals.

Affirmed.

C. W. Pendleton, of Los Angeles, for appellant.

Lloyd S. Nix, of Los Angeles, for respondent.

PER CURIAM.

This in an appeal from a judgment in favor of the plaintiff in a personal injury action, tried before the court without a jury. Defendant appeals on a bill of exceptions, alleging that the findings of the trial court to the effect that the defendant was negligently operating his automobile at the time of the accident are not supported by the evidence, and also contending that there is no finding to support the verdict of $1,509.

It was stipulated at the trial that the plaintiff suffered the injuries of which complaint is made on July 1, 1924, while standing on the sidewalk at the intersection of Nineteenth street and Pacific avenue, in San Pedro, Cal.; that such injuries were incurred by reason of the fact that an automobile driven by the defendant came upon the sidewalk and hit the plaintiff; that, as a result of said injuries, plaintiff suffered a broken arm, a broken hip, injuries about the head and back, abrasions and contusions on both lower limbs between the knee and thigh; that, as a result of such injuries, one of plaintiff's legs has permanently become four inches shorter than the other; that plaintiff has actually expended in doctor, hospital, and other similar expenses the sum of $535.

[1, 2] At the trial there was no issue of contributory negligence, the sole issues being as to whether the defendant was guilty of negligence in the operation of his automobile at the time and place of the accident, and, if so, whether such negligence proximately contributed to the injuries of the plaintiff. Plaintiff could not testify as to any of the circumstances of the accident, except that he was standing on the sidewalk forty or fifty feet from the corner, and was struck from behind by defendant's car. Defendant admitted that such was the fact, but contended that, just prior to the accident, he was proceeding in a lawful and careful manner in an easterly direction on Nineteenth street; that after he had entered the intersection of said street with Pacific avenue and had passed the center thereof, another automobile, driven by a party unknown, ran into him, causing him to so lose control of his car that he ran onto the sidewalk and hit the plaintiff. Defendant admits that, if he was negligent and if such negligence proximately contributed to plaintiff's injuries, the mere fact that the negligence of another tort-feasor contributed to the accident would in no way release him from liability. It is well settled, of course, that one who is injured by the concurrent negligence of two tort-feasors can sue either or both for the entire damage, and it is no defense to the person sued that another's negligence contributed to the injuries of which complaint is made. Defendant contends, however, that such rule has no application to the facts of this case for the reason that the evidence shows that he was entirely free from negligence, and that the accident was caused entirely by the negligence of the unknown driver who, defendant contends, ran into him.

[3, 4] It is our opinion that there is sufficient positive evidence in the record to sustain the court's finding that, at the time of the accident defendant was operating his car in a negligent and careless fashion, and that such finding, being based on conflicting evidence, cannot be disturbed on appeal. It must be remembered, under the factual situation here presented, that plaintiff established a prima facie case by proof of the mere happening of the accident. When an automobile leaves its accustomed place of travel in the street and runs upon the sidewalk and there strikes a pedestrian, the cases have quite uniformly held that the plaintiff establishes a prima facie case by the mere proof of the accident. In Smith v. Hollander, 85 Cal. App. 535, 539, 259 P. 958, 960, the court in dealing with a similar situation where a pedestrian while standing on the sidewalk was hit by an automobile stated:

"In such case all the elements necessary for the application of the doctrine [res ipsa loquitur] are present. The injured person is not in a position to know the cause of the mishap. The one in control of the instrumentality causing the injury is or should be in a position to know. Such an occurrence does not usually happen in the absence of negligence on the part of the one in control of the automobile. * * *

"At most, it was for the jury to decide whether to infer negligence of the appellant from the fact that she came upon the sidewalk with her automobile, or whether to decide that the proof of the skidding of the automobile under the circumstances and in the manner testified to by the witnesses was a sufficient explanation to justify it in deciding that she was not negligent in the operation of her automobile."

See, also, Goss v. Pacific Motor Co., 85 Cal. App. 455, 259 P. 455; Cal. Jur. 1928 Supplement, p. 119, § 55; Berry on Automobiles (6th Ed.) § 452; Huddy on Automobiles (7th Ed.) § 512.

[5-7] It is true that in the case at bar the defendant sought to prove that the accident was caused solely by the negligence of another. The sufficiency of this explanation was a matter for the trial court. The trial court could have inferred that the defendant was entirely without blame, but the evidence offerred was likewise capable of sustaining the inference that defendant was negligent in attempting to pass in front of the other car, or that defendant was negligent in not stopping after he was hit by the other car, and before he hit plaintiff. There was no evidence offered which would indicate that the collision with the other car injured the steering apparatus or brakes of defendant's car. In fact, the evidence indicated that such was not the fact. The evidence indicated that Pacific avenue was a wide street and that plaintiff was hit forty or fifty feet from the corner. The defendant admitted that "* * * I saw the machine there and I tried to go ahead and pass and she hit me." He could not state how far away the other car was when he first saw it. In this connection he stated: "I can guess it was about 20 feet from me when I was crossing the car tracks. I couldn't say it was 20, 30 or 40, or 50—I couldn't say well because I can only guess. I sure saw that car." No evidence at all was offered that defendant attempted to avoid the accident. The weighing of such evidence, and the inferences to be drawn therefrom, were matters entirely within the power of the trial court, and cannot be disturbed on appeal.

[8-10] As stated above, the parties stipulated as to the extent of plaintiff's injuries and the actual expenditures resulting therefrom, amounting to $535. The trial court also found that as a result of such injuries plaintiff has been compelled to remain away from his place of business from and after July 1, 1924, without finding exactly the amount of the damage caused thereby. Nor did the court expressly find as to the damages suffered by virtue of plaintiff's injuries, but, as a conclusion of law from the above-enumerated findings, ordered judgment to be rendered against defendant in the sum of $1,509. The defendant contends that it was reversible error to order any judgment in excess of $535, based on such findings. The point is without merit. The alleged conclusion of law was of itself a finding as to plaintiff's damages. It is well settled, in spite of the fact that section 633 of the Code of Civil Procedure provides that facts and conclusions must be separately stated, that a finding may be regarded as one of fact, although mistakenly placed among the conclusions of law. 24 Cal. Jur., p. 960, § 199. We think that is the situation here.

Moreover, if the findings are deficient in this respect, this court since the addition in 1927 (St. 1927, p. 583) of section 956a to the Code of Civil Procedure has the power in a proper case to make new or additional findings in support of the judgment of the lower court. The evidence amply supports a finding that as a proximate result of the negligence of defendant, plaintiff has been damaged in the sum of $1,509. If such a finding is necessary, we hereby adopt the same as a finding of this court.

For the foregoing reasons the judgment appealed from is affirmed.

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211 Cal. 726

PEOPLE v. BURKHART.

Cr. 3381.

Supreme Court of California.
March 13, 1931.

Rehearing Denied April 6, 1931.

1. Criminal law 🔑55.

Voluntary intoxication is never excuse for crime but may be considered in determining whether particular purpose, motive, or intent actuated accused (Pen. Code, § 22).

2. Homicide 🔑270.

Weight to be given evidence of intoxication and whether intoxication precluded accused from forming specific intention to kill and murder are for jury.

3. Homicide 🔑9.

Specific intention to kill and murder is necessary element of first degree murder.

4. Homicide 🔑253(4).

Jury's implied finding that killing was product of abandoned and malignant heart and was premeditated *held* supported, and warranted infliction of death penalty.

5. Criminal law ⚷369(1).

Ordinarily, evidence of commission of other crimes is inadmissible.

6. Criminal law ⚷369(2).

Proof of one crime tending to prove material facts in trial of another is admissible.

In such case, the fact that such evidence may tend to prejudice the defendant in the minds of the jurors by inducing the belief that he has been the perpetrator of another crime is no ground for its exclusion.

7. Criminal law ⚷369(15), 371(4).

In murder prosecution, evidence showing defendant shortly before homicide purchased automobile and rented apartment under assumed name, issuing fictitious check, *held* admissible.

The fact that defendant did such acts, and thereafter apparently shot deceased while in the car so obtained and brought her to the apartment thus rented, tended to show preparation and premeditation on defendant's part and an attempt to conceal his identity.

8. Criminal law ⚷661.

Evidence that defendant shortly before homicide purchased automobile and rented apartment under assumed name was not rendered inadmissible by offer to stipulate that he purchased car and rented apartment.

Such a stipulation would not have disclosed that defendant prior to the homicide was proceeding under assumed name to divert suspicion.

9. Criminal law ⚷438.

In murder prosecution, obscene shocking picture showing position and condition of deceased's body when found *held* not inadmissible, though prosecution was not to be commended for offering it in evidence.

10. Criminal law ⚷829(6).

In murder prosecution, refusal of instruction respecting effect of intoxication, substance of which was covered by other instructions given, *held* not error.

11. Criminal law ⚷1144(15).

It will be presumed that jurors were true to oath and followed admonitions and instructions to disregard anything stricken from record.

In Bank.

Appeal from Superior Court, Los Angeles County; Marshall F. McComb, Judge.

William Henry Burkhart was convicted of murder in the first degree with death penalty, and he appeals.

Affirmed.

Orbison & Irwin, Charles J. Orbison, and Ralph Paonessa, all of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and John D. Richer, Deputy Atty. Gen., for the People.

WASTE, C. J.

The defendant was charged with the murder of Ann McKnight Burkhart, his estranged wife. The jury brought in a verdict finding the defendant guilty of murder in the first degree and recommending that he suffer the death penalty. This appeal is from the judgment of conviction and from the order denying defendant's motion for new trial.

The homicide of which defendant stands convicted occurred on March 24, 1930, at a time when the parties were living separate and apart, the deceased having theretofore instituted divorce proceedings. On two distinct occasions prior to the homicide, the defendant had attempted in vain to get in touch with his wife, with the view of having her return to him, and, upon being informed by the persons with whom she was living that his wife would not return to him, he stated: "By God, I will have her. She is my wife and if I can't have her nobody else shall because I will kill her first;" and, "I have made up my mind that if I cannot have her nobody else will if I have to spend the rest of my life in the penitentiary." On the day preceding the homicide, defendant purchased a Ford coupé under the name of Charles G. Thompson, and gave a fictitious check for the initial payment. On the day of the homicide he resigned his position with the Los Angeles Gas & Electric Corporation and drew his pay. Immediately thereafter he rented a bungalow court apartment under the name of C. L. Burns, and gave a fictitious check in payment of the first month's rent. The defendant informed the owner of the apartment that he was married and that his wife was working and would arrive about 6:30 that evening. At that time defendant appeared at the apartment house with the deceased and introduced her to the owner, who was then sprinkling the lawn. Within a very few minutes after the parties had entered, the door of the apartment was jerked open and the owner saw the deceased standing between the open door and the closed screen door. The defendant appeared behind the deceased, placed his arm around her, and drew her back into the room. As this was done, the deceased uttered a "guzzling sound, sort of a moaning cry." Approximately one-half hour later the defendant and deceased left the premises in the Ford coupé. Later that evening the defendant went to the apartment occupied by Mr. and Mrs. J. S. Thompson to "borrow a match," and stated to those present that he had just moved in next door and had been drinking and was "pretty stiff," adding that his wife was "stiffer." After defendant had apparently returned to his own apartment, a noise, resembling the falling of a human body, was heard by the Thompsons and their guests. The defendant returned to the Thompson apartment and asked if he might talk to Mr. Thompson "as a friend," whereupon Thompson followed him to his apartment. Defendant then told Thompson that his wife "had passed out drunk" in back of the house, and requested him to help lift her into the house. Thompson and one of his guests went through the defendant's apartment to the rear sidewalk or alleyway, where they found the deceased's body. The police were summoned, and the defendant was taken into custody. Upon his person was found a full loaded .38-caliber Smith & Wesson revolver. This weapon, found to have powder burns at the point where the chamber fits to the barrel, gave off a slight acrid odor, indicating that it had been recently discharged. The autopsy surgeon testified that the deceased had come to her death by reason of bullet wounds, five bullets having entered various part of her body. A ballistic expert gave as his positive opinion that the bullets extracted from the deceased's body had been fired from the gun found on the defendant's person at the time of his arrest. Examination of the Ford coupé disclosed two bullet holes in the upholstery of the car and several blood stains, tending to indicate that the homicide had been committed in the car after the parties left the apartment at approximately 7 in the evening. The bullets thereafter removed from the car were identified as having been discharged from a gun similar in make and caliber to the one found in the defendant's possession.

The evidence points positively and unmistakably to the defendant as the perpetrator of the homicide. He admits the sufficiency of the evidence to support a conviction, but contends that the overwhelming evidence shows that he had been on a protracted "spree" for several weeks, and on the day of the homicide was so intoxicated as to be incapable of fully comprehending the nature and quality of his acts. By reason of such prolonged voluntary intoxication, he argues, his physical and mental condition were such as to exclude any idea of the intent, deliberation, and premeditation essential to murder of the first degree. Therefore, he contends that a verdict of manslaughter is the only verdict warranted by the evidence.

Defendant's claim of prolonged inebriation prior to the homicide finds some support in the evidence introduced on his behalf, but such inebriation is by no means as conclusively nor as overwhelmingly established as contended. The testimony adduced by the prosecution created a sharp conflict on this issue. There is evidence that the defendant worked continuously up to the time of the homicide, resigning his position only a few hours prior thereto. The witness Hunter Graham, from whom defendant purchased the Ford coupé on the day preceding the homicide, testified that defendant was not under the influence of intoxicating liquor when dickering for the car. The owner of the bungalow court apartments stated that she had seen defendant three times on the day of the homicide, the last time being as late as 7 in the evening, and that he did not appear to be under the influence of intoxicants at any of these times. Mrs. Thompson corroborated this testimony, and also stated that defendant appeared perfectly normal when he came to her apartment after 10 o'clock on the night of the homicide, with the exception that his speech was a little slow. Mr. Thompson gave virtually the same testimony, and stated that while, in his opinion, the defendant had imbibed of intoxicating liquor, he was not drunk, and only appeared to be so when in the custody of the police. One of the arresting officers stated that defendant was only "spasmodically" intoxicated, and in his opinion was simulating drunkenness. This witness also testified that defendant answered all preliminary questions as to name, age, occupation, etc., in a coherent manner, but would lapse into a "coma" when directly questioned concerning the homicide.

[1-4] Voluntary intoxication is never an excuse for crime, but, whenever the existence of any particular purpose, motive, or intent is a necessary element to constitute any particular species or degree of crime, the jury, in determining whether such purpose, motive, or intent actuated the accused in the perpetration of the offense, may properly take into consideration the fact that he was intoxicated at the time. Section 22, Pen. Code; People v. Methever, 132 Cal. 326, 64 P. 481; People v. Blake, 65 Cal. 275, 277, 4 P. 1; People v. Sainz, 162 Cal. 242, 245, 121 P. 922. The weight to be given to evidence of intoxication and whether such intoxication precluded the accused from forming a specific intention to kill and murder, which intent is a necessary element in murder in the first degree, are essentially questions of fact for the jury's determination under proper instructions. People v. Yeager, 194 Cal. 452, 474, 229 P. 40; People v. Sainz, supra.

The jury's implied finding in this case that the killing was the product of an abandoned and malignant heart, and was premeditated, finds ample support in the record, and warranted the infliction of the death penalty. We see no real analogy between this case and that of People v. Kelley, 208 Cal. 387, 281 P. 609. Here, as distinguished from the Kelley

Case, there was a motive for the crime, for the deceased had separated from the defendant and he had threatened to kill her to prevent any one else from having her. There is also a showing of preparation and premeditation in the case now before us, which showing was not made in the Kelley Case, for the defendant here resigned his position, and purchased a car and rented an apartment under fictitious names. The car and the apartment were apparently intended to be and were used in the commission of the homicide. The case is not one, therefore, in which the deceased was killed under circumstances which might have shown an accidental or unpremeditated killing, as in the Kelley Case. She was slain with a deadly weapon from which five bullets were discharged into her body. In our opinion, the jury had no alternative but to bring in a verdict of first degree murder.

[5-8] Defendant next contends that the trial court erred in permitting the prosecution to show that shortly prior to the homicide he had purchased the Ford coupé and rented the bungalow apartment under assumed names, and had issued fictitious checks in consummation of each transaction. He argues that such evidence was inadmissible because it tended to prove the commission of other and distinct crimes in no way connected with the offense charged in the information. Ordinarily, evidence of the commission by the defendant of crimes, other than the one for which he is standing trial, is inadmissible. This is not an inexorable rule, and, whenever proof of one crime tends to prove any facts material in the trial of another, such proof is admissible, and the fact that it may tend to prejudice the defendant in the minds of the jurors by inducing the belief that he had been the perpetrator of another crime is no ground for its exclusion. People v. Nakis, 184 Cal. 105, 114, 193 P. 92. The evidence here complained of had a material bearing on the charge of which the defendant stands convicted. The fact that shortly prior to the homicide he purchased an automobile and rented an apartment under fictitious names, and issued checks therefor, and thereafter apparently shot the deceased while in the car so obtained, and brought her to the apartment thus rented, tended to show preparation and premeditation on his part and an attempt to conceal his identity. It also revealed his plan or scheme for doing away with the deceased. The testimony of the police officer and the bank manager along this same line was also properly admitted. Nor do we think any of this evidence was rendered inadmissible by reason of defendant's offer to stipulate that he had purchased the car and rented the apartment. Such a stipulation would not have disclosed that defendant, prior to the homicide, was proceeding under assumed names to divert suspicion from him.

[9] It is also urged that the court below erred when it permitted the prosecution to introduce a photograph (Exhibit No. 24), showing the position and condition of the deceased's body when found. This picture is asserted to be obscene and shocking, and to have been introduced solely for the purpose of inflaming the minds of the jurors against the defendant. The exhibit is all that the defendant states, and the prosecution is not to be commended for offering it in evidence. Its introduction was not necessary, and added little to the case against the defendant. However, we cannot say it was inadmissible, and for this reason the assignment is without merit.

[10] Defendant next asserts that the court below fell into error when it refused to give an instruction tendered by him which had to do with the effect of intoxication upon the species or degree of crime perpetrated. This instruction, if given, would have told the jury that, should they find defendant was so intoxicated at the time of the commission of the homicide as to be incapable of forming a premeditated design or entertaining the necessary malice, the offense would be reduced to manslaughter. The substance of the refused instruction was adequately covered by other instructions given. The record discloses several instructions distinguishing between murder and manslaughter, and others covering the subject of intoxication and its effect upon the species and degree of crime. There is therefore no merit in the point.

[11] In his next assignment of error, the defendant advances some eighteen or twenty charges of misconduct on the part of the district attorney during the progress of the trial. To review them in detail would unduly prolong this opinion, and would serve no useful purpose. We have separately examined each of these many assignments, and have found nothing of a prejudicial character. At times, the district attorney may have exceeded the bounds of propriety, but, whenever necessary to protect the rights of the accused, the trial court immediately rebuked the prosecutor, and forcefully admonished the jury to disregard anything stricken from the record as not intended for its ears. It will be presumed that the jurors were true to their oaths and followed the various admonitions and instructions of the court. In fairness to the prosecuting officer, it must be said that most of the charges of misconduct leveled at him by the defendant are without merit.

Defendant's final contention is that the verdict of the jury recommending the death penalty, and the judgment of the court sentencing him to hang, are excessive. Our discussion and disposition of the first assignment of error sufficiently dispose of this point.

The judgment and order are, and each is, affirmed.

We concur: RICHARDS, J.; SHENK, J.; CURTIS, J.; PRESTON, J.; SEAWELL, J.

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211 Cal. 752

WHITESIDE v. WILKERSON.

L. A. 10822.

Supreme Court of California.
March 17, 1931.

Bastards 🔑92.

Trial court investigating alleged father's earning capacity, and needs of mother was warranted in determining amount reasonable for support of illegitimate child.

In Bank.

Appeal from Superior Court, Los Angeles County; Elias V. Rosenkranz, Judge.

Action by Martha Whiteside against Squire Wilkerson. Judgment for plaintiff, and defendant appeals.

Affirmed.

Willedd Andrews, of Los Angeles, for appellant.

Willis O. Tyler, of Los Angeles, for respondent.

PER CURIAM.

This appeal is from a judgment directing the defendant and appellant to pay to the plaintiff and respondent the sum of $50 per month for the support of the illegitimate minor child of plaintiff and defendant. The respondent has filed no brief herein either originally or after the issuance and service upon her of an order to show cause. We have, however, examined the entire record with a view to determining the merits of the only two points presented by the appellant upon this appeal. As to the first of these, to the effect that the evidence was not sufficient to justify the court in making the judgment appealed from, we find the appellant's contention in this regard to be utterly without merit, and the findings of fact and conclusions of law of the trial court to be fully supported by the evidence in the case. As to appellant's second contention that the court did not require, nor did the plaintiff offer, upon the trial any evidence showing the amount of money necessary for the support and maintenance of the alleged minor child, we find it also to be without the semblance of merit. The trial court had the parties before it and investigated the station in life of each as well as the earning capacity of the defendant and the condition and needs of the mother and child. The evidence educed as to these matters furnished the trial court all that was necessary to enable it to determine what amount would be reasonable for the support of the child. The order made thereon was moderate and was fully supported by the evidence in the case.

The judgment is affirmed.

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211 Cal. 749

Ex parte ROSENCRANTZ.

Cr. 3414.

Supreme Court of California.
March 17, 1931.

1. Constitutional law 🔑250.
Criminal law 🔑1206(1).

Statute fixing maximum punishment for fraudulently issuing checks, and giving judge discretion regarding confinement in jail or state prison, *held* not discriminatory (Pen. Code, § 476a).

Since every person charged with offense involved has the same chance for leniency as well as the same possibility of receiving maximum sentence, there is no discrimination.

2. Criminal law 🔑1202(1).

Defendant who pleaded guilty and was granted probation without judgment of conviction *held* not "convicted of felony" within statute imposing life imprisonment on fourth conviction (Pen. Code, §§ 17, 644).

Pen. Code, § 644, imposes life imprisonment without eligibility for parole on fourth conviction of any felony. Section 17 makes distinction between felony and misdemeanor depend on nature of punishment, and provides that, when crime is punishable either by imprisonment in state prison or in county jail, it is a misdemeanor for all purposes after a judgment imposing any punishment other than imprisonment in state prison.

[Ed. Note.—For other definitions of Convicted; Conviction, see Words and Phrases.]

3. Criminal law 🔑1211.

Defendant convicted of fraudulently issuing checks, having been previously convicted and imprisoned for felony, *held* liable under statute to maximum punishment (Pen. Code, § 476a, and § 667, subd. 1).

4. Habeas corpus ⚷50.

Supreme Court on habeas corpus will not consider excessive sentence until expiration of time for which prisoner is lawfully confined.

In Bank.

Petition by Evelyn Rosencrantz for a writ of habeas corpus against the Warden of San Quentin State Prison.

Writ discharged.

Thos. T. Califro, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Wm. F. Cleary, Deputy Atty. Gen., for respondent.

LANGDON, J.

This is a petition for a writ of habeas corpus.

Petitioner was tried in the superior court of Alameda county and convicted of a violation of section 476a of the Penal Code. The information filed against her also charged the prior conviction of three separate felonies. Petitioner admitted the second and third, but denied the alleged first prior conviction. A finding against her was made on this issue, and she was thereupon sentenced to life imprisonment without eligibility for parole, under the provisions of section 644 of the Penal Code.

Petitioner has heretofore made application for writs of habeas corpus to this court, as well as to the superior court of Marin county and to the District Court of Appeal, First Appellate District, all of which applications were denied. It is urged, however, that the grounds for the present petition are raised here for the first time, and accordingly we have examined them with great care.

[1] The contention is made that section 476a of the Penal Code is unconstitutional, in that by reason of the discretion which it gives to the trial judge to sentence the convicted offender either to the state prison or the county jail, it is discriminatory in operation, and constitutes a denial of equal protection of the laws. The legislative practice of vesting in trial courts or juries discretion in fixing punishments, within certain limits, is quite general and not new. Since every person charged with the offense has the same chance for leniency as well as the same possibility of receiving the maximum sentence, there is nothing discriminatory in the statute.

[2] The main point urged in the petition is that the judgment and commitment under section 644 of the Penal Code was improper because, it is contended, petitioner had not previously been convicted of three prior felonies. It is asserted that the alleged first conviction never occurred. The record shows that she was charged on January 12, 1920, in the county of San Diego, with violation of the same statute as in her later convictions. She pleaded guilty and was granted probation for a period of two years. No judgment of conviction was pronounced by the court. The question is whether this constitutes the conviction of a felony within the meaning of Penal Code, § 644.

It is established in this state, both by statute and judicial decision, that whether a crime is a misdemeanor or a felony is to be determined by the punishment; and where a crime is punishable either by incarceration in the state prison or the county jail, the sentence actually given determines the nature of the offense. Cal. Pen. Code, § 17; People v. Bigelow, 94 Cal. App. 28, 270 P. 460. Hence if petitioner had been sentenced to the state prison, she would have been convicted of a felony; and had she been sentenced to the county jail, she would have been convicted of a misdemeanor. However, she was not sentenced at all, nor was any judgment of conviction pronounced; and this appears to us to be decisive of the problem. There being no conviction, there is nothing to bring this first case within the provisions of section 644.

[3] It therefore appears that petitioner should not have been sentenced to life imprisonment without possibility of parole; nor does her case come within the language of section 644 providing for life imprisonment with eligibility for parole after two prior convictions for certain enumerated felonies. Issuing checks with intent to defraud is not one of these specified felonies. The applicable section is obviously Penal Code, § 667, subdivision 1, which provides: "If the offense of which such person is subsequently convicted is such that, upon a first conviction, an offender would be punishable by imprisonment in the state prison, such person is punishable by imprisonment in the state prison for the maximum period for which he might have been sentenced, if such offense had been his first offense." Under this section, petitioner is punishable by imprisonment in the state prison for the maximum period provided for a violation of Penal Code, § 476a, which is fourteen years.

[4] The judgment committing petitioner to incarceration in the state prison for life without eligibility for parole was therefore improper; but inasmuch as petitioner should have been sentenced to the state prison anyway, there is at the present time no ground upon which she may be discharged from custody. We gave consideration to this precise question in a prior application of petitioner (In

re Rosencrantz, 205 Cal. 534, 271 P. 902, 905), and we there said, quoting from In re Morck, 180 Cal. 384, 181 P. 657, "It is the established practice of the Supreme Court not to consider any question of excess of sentence until the expiration of the time for which the prisoner may be lawfully confined. * * * It is clear, therefore, that a writ should not be granted at this time."

It follows that the writ must be discharged, and it is so ordered.

We concur: WASTE, C. J.; SHENK, J.; RICHARDS, J.; SEAWELL, J.; CURTIS, J.; PRESTON, J.

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211 Cal. 759

PEOPLE v. BORREGO et al.

Cr. 3399.

Supreme Court of California.

March 17, 1931.

1. Intoxicating liquors 🔑139.

Offense of possession of still is established where it is shown that all parts are in possession and immediate control of person, ready for connection.

2. Intoxicating liquors 🔑236(4).

Possession of pipe and gasoline for use with still were sufficient circumstances to warrant finding of guilty of aiding and abetting in possession of still.

Pipe in possession of accused fitted perfectly into still found on premises and was intended to be component part of particular still, while gasoline was the only fuel with which still could be operated, in addition to which the still was ready for use, except for such piece of pipe and gasoline necessary to operate it.

3. Criminal law 🔑650.

On charge of unlawfully manufacturing liquor, it is proper to permit parts carried by accused to be put together in presence of jury with other parts found with still.

4. Intoxicating liquors 🔑167.

One may be guilty of aiding and abetting another in possession of still.

5. Intoxicating liquors 🔑236(19).

Defendant's connection with crime of possession of still may be shown either by positive proof or circumstantial evidence excluding every other reasonable hypothesis except guilt.

6. Criminal law 🔑743.

Although defendant's own story exculpates him, it is for jury to say whether that story should be believed.

7. Intoxicating liquors 🔑236(19).

Evidence *held* to sustain conviction for possession of still.

In Bank.

Appeal from Superior Court, Los Angeles County; Charles W. Fricke, Judge.

Joe Borrego was convicted of possession of a still, and he appeals.

Affirmed.

Superseding opinion of District Court of Appeal in 291 P. 857.

Elliott H. Barrett, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., John W. Maltman, Deputy Atty. Gen., and Warner I. Praul, of Los Angeles, for the People.

PER CURIAM.

This cause was originally appealed to the District Court of Appeal where it was heard, and by a divided court the judgment of the trial court was reversed. Upon petition of the Attorney General, we ordered a transfer to this court. After due consideration given to the opinions rendered by the members of the District Court of Appeal at the time this cause was before said court, we are satisfied that the dissenting opinion, written by Gates, justice pro tem., correctly states the views of this court upon the questions presented by this appeal. We, therefore, adopt the following portions of said opinion (291 P. 857, 858) as the opinion of this court:

"On the evening of December 13, 1929, at about 9 p. m. of that day, an investigator and other members of the enforcement squad of the district attorney's office called at a residence on Warfield avenue, Los Angeles. Upon their arrival at the above place, they saw one of the defendants, Octeau, walking from the driveway. One of the officers took him by the arm and walked into the house. In the house they found in the kitchen a still, with condenser, coil, and gooseneck. In the next room they discovered a pressure tank with some sugar and empty one-gallon bottles. In the front room and front bedrooms, around the walls, were sixteen fifty-gallon barrels of mash. In the front living room were two fifteen-gallon barrels of whisky, and also forty-five gallons of whisky and brandy. According to the people's witness, the still was operated by gasoline burners, and was capable of producing intoxicating liquor containing more than one-half of 1 per cent. by volume fit for beverage purposes. Defendant Octeau told the officers, if they would permit him to remain outside, others connected with the still would soon drive up; that he was only the watchman. The officers permitted him to remain outside. Presently a Chevrolet coupe arrived outside the house, the occupants of which were the appellant, his wife, and defendant Cotton. These people were immediately placed under arrest. On the back seat of the car driven by appellant was found People's Exhibit 2. From a personal inspection of this exhibit, it appears that it is not a single ordinary piece of pipe, but consists of three separate and distinct pieces, which are screwed together, viz.: First, a one-inch by six-inch galvanized iron nipple; second, a one-inch by three-quarter inch reducer; and, third, a three-quarter inch standard male hose nipple. The evidence clearly showed that this exhibit was not a piece of pipe that might be used for any purpose, but, on the contrary, it fitted perfectly into a connection on top of the mash pump, which pump was a part of the still found on the premises. The one-inch by six-inch galvanized iron nipple screwed into the mash pump, one end of the reducer fitted into the galvanized iron nipple, and the other end of the reducer, the smaller end, fitted into the mash hose. In addition to People's Exhibit 2, there was taken from appellant's car two five-gallon cans of gasoline, which appellant stated he had purchased for his truck but had forgotten. It also appeared from the evidence that without the addition of People's Exhibit 2, the connection above referred to, the still found on the premises was usable, but with the addition of People's Exhibit 2 it became a more complete and efficient still—one easier to operate. This is illustrated by the testimony of Officer Summers, a portion of whose testimony is as follows:

" 'A. I took the piece of pipe (People's Exhibit 2) from McDonnell. (The investigator who had previously taken the piece of pipe [People's Exhibit 2] from appellant's car.)

" 'Q. By Mr. Holland: People's Exhibit 2?

" 'A. Yes, sir,—and screwed an iron connection which had been on the table in the kitchen—and screwed that onto the mash pump.

" 'Q. Will you show the jury that connection, please?

" 'A. (Illustrating.) Screwed that into the mash pump and then screwed the piece of pipe (People's Exhibit 2) into that connection and then attached the mash hose onto the other end of the reducer, and there we had a complete outfit for the operation of this still, but without that piece of pipe (People's Exhibit 2) we would have not been able to.

" 'Q. By Mr. Reams: You mean pump?

" 'A. You would have a hard time running that still if you hadn't that mash pump.

" 'Q. By the Court: You referred to a complete still. You mean a complete pump?

" 'A. Yes. This piece of pipe (People's Exhibit 2) was the one thing missing to make this still and this pump and this apparatus complete, and without that (People's Exhibit 2) you would have had to pour your mash with a bucket into the still, but with that piece of pipe (People's Exhibit 2) you could pump it in, which is the customary way.'

"It also appeared that the defendant Octeau rented the premises under an assumed name while in the company of the defendant Cotton. Appellant and Cotton were acquainted with each other. Octeau admitted ownership of the still, after having first claimed that he was the watchman on the premises. Appellant denied having any interest in the still. His story was: That he met the defendant Cotton on Warfield avenue on his way home from work. He offered to help Cotton, who had a flat tire. That he took him over to Twenty-Eighth street to get his key to his spare tire. That when they came near the house in question, he was arrested by Officer McDonnell. He was taken inside of the house and questioned. It is also shown by the evidence that, upon being interrogated by the officers as to the use of People's Exhibit 2, he stated that it might be used for a lot of things. People's Exhibit 2 was on the back seat of his car. He stated: That he got it from a plumber who works for the Edison Company. That he took this particular connection (People's Exhibit 2) around, thinking that he might need it. He did not state for what purpose he might need it. He also stated that he had the gasoline in the car to use; that it had been there for about ten days.

"It further appears from the evidence that appellant, in traveling on Warfield avenue, which is not a through main street, was driving out of his ordinary course or way from his work to his home. Appellant first denied that he knew Cotton, but later, when it was shown that appellant and Cotton resided about a year before at the same address, he admitted he knew him.

[1, 2] "Appellant's first contention that the still found on the premises had not been completely set up is met by the evidence that the still was complete and could have been used for the purpose for which it was intended, but that without the addition of People's Exhibit 2 it would not have been as efficient. Irrespective of whether this still was a completed still, it is immaterial, for it is well settled that the offense of possession of a still is established where it is shown that all of the parts are in the possession and immediate control of a person, ready to be connected up and used. Bradley v. State, 171 Ark. 1083, 287 S. W. 387; McGarity v. State, 151 Ark. 423, 236 S. W. 611; Gamble v. State, 19 Ala. App. 82, 95 So. 202. Appellant insists that People's Exhibit 2 is not such a portion of a still as to come within the terms of the stat-

ute. * * * It must be borne in mind that appellant was not convicted of having a part or parts of something that might be used in connection with a still in his possession. He was tried and convicted with his codefendants of having in his possession a still, the still found on the premises. Appellant's contention, however, would be tenable if he had been found with People's Exhibit 2 in his possession and there was no other evidence to connect him and People's Exhibit 2 with the particular still found on the premises. However, the fact that appellant had in his possession these three connected pieces of pipe (People's Exhibit 2), which unquestionably, to my mind, is and was intended to be a component part of this particular still, which part fitted perfectly into the still found on the premises; together with the fact that he had in his possession two five-gallon cans of gasoline, gasoline being the only fuel with which the still could be operated, these facts, together with his lack of explanation, acquaintance with codefendants, the fact that the still was ready for use and that the only things lacking to effectively and efficiently operate it were People's Exhibit 2 and the gasoline to fire it up, which were both brought by appellant, without any explanation on his part that the articles did not belong to him, are sufficient circumstances in themselves to warrant the jury in finding appellant guilty of aiding and abetting his codefendants in possession of the still found on the premises.

[3] "It is well settled that, where one has been charged with the unlawful manufacture of intoxicating liquor, it is proper to permit parts carried by the defendant to be put together, in the presence of the jury, with other parts found with a still, to determine whether they belonged together, and the value of this evidence is for the jury. Hixson v. State, 158 Ark. 642, 239 S. W. 1057.

[4, 5] "It is also clear that one may be guilty of aiding and abetting another in the possession of a still. Washington v. State, 21 Ala. App. 239, 107 So. 34. And likewise, it is well established by the cases that a defendant's connection with a crime of this kind may be shown either by positive proof or by circumstantial evidence which excludes every other reasonable hypothesis except that of guilt. 33 C. J. 777. It was stated by this court in People v. Baker, 94 Cal. App. 628, 271 P. 765, 767, that 'Circumstantial evidence need not, in order to justify the inference of legal guilt, consist of inculpatory facts which are absolutely and to the point of demonstration incompatible with innocence. "A conviction in the minds of the jurors to a moral certainty and beyond a reasonable doubt, arising from the evidence of the defendant's guilt, is sufficient." People v. Bellamy, 109 Cal. 610, 42 P. 236. Circumstantial evidence may be as conclusive in its convincing force as the testimony of direct witnesses to the overt act. "Circumstances very largely control the conduct of men in the most important affairs of life, and may be sufficient to justify a conviction of crime where they are such as to exclude any other reasonable theory than that of the guilt of the accused." People v. Nagy, 199 Cal. 235, 248 P. 906.' * * *

[6] "The District Court of Appeal, in People v. Kiser, 24 Cal. App. 540, 141 P. 1078, has enunciated the principle that the direct testimony of the accused may be so contradicted by circumstantial evidence alone that the jury need not believe it. And, also, it is a well-settled principle of law in this state that, although the defendant's own story exculpates him, it is for the jury to say whether that story should be believed. People v. Rongo, 169 Cal. 71, 145 P. 1017; People v. Sears, 119 Cal. 267, 51 P. 325; People v. Billings, 34 Cal. App. 549, 168 P. 396; People v. Stephens, 29 Cal. App. 616, 157 P. 570, 572.

[7] "In the instant case the jury's verdict indicates that they did not believe the appellant's story; the effect of this finding being that the testimony of the appellant, positive though it seems to be, is contradicted by the circumstantial evidence, which evidence, to my mind, is amply sufficient to support the verdict of guilt."

The judgment is affirmed.

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211 Cal. 579

MILLS v. STATE BAR OF CALIFORNIA.

L. A. 12403.

Supreme Court of California.

March 27, 1931.

In Bank.

On rehearing.

For former opinion, see 296 P. 280.

PER CURIAM.

Upon the hearing of a petition for a rehearing filed herein, it satisfactorily appeared to this court from the affidavit of petitioner and the reply thereto of respondent, the State Bar of California, that petitioner on the 16th day of June, 1930, closed his law office and ceased to practice law and since said date has not practiced law in this state. It is therefore ordered that the order of this court heretofore made suspending petitioner from the practice of law for the period of one year be, and the same is hereby, modified so that the suspension of petitioner shall commence on the 16th day of June, 1930, and continue for the period of one year from said last-named date.

The petition for rehearing is denied.

212 Cal. 19

BARNHART AIRCRAFT, Inc., v. PRESTON et ux.

L. A. 10445.

Supreme Court of California.

March 24, 1931.

Rehearing Denied April 23, 1931.

1. Evidence 🔑458.

Rule permitting parol evidence to show circumstances under which written agreement was made for purpose of facilitating construction applies only to patent ambiguities (Code Civ. Proc. § 1860).

> Code Civ. Proc. § 1860, provides that, for the proper construction of an instrument, the circumstances under which it was made, including the situation of the subject of the instrument, and of the parties to it, may be shown.

2. Sales 🔑72(5).

Agreement by buyer of brick-making machine to furnish concrete mixer to "operate" machine *held* not obligation to furnish mixer capable of providing sufficient concrete during demonstration period.

> Under the agreement, the seller was to design and construct a brick-making machine capable of producing 25,000 bricks of a specified kind and shape within a given time. The machine was to be completed within one year, and the buyer was not to pay the purchase price until it was demonstrated that the machine would, in all respects, come up to the specifications.
>
> [Ed. Note.—For other definitions of "Operate," see Words and Phrases.]

3. Sales 🔑178(1).

Designation by buyer of brick-making machine of point of installation, and furnishing of concrete mixer for purpose of demonstration, *held* not acceptance.

4. Contracts 🔑170(1).

In determining intent, acts and interpretation of parties have great weight, but acts must be direct, positive, and deliberate and must show that acts were done in attempted compliance with contract.

5. Sales 🔑172.

Where construction of brick-making machine was condition precedent to payment, *held*, buyer's failure to furnish mixer for testing gave no excuse to seller.

> If the lack of a mixer was the agency that prevented performance, the duty rested upon the seller to obtain such a mixer elsewhere and to complete the test.

6. Evidence 🔑450(8).

Agreement by seller of brick-making machine to furnish all necessary machinery for "operation," save concrete mixer, etc., *held* not ambiguous, as regards parol evidence (Code Civ. Proc. §§ 1856, 1860).

> The seller sought to introduce parol evidence to show that the mixer was to be furnished not only for the actual operation of the machine after acceptance by the buyer but also during the tests for the purpose of demonstrating that the machine was built in accordance with the specifications of the contract.

7. Sales 🔑353(6).

Allegation that seller performed contract completely except as prevented by buyer *held* sufficient.

> Plaintiff alleged that he performed every act in accordance with the terms of agreement, except in so far as such performance has been prevented by the acts and omissions of the defendants.

In Bank.

Appeal from Superior Court, Los Angeles County; Hugh J. Crawford, Judge.

Action by the Barnhart Aircraft, Incorporated, against G. W. Preston and wife. From a judgment in favor of plaintiff, defendants appeal.

Reversed and remanded.

For opinion of District Court of Appeal herewith adopted, see 290 P. 545.

Leslie H. Kranz and Wellburn Maycock, both of Los Angeles, for appellants.

Dryer, Castle, McConlogue & Richards, C. H. Hartke, Bruce Wallace, and H. L. Pratt, all of Los Angeles, for respondent.

PER CURIAM.

In making an order of transfer to this court, we were satisfied that the District Court of Appeal, Third Appellate District, properly reversed the judgment entered for the plaintiff, but we were unable to agree with all of the reasons advanced by that court in support of its conclusion. The following portion of the opinion prepared by Mr. Justice Pullen, pro tempore, meets with our approval, and is therefore adopted as and for the decision of this court:

This is an action on a contract, one count being for the breach thereof and the other for goods sold and delivered and for the reasonable value of a certain brick-making machine.

Appellants were engaged in the manufacture and sale of pressed brick and entered into an agreement with Barnhart Aircraft, Inc., respondent herein, who agreed to design and construct an automatic brick-making machine capable of producing 25,000 bricks conforming to certain designated specifications in ten or less successive hours. Respondent agreed to deliver the completed machine not later than one year from the date of the agreement; and when it was demonstrated that the machine would make the number, kind, and character of brick in the prescribed time, then appellants were to pay to respondent the amount agreed upon.

Respondent designed and undertook the construction of the machine and set it up for demonstration purposes at the brickyard of appellants. Several demonstration runs were made, but never did the machine perform as required by the contract. It never operated continuously for any extended period and the bricks turned out were not of the size or shape mentioned in the specifications. Respondent claims failure of the machine to perform was due to the fact the concrete mixer and conveyer as furnished by the appellants were inadequate to supply to the machine the mixture in sufficient quantity or of required composition. Respondent sets forth in its complaint that it was understood and agreed between the parties that appellants were to furnish, provide, and install in connection with said brick-making machine a concrete mixer in all respects adequate to provide and capable of providing sufficient concrete in the proper form and mixture to permit said machine to operate in the making of brick continuously and to produce 25,000 brick in ten or less successive hours. It therefore was essential to the cause of action of respondent to prove this material allegation. This purported understanding or agreement was based upon paragraph (t) of the contract, which read as follows: "Second party [respondent herein] will furnish all necessary machinery, motors and attachments for operation of said machine, save concrete mixer, power line or lines and steam curing rooms." In interpreting paragraph (t), quoted above, the trial court permitted parol evidence to be introduced for the purpose of explaining what was termed an extrinsic ambiguity.

The first point to be determined, therefore, is whether such an ambiguity is found in the language of paragraph (t) and whether or not the trial court erred in receiving parol evidence in respect to the construction of the paragraph to which we have referred. The trial court, believing paragraph (t) contained such an extrinsic ambiguity, permitted parol evidence to be admitted. This was done under the provisions of sections 1856 and 1860 of the Code of Civil Procedure. Section 1856 of the Code of Civil Procedure reads as follows:

"When the terms of an agreement have been reduced to writing by the parties it is to be considered as containing all those terms, and therefore there can be between the parties and their representatives, or successors in interest, no evidence of the terms of the agreement other than the contents of the writing, except in the following cases:

"1. Where a mistake or imperfection of the writing is put in issue by the pleadings;

"2. Where the validity of the agreement is the fact in dispute.

"But this section does not exclude other evidence of the circumstances under which the agreement was made or to which it relates, as defined in section eighteen hundred and sixty, or to explain an extrinsic ambiguity, or to establish illegality or fraud. The term agreement includes deeds and wills, as well as contracts between parties."

[1] Section 1860 of the Code of Civil Procedure is as follows:

"For the proper construction of an instrument, the circumstances under which it was made, including the situation of the subject of the instrument and of the parties to it, may also be shown, so that the judge be placed in the position of those whose language he is to interpret."

The rule as stated in section 1860 of the Code of Civil Procedure can only be invoked to explain an ambiguity which appears upon the face of the document itself. United Iron Works v. Outer Harbor Dock & Wharf Co., 168 Cal. 81, 141 P. 917, 919; Peterson v. Chaix, 5 Cal. App. 525, 90 P. 948. In United Iron Works v. Outer Harbor, etc., Co., supra, the court said:

"Appellant undertook by parol evidence of the 'surrounding circumstances' to show that there was such a warranty given even if it were not expressly embodied in the written contract. The objections to the admission of this evidence were sustained, and this is the first one of the asserted errors; the contention being that under section 1647 of the Civil Code and section 1860 of the Code of Civil Procedure such evidence was clearly admissible. In this, however, appellant errs. These sections but enact the common-law rule. It is never within their contemplation that a contract reduced to writing and executed by the parties shall have anything added to it or taken away from it by such evidence of 'surrounding circumstance.' This rule of evidence is invoked and employed only in cases where upon the face of the contract itself there is doubt and the evidence is used to dispel that doubt, not by showing that the parties meant something other than what they said, but by showing what they meant by what they said. Harrison v. McCormick, 89 Cal. 327, 26 P. 830, 23 Am. St. Rep. 469;

Kreuzberger v. Wingfield, 96 Cal. 251, 31 P. 109; Balfour v. Fresno Canal Co., 109 Cal. 221, 41 P. 876; 3 Jones, Commentaries on Evidence, § 454."

Jones, in his Commentaries on Evidence, volume 3, § 454, cited in the foregoing opinion, states the rule as follows:

"The rule has been laid down in the adjudicated cases that no evidence of the language employed by the parties in making the contract can be given in evidence except that which is furnished by the writing itself. It will be found that nearly all if not all the illustrations given in the last section [entitled Proof of Surrounding Facts] recognized the general rule that the written contract must govern and that proof of the acts, situation and statements of the parties can have no other effect than to ascertain the meaning of the parties as expressed in the writing. It will also be found that in the cases where evidence of the declarations of parties has been received the language of the writing admitted of more than one construction, either upon its face or explained by the parol evidence concerning the surrounding facts, or identifying the subject matter or the parties.

"* * * Ambiguity in a written contract, calling for construction, may arise as well from words plain in themselves but uncertain when applied to the subject matter of the contract, as from words which are uncertain in their literal sense and it may be discovered on cross-examination, without precluding its explanation, but it must relate to a subject treated of in the paper and must arise out of words used in treating that subject. Such an ambiguity never arises out of what was not written at all, but only out of what was written so blindly and imperfectly that its meaning is doubtful.

"It must be borne in mind that although declarations of the parties may in some cases be received to explain contracts or words of doubtful meaning, yet no other words can be added to or substituted for those of the writing. The courts are not at liberty to speculate as to the general intention of the parties, but are charged with the duty of ascertaining the meaning of the written language."

[2] The effect of the evidence received by the court in the instant case was to write into the contract a provision not placed there by the parties, although respondent in its complaint attempted by pleading the legal effect of the contract to incorporate therein such an understanding, but when confronted with the document itself the interpolation becomes obvious. The language of paragraph (t) which was agreed upon by the parties to the contract provided that the second party (respondent herein) would furnish all necessary machinery, motors, and attachments for the operation of the machine, save concrete mixer, power line, and steam curing rooms, is not the same agreement as constructed therefrom by the court to the effect that the parties of the first part (appellants herein) agreed to provide a concrete mixer in all respects adequate to provide and capable of providing sufficient concrete in proper form, manner, and mixture to permit or enable said machine to operate in the making of brick continuously and to produce 25,000 brick of given specifications in ten or less successive hours. A study of the contract in question seems to clearly indicate further that respondent was to design and construct a machine capable of performing a definite requirement, but until such machine had been designed, constructed, set up, and had demonstrated its ability to turn out 25,000 brick of specified characteristics in a given time, all within one year from the date of the contract, then and not until then were appellants to be called upon to make any payments or to accept the machine.

[3-6] It is true that appellants designated the point of installation, but that was admittedly done before the machine had proved its worth and could not be construed as an acceptance, although the mixer and conveyor belt of appellants were used to mix and convey the concrete to the machine in question. In determining the construction of the terms of a contract, the acts and interpretation of the parties themselves to the contract have great weight with the courts in construing the intent of the parties, but such acts must be direct, positive, and deliberate, and must show that the acts so done were done in an attempted compliance with the terms of the contract or agreement. Here the record discloses the mixer and conveyor were used not by the direct instruction of the appellants or with the idea of carrying out any of the provisions of the contract, but was a permissive use only. The use of the word "operate," having in mind the entire contract, is significant for if the duty rested upon appellants to co-operate in the experimental stages of the designing and constructing of the machine some word connoting the period of demonstration as distinct from the period of operation would have been used. As a condition precedent to the payment of the purchase price, respondent was required to design and construct a brick-making machine that would comply with the prescribed conditions, and if the lack of a mixer was the agency that prevented performance, the duty rested upon respondent to obtain such a mixer elsewhere and to complete the test. There is nothing so unique in the supplying of concrete to a brick-making machine that would excuse respondent from going into the market if necessary and obtaining such mixer.

[7] Appellants urge that the complaint of respondent did not state a cause of action in that it did not specifically allege that the terms of the contract had been complied with. We are of the opinion that the allegation that "plaintiff did and performed each and every act and thing incumbent upon it to be performed fully and completely in accordance with the terms and provisions of said agreement and addendum, except in so far as such performance has been prevented by the acts and omissions of the defendants" is sufficient under authority of Gilfallan v. Gilfallan, 168 Cal. 23, 141 P. 623, Ann. Cas. 1915D, 784.

What has been said sufficiently disposes of the appeal, and we therefore find it unnecessary to pass upon the point having to do with the admissibility in evidence of certain depositions. The point may not arise on the second trial.

The judgment is reversed.

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211 Cal. 744

PEOPLE v. MOTT.

Cr. 3388.

Supreme Court of California.
March 17, 1931.

Rehearing Denied April 16, 1931.

1. Witnesses 🔑286(4).

In murder prosecution, redirect examination of state's witness to show no gun was kept in premises where homicide occurred *held* proper, in view of cross-examination.

> It was sought on cross-examination to extract from the witness an admission that the deceased had reached under or into his desk as though to draw a weapon, the purpose obviously being to support defendant's testimony that he acted in self-defense.

2. Criminal law 🔑1036(1).

In murder prosecution, admission of testimony respecting decedent's possession of gun *held* not prejudicial, where question was asked and answered without objection.

> On redirect examination, the witness was asked whether he ever saw deceased in possession of a gun at the place where the homicide occurred, and witness answered that he had not. This testimony followed cross-examination in which defendant attempted to extract from witness an admission that deceased had reached under or into his desk as though to draw weapon.

3. Criminal law 🔑829(1).

Refusal of instruction covered by instructions given was not error.

4. Homicide 🔑309(5).

Refusal of manslaughter instruction *held* not error, where, under testimony, defendant was guilty of murder or not guilty at all.

In Bank.

Appeal from Superior Court, City and County of San Francisco; J. J. Trabucco, Judge.

Fred Mott was convicted of murder without recommendation, and he appeals.

Affirmed.

Albert J. McGuire and Leo Arthur Elkins, both of San Francisco, for appellant.

U. S. Webb, Atty. Gen., W. R. Augustine, Deputy Atty. Gen., and Mathew Brady and Peter J. Mullins, both of San Francisco, for the People.

RICHARDS, J.

This appeal is from a judgment of conviction of the defendant upon a charge of murder, following a verdict of guilty by the jury without recommendation. The evidence convincingly shows the defendant to have been guilty of a deliberate, premeditated, and unprovoked murder. Upon his arraignment therefor he entered a plea of "not guilty" and "not guilty by reason of insanity," and he also denied the two prior convictions of felonies charged in the information. Thereafter and before trial he withdrew his plea of "not guilty by reason of insanity," and proceeded to trial upon his plea of "not guilty," and upon his denial of his previous convictions. In statements made after his arrest and before his trial he admitted the homicide, but indicated that his only defense thereto would be that of self-defense, and upon his trial he undertook to support this plea by his own testimony, in which, however, he was contradicted by every other witness to the homicide.

[1, 2] The appellant makes three contentions upon this appeal. The first of these is that the trial court committed prejudicial error in allowing incompetent evidence to be admitted and considered by the jury. This contention is based upon the following state of the record: A witness named Boyer was called on behalf of the prosecution and testified that he was and for several months prior thereto had been the manager of the radio shop in which the shooting had occurred and the employer there during that period of the deceased. He also testified that he was an eyewitness to the crime, to the circumstances which preceded it, and to the attempted escape of the defendant, whom he had followed from the scene of the crime to the place where he accomplished his arrest. This witness was cross-examined at considerable length by counsel for the defendant, in the course of which he endeavored to show that immedi-

ately before he was killed the deceased had reached under his desk as though, it was claimed, to draw a weapon. The purpose of this cross-examination was obviously that of seeking to support the testimony which the defendant was about to give in support of his plea that he acted in self-defense. Following this cross-examination the witness Boyer was recalled by the prosecution during the presentation of its main case, and was asked the following questions by counsel for the prosecution:

"Q. Did you ever know of a gun being kept in the premises at 1251 Market street? A. No sir.

"Mr. Elkins. We object to that on the ground that it is not proper rebuttal. This witness was on the stand before and no evidence is shown that there was a gun there.

"The Court. Objection overruled.

"Q. Have you answered the question, Mr. Witness? A. I said, 'No, sir.'

"Q. Did you ever see Thomas [the deceased] in the possession of a gun at 1251 Market street? A. No, sir."

It is the contention of the appellant that the asking of these questions and the answers given thereto constituted prejudicial error. There are several answers to this contention, the first of which would seem to be that as to the first of these questions it constituted proper redirect examination in view of the effort of the defendant's counsel upon the cross-examination of the witness Boyer to extract from the latter an admission that the deceased had reached under or into his desk as though to draw a weapon, the effect of the redirect examination being to show that there was no weapon upon the premises which the deceased could have reached for immediately before he was slain. As to the second question, a sufficient answer to the present objection thereto consists in the fact that upon the trial the question was asked and answered without objection. The appellant relies for support to his foregoing contention upon the case of People v. Hoffman, 195 Cal. 295, 302, 232 P. 974, and upon the earlier case of People v. Powell, 87 Cal. 348, 25 P. 481, 11 L. R. A. 75, which is therein cited with approval. Neither of these cases, however, presents the situation shown to exist in the instant case. It may be further stated that the affirmative evidence in this case contained in the testimony of the officers of the law who examined the premises immediately after the homicide, given without objection, shows that no weapon of any kind was found upon or in the proximity of the deceased, and that there were no firearms found in the room where he was killed. In view of the foregoing we are constrained to hold that no prejudicial error was committed by the admission of the foregoing testimony.

[3, 4] Appellant's next contention is that the court erred in its refusal to give certain instructions proposed by the defendant. These instructions were four in number, and as to the first three of them the appellant has furnished us with neither argument nor authority to show wherein the refusal to give these instructions was error. The record discloses that the matters contained therein were fully covered by instructions which the trial court had already given. With respect to the fourth of these instructions, the appellant earnestly contends that he was entitled to have it given. This instruction is to the effect that the jury upon a trial for murder was entitled to bring in a verdict of manslaughter, and the appellant therefore requested an instruction defining manslaughter, which the trial court refused to give. In the instant case, however, the defendant offered neither plea nor evidence as to any fact which would have justified the jury in finding the defendant guilty only of manslaughter. The only justification which the defendant offered for his otherwise deliberate and premeditated murder was the plea of self-defense. If the jury found that his testimony with regard to that plea was wholly unsupported and unbelievable, it had no other alternative than that of finding him guilty of a willful, unprovoked, and cold-blooded murder. Under such circumstances the authorities fully sustain the trial court in refusing to give to the jury an instruction concerning or defining manslaughter. People v. Haun, 44 Cal. 96, 100; People v. Turley, 50 Cal. 469; People v. Lee Gam, 69 Cal. 552, 11 P. 183; People v. Fellows, 122 Cal. 233, 54 P. 830; People v. Chaves, 122 Cal. 134, 54 P. 596; People v. William Yee, 37 Cal. App. 579, 174 P. 343; People v. Dad, 51 Cal. App. 182, 196 P. 506; People v. Shannon, 203 Cal. 139, 143, 263 P. 522, 524. In the case last above cited this court said: "The record discloses no possible theory upon which to rest an argument that the defendant was guilty of manslaughter. Under the evidence, he was guilty of murder, or not at all. The instruction was therefore properly refused."—citing cases.

The final contention of the appellant is that the court erred in denying his motion for a new trial. In support of this contention the defendant urged the points already made, but otherwise presented nothing further in the way of argument or authority to support his said motion. It was therefore properly denied.

The judgment and order are affirmed.

We concur: WASTE, C. J.; SHENK, J.; SEAWELL, J.; LANGDON, J.; PRESTON, J.; CURTIS, J.

211 Cal. 739

BRILL v. FOX et al.

L. A. 12426.

Supreme Court of California.
March 16, 1931.

1. Mortgages ⚷496.

Erroneous allegations of complaint as to certain defendants' personal liability and codefendants' ignorance of facts supporting alleged defense *held* to authorize vacation of default mortgage foreclosure judgment against codefendants (Code Civ. Proc. § 473).

2. Judgment ⚷139.

Setting aside default is primarily within trial court's legal discretion, exercised according to spirit of law in manner subserving substantial justice (Code Civ. Proc. § 473).

3. Judgment ⚷163.

Doubt as to propriety of vacating default judgment should be resolved in favor thereof (Code Civ. Proc. § 473).

4. Appeal and error ⚷957(1).

Orders denying motions to set aside default judgments are scanned more carefully on appeal than orders granting such relief so that case may be heard on merits (Code Civ. Proc. § 473).

In Bank.

Appeal from Superior Court, Los Angeles County; Myron Westover, Judge.

Action by William Brill against Wallace I. Fox and wife and others. From an order denying the motion of defendants Fox to vacate and set aside a default judgment against them, they appeal.

Reversed and remanded with direction.

Ben A. Hill, of San Pedro, and Bodkin & Lucas and Stuart Silliman, all of Los Angeles, for appellants.

Arthur Crum, of Los Angeles, for respondent.

PER CURIAM.

This is an appeal from an order denying the motion of defendants Wallace I. Fox and Haddie Fox, made under section 473 of the Code of Civil Procedure, to vacate and set aside a default judgment entered against them in an action to foreclose a mortgage.

The record shows that the foreclosure action was commenced January 21, 1930; that a copy of the complaint attached to an undated summons was served on these two defendants, in the county in which the action was commenced, on January 24, 1930; that their default was entered on February 8, 1930; that judgment was entered on February 17, 1930. It further appears that on February 23, 1930, defendants discovered that judgment had been entered against them, and called on plaintiff and his attorney the same day; that on February 25, 1930, defendants sought the advice of counsel, who caused a title search of the property to be made, and on February 28, 1930, counsel informed defendants that they had a defense to the action; that on March 18, 1930, defendants served, and on March 19, 1930, filed, a notice of motion to set aside the default.

By the complaint plaintiff sought to foreclose a mortgage on real property alleged to have been executed by the defendants Fox and wife, and to secure a deficiency judgment, if a deficiency should be found to exist. The complaint originally named Wallace B. and Amelia J. Allen as parties defendant, but plaintiff dismissed as to these defendants on February 14, 1930, six days after the default of the Foxes had been taken, and three days before judgment was entered against them.

Appellants contend that their default was taken by reason of "mistake, inadvertence, surprise and excusable neglect," and that the trial court abused its discretion in denying to them the relief sought. In order to understand appellants' contentions in this regard, it is necessary to trace the history of the property which is the subject of the foreclosure action, as disclosed by the record herein.

On August 6, 1925, Brill, respondent herein, owned the real property in question. On that day, Brill sold the property to the appellants for $12,000, $7,000 being paid in cash, and the remainder evidenced by a promissory note, secured by a mortgage. It is this mortgage which is the subject of this action. On December 28, 1925, appellants sold the property to one Louis P. Mosti, who did not assume personal liability on the mortgage. Mosti, while owner of the property, subject to the above mortgage, borrowed $1,500 from Brill, respondent herein, evidencing the indebtedness with his promissory note, secured by a deed of trust. Later, on June 19, 1926, Mosti sold the property to the Allens, originally defendants herein, the Allens assuming personal liability on the mortgage. There were no intervening liens between the Fox mortgage and the Mosti trust deed. Subsequently, Mosti defaulted on his $1,500 note secured by the deed of trust, and the trustee sold the property to Brill, being conveyed to him by trustee's deed on August 24, 1927. Then, after appellants herein and their grantees had defaulted in payments on the $5,000 note, secured by this mortgage, this action of foreclosure was commenced, resulting in the taking of appellants' default, and the securing of a deficiency judgment against appellants in the sum of $4,898.08.

Appellants, in their verified answer filed with their affidavit of merits under section 473, Code of Civil Procedure, set up as a proposed defense that the lien of the mortgage was merged in the fee simple title to the property acquired by respondent Brill by the trustee's deed naming Brill as grantee, dated August 14, 1927. Respondent does not contend that this defense is not a meritorious one, contenting himself with the position that appellants' default was entered due to their own gross negligence. The question as to the merits of the proposed defense is an important one, which apparently has never been directly passed upon by the courts of this state. We do not feel justified in determining whether or not the doctrine of merger would apply to the facts of this case, that question being one to be determined by the trial court in the first instance upon all the evidence. On the showing made by appellants, we will assume for the purpose of this motion that the proposed defense is a meritorious one, the only other question being as to whether the trial court abused its discretion in denying appellants' motion to be relieved from their default.

The affidavit of merits filed by appellants sets forth two major contentions, which it is contended demonstrate that the default of appellants was entered as a result of their inadvertence and excusable neglect.

1. That when appellants were served with a copy of the complaint and summons, they noted that the Allens had been made party defendants; that appellants knew that the Allens had purchased the property from Mosti in 1926, and believed in good faith that the Allens still owned the property; that, from the allegations contained in the complaint, appellants were induced to believe that the Allens were personally liable on the mortgage; that appellants believed that they (appellants) were liable only as sureties; that, because of this belief, appellants did not investigate the title. As a matter of law, although the Allens had personally assumed liability on the mortgage, they were not personally liable thereon, inasmuch as their grantor, Mosti, had not assumed the personal liability thereof. Respondent and his attorney were not aware of this fact when the complaint was filed and, for that reason, joined the Allens as party defendants. Both respondent and appellants could have discovered their mistake, had a search of the title been made. Of course, the mere fact that the Allens were or were not responsible would not relieve the appellants from liability on the mortgage as a matter of law, but, as a matter of practical consideration, it goes far in explaining appellants' neglect in failing to file an answer, believing, as they did, that the Allens would pay rather than permit a deficiency judgment to be taken against them. The allegations in the complaint as to the Allens' liability were, under such circumstances, of such a nature as reasonably to mislead the appellants. Both parties were laboring under a mistake of fact and law as to the Allens' liability.

2. That, at the time of service of the copy of the summons and complaint, appellants did not know that they had a meritorious defense to the action, based on the doctrine of merger, and that such lack of knowledge was not due to their neglect. It is alleged in the affidavit of merits that appellants believed that the Allens still owned the property and were unaware that Brill owned the property by virtue of the trustee's deed of August 14, 1927. Certainly there was nothing to put the appellants on inquiry concerning this fact. Assuming that the merger constitutes a complete defense to the foreclosure action, certainly appellants were justified in the belief that Brill had not become the owner of the property and so by his own acts rendered his cause of action valueless.

[1] We are of the opinion that the allegations of the complaint, although made in good faith, were of such a nature as to have misled the appellants, and that this factor, coupled with the ignorance of appellants as to the facts giving rise to their alleged defense, constitutes sufficient reason for granting the relief sought by the appellants.

[2-4] The legal principles underlying the granting of motions to set aside defaults are comparatively simple, and have been frequently announced by this court. The question is primarily one within the discretion of the trial court, but this discretion is not capricious or arbitrary, but it is an impartial discretion guided and controlled in its exercise by fixed legal principles.

"It is not a mental discretion, to be exercised ex gratia, but a legal discretion, to be exercised in conformity with the spirit of the law, and in a manner to subserve and not to impede or defeat the ends of substantial justice." Bailey v. Taaffe, 29 Cal. 422, 424, quoted with approval in Waite v. Southern Pacific, 192 Cal. 467, 470, 221 P. 204, 206. It is also well settled that it is the policy of the law to bring about a trial on the merits wherever possible, so that any doubts which may exist should be resolved in favor of the application, to the end of securing a trial upon the merits. Jergins v. Schenck, 162 Cal. 747, 748, 124 P. 426; Waite v. Southern Pacific, supra. Although it is true that courts of appeal have shown great reluctance in cases of this kind to disturb the order of the trial court, it is equally true that denials of such relief by the trial court are scanned more carefully than cases where the trial court has granted the relief, to the end that wherever possible cases may be heard on their merits. See California National Bank v. El Dorado, 200 Cal. 452, 253 P. 704; Waite v. Southern Pacific, supra; Mitchell v. Calif., etc., S. S.

Co., 156 Cal. 576, 105 P. 590; Roehl v. Texas Co. (Cal. App.) 291 P. 262; Toon v. Pickwick Stages, 66 Cal. App. 450, 226 P. 628.

Tested by the above rules, we are of the opinion that the order of the trial court in this case should be reversed and the case heard on its merits. It does not appear that such a result will in any way injure respondent, except for the delay, and this injury can be taken care of by the trial court by the imposition of terms and conditions as provided for in section 473, Code of Civil Procedure.

For the reasons above indicated, the order refusing to vacate and set aside the judgment by default is reversed, and the cause remanded to the superior court, with direction to permit the defendants to file an answer to the plaintiffs' complaint within such time as the court may deem proper, and upon such terms as may seem just.

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212 Cal. 15

McCLURG v. McCLURG.

L. A. 10244.

Supreme Court of California.
March 20, 1931.

1. Divorce 🔑182.

Court, sustaining demurrer to complaint in divorce action, could enter order for payment of attorney fees and costs on appeal from order denying husband's motion for alimony (St. 1927, p. 441).

Order was made under express provisions of St. 1927, p. 441, permitting husband to apply for and receive alimony, counsel fees, and costs in an action for divorce, and cause at time order was made was still pending, regardless of order sustaining demurrer to complaint with full right in plaintiff to apply for further leave to amend pleading, and with full power of court to allow such amendment and jurisdiction to make whatever orders in action it might deem proper.

2. Divorce 🔑182.

Order allowing husband attorney's fees and costs on appeal from order denying alimony after effective date of law relating thereto was not retroactive (St. 1927, p. 441).

Although divorce action was commenced prior to the adoption and taking effect of St. 1927, p. 441, amending Civ. Code, § 137, so as to authorize recovery of alimony, counsel fees, and costs by husband, the order allowing fees and costs on appeal was entered subsequent to the effective date of such amendment.

In Bank.

Appeal from Superior Court, Los Angeles County; James H. Pope, Judge.

Divorce action by Lilian Sanford McClurg against Kenneth Gulick McClurg. From an order directing payment of attorney's fees and costs on appeal from an order denying motion for alimony, attorney's fees, and costs, plaintiff appeals.

Affirmed.

Eastham & Smith and Clyde W. Smith, all of San Pedro, and Wolfson & Swarthe, of Los Angeles, for appellant.

E. H. Woodard, and S. C. Schaefer, of Los Angeles, for respondent.

PER CURIAM.

This appeal is from an order made by the trial court in an action for divorce, directing the plaintiff to pay to the defendant $100 as attorney's fees and $75 costs, in order to enable the defendant to prosecute an appeal which he had taken from a prior order of the trial court denying his application for $500 a month alimony and $5,000 attorney's fees and costs, which the defendant had theretofore applied for and asserted to be necessary for his support and for the proper defense of this action for divorce.

The case presents the unusual feature of a husband defendant, in an action brought against him by his wife for a divorce, applying for alimony, counsel fees, and costs, appealing from an order of the trial court denying said application, and thereupon again applying for counsel fees and costs to enable him to prosecute his said appeal; and, the trial court having granted said latter motion, it is the defendant's wife who now appeals from the order which the trial court made in this latter behalf. The respondent husband has presented and filed no brief upon this appeal, and has made no response to the order to show cause issued herein.

[1] The first contention of the appellant upon this appeal is that the order appealed from was and is void for excess of jurisdiction in the trial court to make the same. This contention is based upon the following facts: The action was commenced on April 4, 1927. Thereafter the defendant applied for an order requiring the plaintiff to pay him alimony, counsel fees, and costs, which application was on September 14, 1927, denied. Upon the same date a demurrer presented by the defendant to the second amended complaint of the plaintiff was sustained. The minute order sustaining this demurrer was silent as to whether plaintiff was to have leave to further

amend her complaint. The defendant having in the meanwhile taken an appeal from the former order denying him alimony, counsel fees, and costs, he applied on September 23, 1927, for an order directing the plaintiff to pay him $100 attorney's fees and $75 costs on account of his said appeal, and the trial court on that date made such order, which is the order from which the present appeal is taken. The appellant contends that, since the trial court had, in sustaining the defendant's demurrer to the plaintiff's second amended complaint, inserted therein no order allowing the plaintiff to further amend her pleading, and the plaintiff having made no application or been given no order for the allowance of such amendment, the court had no jurisdiction in this interim to make the order appealed from herein. There is no merit in this contention. The cause was still pending in the trial court, with the full right in the plaintiff to apply for further leave to amend her pleading, and with full power in the court to allow such further amendment, and with full jurisdiction in the court to make whatever orders in the action it might deem proper. The order which the court did make, from which this appeal is taken, was made under the express provisions of section 137 of the Civil Code as amended in 1927 (St. 1927, p. 441), and by which amendment the terms of the original section were broadened so as to permit a husband to apply for and receive alimony, counsel fees, and costs in an action for divorce.

[2] The appellant, however, further contends that, since this action was commenced on April 4, 1927, and since section 137 of the Civil Code did not, as to said amendment thereof, become effective until August, 1927, the section as thus amended cannot be given retroactive effect so as to have application to an action commenced prior to the adoption and taking effect of the amendment; and that for this further reason the trial court had no jurisdiction to make the order appealed from herein. This contention is also without merit. The provision of the Civil Code embraced in section 3 thereof, providing that "no part of it is retroactive, unless expressly so declared," has been held to have no application to purely procedural matters arising in the course of a litigation commenced before the passage or amendment of a law affecting the procedure in civil actions. 23 Cal. Jur. 632, § 28, and cases cited; Sutherland on Stat. Construction (2d Ed.) § 674; Rice v. Dunlap, 205 Cal. 134, 137, 270 P. 196; Maguire v. Cunningham, 64 Cal. App. 536, 222 P. 838. Whether, however, the said order of the trial court directing the plaintiff to pay to the defendant counsel fees and costs in order to enable him to prosecute his former appeal was a procedural or a substantive order, it was an order made after the statute had become effective permitting the trial court to make such orders in actions pending for divorce, and was not therefore retroactive in character or effect, and was not, therefore, susceptible to the attack made upon it upon this appeal.

The order is affirmed.

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112 Cal. App. 498

ROBINSON v. THORNEWILL et al.

Civ. 7842.

District Court of Appeal, First District, Division 1, California.
March 12, 1931.

1. Appeal and error 🔑1015(2).

Order granting plaintiff new trial because evidence did not justify verdict could not be disturbed, on appeal, if evidence substantially conflicted and could sufficiently support judgment for plaintiff.

2. Automobiles 🔑244(10).

In death action resulting from automobile collision, evidence supported finding of defendant's negligence in driving on wrong side of highway.

3. Automobiles 🔑244(42).

In death action arising from automobile collision, circumstantial evidence that lights of decedent's truck were burning at time of collision overcame defendant's testimony that lights were not burning.

4. Witnesses 🔑317(2).

Jury *held* entitled to believe defendant willfully swore falsely as to material matters in death action resulting from automobile collision (Code Civ. Proc. § 2061, subd. 3).

> Defendant testified that at all times before the collision he was entirely on the right of the center of the highway, whereas the evidence would justify a finding that this was not true. He also testified that he saw the decedent's truck when it was about thirty feet away. In this he was contradicted by the testimony of another witness to the effect that shortly after the collision defendant told him that he did not see the decedent's truck until he was within six or eight feet of it.

5. Witnesses 🔑317(2).

Jury believing that witness willfully swore falsely as to material matters could disbelieve all his testimony (Code Civ. Proc. § 2061, subd. 3).

Appeal from Superior Court, Santa Cruz County; H. C. Lucas, Judge.

Action by Amos H. Robinson against Leslie A. Thornewill and another. From an order granting a new trial after verdict and judgment for defendants, defendants appeal.

Affirmed.

Rittenhouse & Snyder, of Santa Cruz, and Hadsell, Sweet & Ingalls, of San Francisco, for appellants.

J. Maxwell Peyser, of San Francisco, and Philip M. Carey, of Oakland, for respondent.

DOOLING, Justice pro tem.

[1] Appeal from an order granting a new trial after verdict and judgment for defendants. The action was one for wrongful death and arose out of a collision between a light Ford truck driven by decedent and a De Martini truck driven by appellant Patten. One of the grounds specified by the court in its order granting a new trial is insufficiency of the evidence to justify the verdict, and the order cannot therefore be disturbed on appeal if the evidence is in substantial conflict and there is sufficient evidence to support a judgment for plaintiff.

Appellants insist, however, that there was no evidence that defendants were guilty of negligence, and that under the evidence the decedent was guilty of negligence as a matter of law.

[2] The collision occurred on the highway north of Santa Cruz shortly after dark. The decedent, Aldon E. Robinson, was driving his Ford truck in a northerly direction on this highway, and appellant Patten was driving the De Martini truck in a southerly direction. No other person was present when the collision occurred except the drivers of the two trucks, and consequently the only eyewitness who testified at the trial was appellant Patten. There was testimony, however, of the sheriff of the county that when he arrived at the scene of the accident there were skid marks on the road about seventy feet in length which led to the De Martini truck. At the place where these marks commenced, the right mark was about five feet from the right side of the road and the left mark about six feet from the left side of the road. From this the jury would be entitled to find that the marks were made by the wheels of the De Martini truck and that it was then being driven partly on the left side of the highway. Appellants' claim, that there is nothing to show that the marks did not commence after the point of collision, is answered by the testimony of appellant Patten himself that his truck proceeded only thirty-nine or forty feet after the collision, while the skid marks as testified to by the sheriff were seventy feet long. If the jury chose to believe this evidence, they could find that the De Martini truck was partly on the left side of the center of the road for at least thirty feet before the collision occurred. We conclude that there was sufficient evidence to support a finding of appellants' negligence.

[3] Appellants' contention that the decedent was guilty of negligence as a matter of law is predicated on the testimony of Patten that the lights of the Ford truck were not burning. Against this evidence respondent invokes the presumption that the deceased used due care for his own safety, thus raising the debatable question of law as to whether a disputable presumption can support a finding where contradicted by positive testimony to the contrary (Smellie v. Southern Pacific Co. [Cal. Sup.] 287 P. 343), in which a rehearing has been granted by the Supreme Court. We do not feel called upon in this case to attempt to anticipate the ultimate ruling of the Supreme Court in the Smellie Case because, as respondent points out, there is positive evidence in the record from the witness King that at a point which could not have been more than a few hundred yards from the point of collision he passed the Ford truck driven by the deceased and its lights were burning, and testimony that after the collision the light switch of the Ford truck was found to be turned on. While this is only circumstantial evidence that the lights were burning at the time of the collision, it is in our judgment sufficiently strong, if believed, to contradict the direct testimony of Patten. Parsons v. Easton, 184 Cal. 764, 769, 195 P. 419.

[4, 5] Furthermore the jury was entitled to believe that Patten had willfully sworn falsely as to material matters, in which event his testimony as to the lights could be disbelieved. Code Civ. Proc. § 2061, subd. 3. In this connection it is sufficient to point out that Patten testified that at all times before the collision he was entirely on the right of the center of the highway, whereas the evidence would justify a finding that this was not true as pointed out above. Patten also testified that he saw the Ford truck when it was about thirty feet away. In this he was contradicted by the sheriff's testimony that shortly after the collision Patten told him that he did not see the Ford truck until he was within six or eight feet of it. If the jury concluded that Patten had willfully sworn falsely in these particulars, it would be at liberty to disbelieve all of his testimony, in which event the presumption that the deceased exercised due care would stand uncontradicted.

The order appealed from is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

112 Cal. App. 540

STELLER et al. v. MORTHLAND MORTGAGE CO.

Civ. 6543.

District Court of Appeal, Second District, Division 2, California.

March 13, 1931.

Appeal and error ⚷934(2).

In action for materials furnished, reviewing court, resolving all intendments in favor of judgment for defendant, must assume evidence supported judgment (Civ. Code, § 2258).

> Reviewing court must assume that from the evidence before the court it appeared that orders presented to defendant for payment were not acceptable until inspection should show work was progressing and that account was in order, and further that such orders were not accepted and were not due or payable for the reason that these conditions were not fulfilled. The owner of the real property had executed to defendant corporation a mortgage to secure a loan for the payment of costs of labor and materials for building upon such property, and the lender held in trust the principal fund so secured for disbursement for such purposes upon orders to be issued by the owner.

Appeal from Superior Court, Los Angeles County; Charles C. Montgomery, Judge.

Action by H. A. Steller and others, doing business under the fictitious name of Steller Bros. & Skogg, against the Morthland Mortgage Company. Judgment for defendant, and plaintiffs appeal.

Affirmed.

D. Chase Rich, of Los Angeles, for appellants.

Paul W. Sampsell, of Los Angeles, for respondent.

CRAIG, Acting P. J.

Judgment having been rendered in favor of the defendant, a mortgagee of real property, in an action against it by materialmen, based upon orders from the owner for payment of material bills from the amount of a loan, the plaintiffs appealed.

The owner of real property in Los Angeles county executed to respondent corporation a mortgage to secure a loan for the payment of costs of labor and materials for building upon said property, and the lender held in trust or "escrow" the principal fund so secured for disbursement for such purposes, upon orders to be issued by the owner. It is inferred that the trustee was controlled and guided in the performance of its duties by certain written instructions or conditions requiring approval and acceptance of the orders, but the record fails to disclose their provisions. It is conceded that appellants furnished certain materials for construction work upon its printed forms, which were paid. The orders in controversy were received by appellants in like manner, and were in turn presented to respondent for payment, and receipts were given therefor, but they were not paid. Appellants instituted an action for the alleged indebtedness for said materials, as arising "out of certain orders executed in favor of plaintiffs by one J. F. Mullen upon funds of the said J. F. Mullen at said time in the hands of the defendant and which said orders were accepted by the defendant, and by reason of said acceptance of said orders the defendant was and is indebted to the plaintiffs." Upon conflicting evidence as to this issue, the trial court found that the defendant was not indebted to the plaintiffs, and rendered judgment accordingly. This appeal is founded entirely upon specifications that the findings and judgment are not supported by the evidence.

Each of the orders provided that the "money, check or its proceeds is requested and received for the express purpose of paying bills and claims for labor performed and/or materials used in the construction or completion of the certain building * * * all in accordance with escrow instructions covering the loan or fund from which this money is received and it is hereby represented that such money, check or its proceeds will be used for said purpose or purposes and no other whatsoever." It was testified by a representative of respondent that when the orders were presented he informed appellants that they would not be immediately due, but would be payable when the work was in, "provided the job was kept running steadily and the account was in order." Resolving all intendments in favor of the findings and judgment, we must assume that from the evidence before the court it appeared that the orders were not acceptable until inspection should reveal that the work was progressing in a regular manner and that the account was in order, and, further, that such orders were not accepted and were not due or payable for the reason that these conditions were not fulfilled. Civ. Code, § 2258. Authorities cited by appellants were based upon orders which had been accepted, and are therefore not in point.

The judgment is affirmed.

We concur: IRA F. THOMPSON, J.; ARCHBALD, Justice pro tem.

112 Cal. App. 518

PHELPS v. ARNOLD.

Civ. 7733.

District Court of Appeal, First District, Division 2, California.

March 13, 1931.

1. Appeal and error 🔑1004(1).

Reviewing court will not interfere with determination of damages, unless verdict is obviously so disproportionate to injuries as to justify belief that verdict is not result of dispassionate discretion of jury.

2. Appeal and error 🔑932(1).

Where trial court reduced jury's verdict to approximately one-fifth, presumption of passion, prejudice, or corruption as to reduced amount would be almost completely overcome.

3. New trial 🔑162(1).

Where jury was warranted in assessing punitive damages, trial judge in reducing verdict had same power.

4. Appeal and error 🔑932(2).

Where no request was made to segregate compensatory and punitive damages, reviewing court regarded both elements of damages as entering into verdict.

5. Assault and battery 🔑40.

Upon evidence indicating violent unprovoked assault, trial court did not abuse its discretion in reducing $3,500 verdict to $750, notwithstanding less might have compensated plaintiff.

6. Assault and battery 🔑15.

Home owner may use reasonable force to eject trespassers.

7. Assault and battery 🔑15.

Plaintiff, ordered to remain away, visiting defendant's home to present written demand notice prepared by her attorney, was trespasser, and defendant was justified in using reasonable force to eject her.

> The demand notice was for the return of money alleged to have been given by plaintiff's husband to defendant. The notice, prepared by plaintiff's counsel, set up the fact of community ownership in the money, a brief résumé of the law, and plaintiff's demand for the return of the money.

8. Trespass 🔑44.

Presumption of invitation to visit home never arises against expressed disavowal thereof.

9. Appeal and error 🔑1067.

In action for assault, refusing instruction upon defendant's right to use reasonable force to eject trespasser from his property *held* prejudicial error.

> Only instruction on the point in question given by the court stated to the jury that it was the duty of defendant at all times to protect his family and home from the attack, and that if the jury found there was an attack, defendant might use such physical force as was reasonably necessary to eject any person therefrom, thereby leaving jury with erroneous notion that, to justify ejection of trespasser from home, an attack was required. In addition, the question whether plaintiff had suffered any actual damage was sharply contested.

10. Assault and battery 🔑15.

Where plaintiff, ordered to remain away from defendant's premises, made apparently hostile entry in defiance of order, defendant could use reasonable force to eject plaintiff, without just ordering plaintiff to leave.

11. Appeal and error 🔑1070(1).

Prejudicial error, precluding fair hearing on merits, cannot be cured by reducing damages found.

Appeal from Superior Court, Los Angeles County; J. R. Hughes, Judge.

Action by Evelyn Mary Phelps against Gloyd S. Arnold. Judgment for plaintiff, and defendant appeals.

Reversed.

D. Chase Rich, of Los Angeles, for appellant.

James E. Fenton, of Los Angeles, for respondent.

PARKER, Justice pro tem.

The action was commenced to recover damages alleged to have resulted to plaintiff from an assault made upon her by the defendant. The complaint characterized the assault as unprovoked and malicious and alleged numerous injuries sustained and asked damages, both compensatory and punitive. The trial was by jury and the verdict was in favor of the plaintiff in the sum of $3,500. On motion for a new trial the court below ordered a remission of the damages to the end that unless plaintiff consented to accept the sum of $750 in full satisfaction, a new trial would be ordered. Thereupon plaintiff remitted the excess and judgment was entered in her favor for the amount of $750.

Defendant on this appeal urges but two grounds for reversal, namely, excessive damages and error in the refusal of certain proposed instructions.

[1-5] The rule regarding damages is well settled in this jurisdiction to the effect that the matter of damages is one which must be left almost entirely to the determination of the trial court, and that reviewing courts will not interfere unless the verdict is obviously so disproportionate to the injuries received as to justify the belief that it is not the result of cool and dispassionate discretion of the jury. Szasz v. Joyland Co., 84 Cal. App. 264, 257 P. 871. The rule is likewise stated in Kelley v. Hodge Transportation System, 197 Cal. 598, at page 610, 242 P. 76, 81, as follows: "Unless we are able to say that the award of damages made by the jury and sustained by the trial court were grossly disproportionate to any compensation reasonably warranted by the facts as presented to us on appeal as to shock the sense of justice and raise at once a presumption that it was the result of passion, prejudice, or corruption, rather than an honest and sober judgment, this court may not exercise the power of revision." As a corollary to the rule it would follow that where the record discloses a review of the amount assessed by the jury, in the court below, and a diminution thereof to the extent of reducing the same to approximately 20 per cent. of the amount returned in the verdict, the presumption of passion, prejudice, or corruption would be almost completely overcome in as far as it could affect the reduced amount. The facts of the case before us disclose a situation wherein the jury would have been warranted in assessing punitive damages and they were instructed to that effect by the trial court should they find in favor of plaintiff. In the diminution of the verdict the trial judge had the same power. Just what portion of the awarded sum is for compensatory damages and what portion as punitive damages does not appear. There being no request, either to the court or jury, for such a segregation, we regard both elements of damage as entering into the total and properly so. Bloomberg v. Laventhal, 179 Cal. 620, 178 P. 496. With the foregoing in mind it becomes unnecessary to detail all of the facts of the case. There was sufficient evidence to indicate that plaintiff was forcibly and violently assaulted without provocation and that while her damage, in so far as permanent injuries was concerned, might have been fully compensated by even a lesser amount, that was a matter within the sound discretion of the trial judge and we cannot hold that discretion to have been abused.

The next phase of the appeal involves the matter of refused instructions. A proper consideration of the question necessitates a brief review of the facts. Plaintiff and defendant resided in adjoining homes, not the same building, however. The husband of the plaintiff was an aged man, a veteran of the Civil War, and retired from active work. There seems to have been the usual neighborly intercourse between the families manifested in exchange of services looking to the improvement of the properties and in other similar contacts. Both defendant and his wife displayed some little interest in the aged husband and the latter would often spend his leisure time with them. As time went on the plaintiff became somewhat resentful towards this intimacy, particularly when she became informed of the fact that her husband was making small gifts of money to the defendants. There then arose a feud between the clans. Much bickering followed and finally an open rupture. The women of the household came almost into physical encounter on the premises of defendant, on which occasion the plaintiff was ordered to remain away from the home or property of defendant. At this time plaintiff sought counsel, and as a result thereof she procured advice to the effect that the earnings of the husband during coverture were community property and that the husband had no legal right to dissipate or give away these earnings without the consent of the wife. She obtained from her counsel a notice of demand for the return of the moneys alleged to have been given by her husband to the defendants, and on the day of the alleged assault or the night thereof, she again visited the house of defendant to serve upon the latter the prepared notice, which, to repeat, set up the fact of community ownership, a brief résumé of the law, and her demand for the return of the money. This is the written demand hereinafter referred to as "Defendant's Exhibit A." It was on this occasion that the assault complained of occurred. The plaintiff's testimony, if believed, showed a violent assault. The defendant, on the other hand, claimed that he gently led her off the premises, using some force only when and as plaintiff resisted removal and began an attack upon him. The evidence of injury offered by plaintiff was practically overcome by the testimony of her attending physicians and by other competent proof; also, for what purpose hardly discernible, it was before the jury that upon a criminal complaint against defendant he was acquitted.

With this picture of the controversy we can approach the instructions. The following instructions were offered and requested by defendant and refused:

A. "You are instructed that the paper served upon the defendant on March 11, 1927, by the plaintiff * * * is not a 'legal paper or notice,' and is not such a paper or notice as the law, in any case, would require to be personally served upon the defendant."

B. "You are instructed that if you find that the plaintiff had been notified by the defendant, or his wife, prior to March 11, 1927, that the plaintiff should thereafter keep off the property of the defendant, and that the plaintiff thereafter keep off the property of the defendant, and that the plaintiff thereafter on March 11, 1927, went upon the property of defendant for the purpose of serving the paper, defendant's exhibit 'A' upon the defendant, that such act of the plaintiff is not justified in law and was a trespass upon the property and rights of the defendant, and that the defendant, upon that occasion was justified in using reasonable physical force to eject the plaintiff from his property."

[6-11] The last-quoted offered instruction practically embraced the first, and therefore our discussion will be addressed to the said instruction. It is elemental that an owner of premises, such as are being discussed, to wit, his home, is justified in using reasonable force to eject trespassers. The doctrine of the law in this respect is quite fully discussed in the case of Walker v. Chanslor, 153 Cal. 118, 94 P. 606, 17 L. R. A. (N. S.) 455, 126 Am. St. Rep. 61, and many of the authorities, ancient and modern, are therein collated. The rule therein announced is the common-law rule that an owner has the right to forcibly eject trespassers and if the force used is not excessive, the trespasser has no personal action against the owner. The correctness of the ruling has never been questioned and now stands as the accepted law of this jurisdiction. In the case before us it was not disputed that the alleged assault took place at the home of the defendant. Nor can it be disputed that the plaintiff, if she had been ordered or requested to remain away from the premises, particularly after unfriendly relations had been established, was a trespasser upon these premises. By no stretch of principle can it be declared that because plaintiff was presenting a written demand, theretofore repudiated, this fact made her entry of a character distinguished from trespass. The evidence discloses this same demand had been made prior to the time in question and payment refused and liability denied. There was nothing that required the presentation in writing and there was, in effect, no greater right conferred by reducing the claim to writing than if the plaintiff had renewed her oral demand. We think that plaintiff at the time in question was clearly without right and a trespasser. The invitation presumed to be extended to all that may have business at one's home does not survive when the facts disclose a condition such as here. Had there been no previous trouble between the parties, the presumption of invitation might be indulged, but it never arises against the expressed disavowal thereof. The liability of the defendant therefore rested upon two questions. Was the plaintiff a trespasser, and, if so, was the amount or degree of force used reasonable under the circumstances? Before the jury could intelligently pass upon the question of whether or not there had been an unlawful assault, it must first determine the status of the parties at the time the assault is alleged to have occurred. On this point the jury had absolutely no instruction. We have carefully read the instructions that were given, and we find that the only instructions on the point stated to the jury that it was the duty of the husband at all times to protect his wife, family, and home from the attack of any person, and that if the jury found there was an attack the husband might use such physical force as was reasonably necessary to eject any person as might be necessary from his home or property. This left the jury with the notion that in order to justify the use of even reasonable force in ejecting a trespasser from the home there must be an attack. No other construction can be put upon this plain language. We think that the trial court was clearly in error in refusing to give the requested instruction. In Townsend v. Briggs, 99 Cal. 481, at page 483, 34 P. 116, 117, it is said: "A man's house is his castle, and that he has the right to defend it against an intruder with all the force reasonably necessary to the defense. Of course, in such a case, a man would be liable for the result of a brutal use of force clearly beyond what the occasion warranted; but, in determining such a question, due allowance should always be made for the difficulty which a reasonable man would have in measuring, under exciting circumstances, the exact amount of force necessary; and it is extremely important that a jury, in passing upon such a case, should not in any way be misled by an instruction of the court." And following the same line of reasoning it is likewise extremely important that a jury should be fully instructed upon the law applicable. Here, as noted, the defense of appellant was restricted to proof of an attack. It is urged that the law requires an owner to first order or request the trespasser off the premises before any use of force is justified. This has been declared to be the law only under the circumstances present in the particular case wherein the rule is announced. In any event this rule would not affect our conclusions here, even though in a measure applicable. In the first place, the refused instruction embodies the rule, in that it specifies the finding of a notice not to enter the premises before plaintiff can be held a trespasser. And, further, a fair interpretation of the rule does not mean that a trespasser must be given more than one notice or request or order. After an unfriendly feeling has developed culminating in quarrel and encounter and plaintiff had then been ordered to remain away from the premises, it was not a requirement that upon re-entry she should again be ordered to leave; it being apparent that her entry was hostile and in defiance of the former order. Also, the necessity of request to leave was, in

a sense, embraced in the use of the term reasonable force and could by implication be read into that phase of the proffered instruction; it being manifest that a determination of the reasonableness of the force used involved question of necessity of any force whatsoever. Holding the action of the trial court error, it is obvious that such error was prejudicial. This is demonstrated by the fact that the trial court must have deemed the amount of the verdict to have been the result of passion or prejudice. The reduction of the verdict from $3,500 to $750 clearly indicates the trial court's opinion. A mere reduction of the amount, however, is not a complete solution of the question. The defendant is entitled to a fair trial and to the jury's determination of all questions involved, including amount of damages. We do not criticize the practice of trial judges reducing the amount returned in the verdict of a jury in appropriate cases and particularly in cases where no other substantial error occurs. But we do hold that errors prejudicial to a party's cause, the effect of which is to preclude a fair and impartial hearing on the merits, cannot be cured by the reduction of the amount of damage found. There was a sharp conflict in the evidence. The question of whether or not plaintiff had suffered any actual damage was hotly contested. Her attending physician found nothing worthy of mention. The jurors who had sat on the criminal case wherein the same issue was tried within a few days after the alleged assault testified that no mention was made of injury nor was any shown nor did the physical appearance of the plaintiff indicate any of the injuries complained of.

We think that the judgment should be reversed, and it is so ordered.

We concur: SPENCE, Acting P. J.; STURTEVANT, J.

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112 Cal. App. 442

PEOPLE v. FRANCISCO.

Cr. 1617.

District Court of Appeal, First District,
Division 1, California.
March 11, 1931.

1. Criminal law 🔑1186(4).

Defect in information charging extortion in failing to allege money was obtained with injured person's consent did not require reversal (Pen. Code §§ 518, 960, 1258, 1404; Const. art. 6, § 4½).

The evidence, direct and indirect, showed that money in question was obtained with consent of injured person by use of fear, and therefore there was no miscarriage of justice under Const. art. 6, § 4½, and defendant was not prejudiced within meaning of Pen. Code, §§ 960, 1258, or 1404.

2. Threats 🔑1(1).

Fear, such as will constitute extortion, may be induced by threat to accuse person of crime (Pen. Code § 519).

3. Criminal law 🔑404(4).

In extortion prosecution, articles which defendant took from witnesses *held* admissible to corroborate their testimony that defendant made similar threats to them and took articles from them.

Appeal from Superior Court, Monterey County; H. G. Jorgensen, Judge.

Albert Francisco was convicted of extortion, and he appeals.

Affirmed.

J. M. Lopes, of Tulare, for appellant.

U. S. Webb, Atty. Gen., and Lionel Browne, Deputy Atty. Gen., for the People.

PER CURIAM.

The defendant was charged by an information filed in the superior court of Monterey county with the crime of extortion, to which he entered a plea of not guilty. A jury returned a verdict of conviction, and he has appealed from the judgment entered thereon.

As grounds for his appeal it is alleged that the information failed to state facts constituting a public offense; that the verdict is unsupported; that the court erred in overruling defendant's objection to the introduction of certain evidence and in instructing the jury.

[1] The information alleged in substance that defendant feloniously extorted and obtained from Josephine M. Marks a sum of money by falsely representing himself to be a public officer, and threatened to cause her arrest for illegally possessing intoxicating liquor in case the amount was not paid, and that the payment was induced by defendant's threats and the unlawful use of fear.

Section 518 of the Penal Code defines extortion as follows: "Extortion is the obtaining of property from another, with his consent, induced by a wrongful use of force or fear, or under color of official right." The information failed to allege that the money was obtained with the consent of Mrs. Marks, and it is urged that the pleading was consequently insufficient.

It was so held in People v. Hoffman, 126 Cal. 366, 58 P. 856; but since the adoption of section 4½ of article 6 of the Constitution no error in any matter of pleading is ground for reversal which does not result in a miscarriage of justice; and in the case at bar the evidence, direct and indirect, shows beyond reasonable doubt that the money in question was obtained with the consent of Mrs. Marks by the use of fear. In view of the facts there was no miscarriage of justice; nor was the defendant prejudiced within the meaning of sections 960, 1258 or 1404 of the Penal Code. People v. Hinshaw, 194 Cal. 1, 227 P. 156; People v. Kuder, 93 Cal. App. 42, 269 P. 198, 630.

[2] Defendant further claims that there was no evidence that Mrs. Marks had committed a crime, and that consequently the verdict is unsupported. As to this contention it will be sufficient to cite section 519 of the Penal Code, which provides that fear such as will constitute extortion may be induced by a threat to accuse a person of a crime.

[3] In order to show intent and that the alleged offense was a part of a common scheme or plan, witnesses testified to similar threats made to them, and that defendant, claiming to be a public officer, took from their possession at the time certain articles of jewelry and other personal property, all of which was found in his possession at the time of his arrest. These articles were admitted as evidence tending to corroborate the testimony of the witnesses mentioned, and were competent for that purpose.

We find no merit in the further claim that the court's instructions were erroneous or misleading.

The evidence was amply sufficient to support the verdict, and the evidence discloses no error which can reasonably be said to have resulted in a miscarriage of justice.

The judgment is affirmed.

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112 Cal. App. 279

DREYER et al. v. CYRIACKS.

Civ. 7654.

District Court of Appeal, First District,
Division 1, California.

Feb. 28, 1931.

1. New trial 🔑6.

Granting or refusing new trial is largely within trial court's discretion.

2. New trial 🔑157.

In considering motion for new trial, trial court is not bound by rule of conflicting evidence binding appellate tribunal.

3. New trial 🔑157.

In considering motion for new trial, trial court must weigh evidence for both parties, determine conclusions for itself, and grant new trial, if satisfied verdict is contrary to weight of evidence.

4. New trial 🔑157.

Though evidence is not conflicting and all proofs apparently favorable to one party, probative force or evidentiary value is for trial court in considering motion for new trial.

5. Appeal and error 🔑933(1).

In reviewing order setting verdict aside as excessive, every intendment is indulged in support of order.

6. Appeal and error 🔑979(5).

Order setting verdict aside as excessive and granting new trial will not be disturbed, if its propriety is debatable.

7. Appeal and error 🔑933(4).

On appeal, order granting new trial because verdict was excessive may be construed as meaning trial court was not satisfied evidence supported verdict regarding extent of damage.

> Declaration of trial court that verdict is excessive does not necessarily mean that trial court was of opinion that verdict was result of passion or prejudice.

8. Appeal and error 🔑979(5).

Under evidence regarding value of killed dog, trial court *held* justified in holding award of $100,000 actual damages as grossly excessive.

> While several witnesses estimated value of dog to be from $150,000 to $200,000, in view of other testimony in case showing amounts dog earned in motion pictures and other matters, it was obvious estimates fixed were fabulous and based entirely on fanciful speculation.

9. Animals 🔑44.

In action for damages for killing of dog, award of $25,000 punitive damages, in addition to actual damages, *held* grossly excessive (Civ. Code, § 3340).

> It appeared from evidence that, as one of owners of dog, with companions, was leaving defendant's home in automobile, following quarrel which had taken place there, defendant fired three shots from

rifle at automobile, one of bullets embedding itself in tire, another passing through hat of one of occupants of automobile, and third penetrating rear of automobile and striking and killing plaintiffs' dog, which, unknown to defendant, was riding on rear seat of automobile. Testimony conflicted as to particular circumstances of quarrel and as to who was party at fault in quarrel.

10. Animals ⚷44.

In action for killing of valuable dog acting in motion pictures, standard in determining value of human life *held* inapplicable (Pen. Code, § 491).

Pen. Code, § 491, provides that dogs are personal property, and their value is to be ascertained in same manner as value of other property.

Appeal from Superior Court, Los Angeles County; S. M. Marsh, Judge.

Action by Charles B. Dreyer and another against Fred B. Cyriacks. Verdict in favor of plaintiffs. From an order setting aside the verdict and granting a new trial, plaintiffs appeal.

Affirmed.

John T. Mulligan, of Long Beach, and Gerard Remington, of Los Angeles, for appellants.

Bailie, Turner & Lake and W. I. Gilbert, all of Los Angeles, for respondent.

KNIGHT, J.

While the plaintiff Faust, accompanied by two companions, named Richardson and Kempin, were leaving the home of the defendant Cyriacks in an automobile, following a quarrel which had taken place there, Cyriacks fired three shots from a rifle at the automobile. One of the bullets embedded itself in the spare tire, another hit Kempin's hat, and the other penetrated the rear of the automobile and struck and killed a dog belonging to plaintiffs, which, unknown to Cyriacks, was riding on the rear seat with Kempin. Thereafter plaintiffs brought this action for damages for the killing of the dog, and upon trial in the superior court of Los Angeles county a jury awarded them $100,000 actual and $25,000 punitive damages. The trial court set aside the verdict and granted a new trial, one of the grounds being that the verdict was excessive.

The dog was of the breed known as German police dog, and the scene of the shooting was in or near Hollywood, the dog being worked in the moving picture industry and known as "Peter the Great." All of the interested parties to this controversy are connected with the same industry. The circumstances leading up to the shooting are sharply conflicting, and it would be unnecessary to inquire into them, except that under section 3340 of the Civil Code exemplary damages may be awarded "for wrongful injuries to animals being subjects of property, committed willfully or by gross negligence, in disregard of humanity"; and the jury awarded plaintiffs an extra $25,000 to cover such element. It appears from the evidence that on the night of the shooting all of the parties had been drinking, and that there was considerable animosity existing between Faust and Cyriacks, which arose over the fact that several days previously Faust had called at Cyriacks' home while he was away, and, as he claims, insulted his housekeeper.

The shooting took place shortly after dark. Late that afternoon Richardson and his wife were making a call at Faust's house and a quarrel took place between Richardson and his wife, because she persisted in petting Peter the Great after he had shown a dislike for her by snapping at her; and Mrs. Richardson left. Thereupon Richardson and Faust started out to find her in Richardson's automobile, taking Kempin and Peter the Great along with them in the back seat. After searching the streets in the immediate vicinity they went to Cyriacks' house, where he was entertaining some friends, to see if she was there. Faust testified that he went to the door and inquired for Mrs. Richardson, and that after a few words Cyriack struck at him; that Richardson then came up and asked for his wife; whereupon Cyriacks sicked his police dog on Richardson; that Cyriacks then turned to go into the house for his gun, and that as he did so Faust and Richardson returned to the automobile and started to drive away; that they had proceeded about halfway down the driveway when Cyriacks began shooting, with the result already stated. Faust's testimony was supported generally by the testimony of Richardson. Cyriacks gave conflicting accounts of the shooting, but the substance of the testimony he gave in court was as follows: He stated that Faust appeared at his door and asked for a drink; that, observing that Faust had already been drinking, he told him that he had had enough; whereupon Faust told Cyriacks to bring out his (Cyriacks') dog and he would throw him in the fishpond; that he then took Faust by the arm, and, as they proceeded toward the fishpond, Cyriacks' dog ran out toward the automobile; that he called the dog back and Faust struck the dog over the nose; that Cyriacks then struck Faust and knocked him down; that Faust then dashed into Cyriacks' house, grabbed a revolver from a holster hanging near the door and called to Richardson to bring his gun; that Cyriacks then went into the house, brought out his rifle and fired down the driveway; that Faust and Richardson then got in the automobile and drove away. The guests at Cyriacks' house corroborated his statements. Cyriacks denied knowing that Kempin or Peter the Great were in the automobile, and there is no testimony in the record to show that he had any reason to believe they were there.

[1-6] The well-settled rule is that the matter of granting or refusal to grant a motion for a new trial is largely within the discretion of the trial court (Work v. Whittington, 61 Cal. App. 302, 214 P. 474); that in passing upon such motion the trial court is not bound by the rule of conflicting evidence as is the appellate tribunal (Huckaby v. Northam, 68 Cal. App. 83, 228 P. 717; Smith v. Royer, 181 Cal. 165, 183 P. 660); but must weigh and consider the evidence for both parties and determine for itself the just conclusion to be drawn from it (Green v. Soule, 145 Cal. 96, 78 P. 337; Rudin v. Luman, 53 Cal. App. 212, 199 P. 874); and, if it is satisfied that the finding of the jury is contrary to the weight of the evidence, it may grant a new trial (Gordon v. Roberts, 162 Cal. 506, 123 P. 288). Even where the evidence is not conflicting and all the proof seems to be favorable to one or the other of the parties litigant, the question of the probative force or the evidentiary value of the testimony is nevertheless within the determination of the trial court in a proceeding on motion for a new trial. Otten v. Spreckels, 24 Cal. App. 251, 141 P. 224; Roberts v. Southern Pacific Co., 54 Cal. App. 315, 201 P. 958. It may be conceded that the rule controlling in cases where the reviewing court is asked to reverse a judgment upon the ground of excessive verdict, after the trial court has refused to set aside the same, is that the verdict must stand unless it is so grossly disproportionate to any reasonable limit of compensation warranted by the facts as to shock the sense of justice, and raise at once a strong presumption that it is based on prejudice, passion, or corruption, rather than sober judgment. Szasz v. Joyland Co., 84 Cal. App. 259, 257 P. 871; Reneau v. Hirsch, 88 Cal. App. 1, 262 P. 1100; Morris v. Standard Oil Co., 188 Cal. 468, 205 P. 1073. But where, as here, we are asked to review the act of the court, where, in the exercise of its discretionary power, it has seen fit to set aside the verdict on this ground, a very different rule prevails. Every intendment is to be indulged here in support of the action of the court below, and it will not be disturbed if the question of its propriety be open to debate. Harrison v. Sutter Street R. R. Co., 116 Cal. 156, 47 P. 1019.

[7] Furthermore, where a trial court grants a new trial upon the ground that the verdict is excessive, the declaration of the court that it is excessive does not necessarily mean that the trial court was of the opinion that the verdict was the result of passion or prejudice. It is susceptible of the interpretation that the trial court was not satisfied that the finding of the jury as to the extent of the damage suffered by the plaintiff was supported by the evidence adduced upon that phase of the case. Meinberg v. Jordan, 29 Cal. App. 760, 157 P. 1005, 1007.

[8, 9] In the present case several witnesses estimated the value of the dog to be from $150,000 to $200,000, but, in view of the other testimony in the case showing the amounts the dog had earned, etc., it is obvious the estimates fixed by these witnesses were fabulous, and based entirely on fanciful speculation. Consequently, under the authorities above cited, the trial court was not bound to accept the same and was more than justified in holding that the award of $100,000 was grossly excessive. Moreover, it would seem to require no discussion to point out that, under the circumstances under which the shooting took place, the award of $25,000 as punitive damages was likewise grossly excessive.

[10] With reference to the question of the amount of the verdict plaintiffs have cited us to an array of cases from thirty states of the Union and from England and Canada. But not one of them relates to the destruction of an animal. They all concern the death of or injury to human beings, and it is absurd to argue that in fixing damages the value of human lives and the value of dogs are to be measured by the same standard. As declared in section 491 of the Penal Code, "Dogs are personal property, and their value is to be ascertained in the same manner as the value of other property," but certainly the value of a human life is not to be so determined.

Plaintiffs say in their brief: "* * * It must be remembered, that Peter the Great was a motion picture star, he was a gift to humanity. 'Peter the Great' is a name that will go down in history as the most human like dog that ever displayed its skill in a film drama. His name was a symbol of loyalty, devotion, nobility, and heroic exploits. Peter the Great, king of the silver screen, was the playmate of mankind. He lived and struggled, suffered and sacrificed, to make countless thousands happy and cheerful. He made the multitude laugh and cry, wonder and admire. Peter the Great sent them to their homes with pictures of high ideals and unselfish service; the clean, the pure, the good in thought, example and action. Peter the Great was a by-word of every household, a wonderword to every child lover of the motion picture world. And when he came to the last scene, in the drama of life, when the curtain of death was slowly ringing down and he was going into that long, long sleep, I know he felt that it was only a new act he was performing as a part of his life work, as a part of some cruel tragedy, and he seemed to smile as the lights went out." Whatever virtue there may be in the foregoing sentiments as a tribute to the memory of Peter the Great, they certainly carry little convincing force as a legal argument in support of the theory that the measure of damages for the destruction of a dog is or should be the same as the one applied in actions growing out of the death of a human being.

The conclusion we have reached upon the action of the trial court in granting a new trial upon the ground that the verdict was excessive makes it unnecessary to consider the second ground upon which the order was based, namely, erroneous instructions.

The order appealed from is therefore affirmed.

We concur: TYLER, P. J.; CASHIN, J.

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112 Cal. App. 329

STATE COMPENSATION INSURANCE FUND v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 7792.

District Court of Appeal, First District, Division 2, California.

March 4, 1931.

1. Master and servant 🔑403.

Claimant not within class conclusively presumed dependent must show dependency in compensation proceedings, and must further show amount actually devoted by deceased employee to his support (Workmen's Compensation, Insurance and Safety Act [St. 1917, p. 844]).

2. Master and servant 🔑388.

Amount devoted by employee to dependent's support must be applied wholly to that purpose in order that compensation may be fixed thereby (Workmen's Compensation, Insurance and Safety Act [St. 1917, p. 844]).

3. Master and servant 🔑405(5).

Finding of Industrial Accident Commission of partial dependency upon deceased employee of minor children of employee's cousin *held* not supported by evidence (Workmen's Compensation, Insurance and Safety Act [St. 1917, p. 844]).

The evidence disclosed that the deceased employee had stayed with his cousin for three months, paying board, and that thereafter he sent two checks to his cousin, but there was no evidence showing the amount contributed by him to the support of the minor children of his cousin, and no evidence showing that any particular sum was actually applied to that purpose; but the father of the children merely stated that the money was turned over to his wife, and that he had no knowledge as to how she disposed of it.

4. Witnesses 🔑37(1).

Witness having testified that he has no knowledge of subject-matter disqualifies himself on that subject (Code Civ. Proc. § 1845).

Proceedings under the Workmen's Compensation Act by Spiros Paizes in behalf of minor children for the death of G. S. Paizes, opposed by the State Compensation Insurance Fund. The Industrial Accident Commission awarded compensation, and the insurance carrier petitions for review.

Award annulled and matter remanded.

Henry G. Sanford and B. E. Pemberton, both of San Francisco, for petitioner.

Edward O. Allen, of San Francisco, for respondents.

NOURSE, P. J.

The petitioner is the insurance carrier of the city and county of San Francisco, the employer of one G. S. Paizes, who was instantly killed in an explosion upon the work being conducted by the water department of the city near the town of Sunol. Spiros Paizes and the deceased were first cousins. The former was married and lived in San Francisco with his wife and four children. An unmarried brother of Spiros lived with him, paying $45 a month for board and room. Spiros conducted a barber shop from which he earned from $100 to $140 per month upon which, for many years past, he had supported his family. In January, 1930, the deceased came to live with Spiros, and he too paid $45 a month for board and room. This relation continued for three months when, in April, 1930, the deceased moved to Sunol and entered the employment of the city, where he remained until June 8th, the date of his death.

During his residence with the Paizes family the deceased became attached to the two younger children—a boy of seven and a girl of five years—and contributed considerable sums to their support. After he moved to Sunol he sent two checks to Spiros—one for $57.75 and another for $62.25. These checks were cashed by Spiros and the proceeds were turned over to his wife. Upon the testimony of Spiros alone as to an oral agreement of the deceased to adopt and care for these minors, and as to the disposition of the funds received from the deceased, the commission concluded that these two minors were dependents of the deceased to the extent of $1,200 a year and awarded the full sum of $3,600 to the father "to be received by him in his own right and disbursed in his own discretion for such purpose" (the support of said minors). In this proceeding the petitioner insists that the evidence fails to show that the minors were dependents within the meaning of the Compensation Act and that they were not members of the same family or household.

[1] We are compelled to agree with petitioner that there is no evidence to support the amount of the award made, and hence we will confine our discussion to that subject. Section 21 of article 20 of the Constitution permits the enactment of a Workmen's Compensation Act for the benefit of "all workmen and those dependent upon them for support." Section 14, subdivision c, of the Workmen's Compensation, Insurance and Safety Act (St. 1917, p. 844) provides, in part, that, "No person shall be considered a dependent of any deceased employee unless in good faith a member of the family or household of such employee." The purpose of these enactments is to place the burden of caring for the dependents upon the industry in which the "breadwinner" was employed rather than upon the public in general. In order to profit under the terms of the act it is necessary for the applicant to show: First, that he is a dependent; and second, the amount actually devoted by the employee to such support.

Webster defines a "dependent" as "one who is sustained by another, or who relies on another for support or favor." Except in those cases in which wives, children, and others are conclusively presumed, under the act, to be dependent, "questions as to who constitute dependents and the extent of their dependency shall be determined in accordance with the fact, as the fact may be at the time of the injury of the employee." Compensation Act, § 14, subd. b. There being no conclusive presumption of dependency because of the relation of the applicants to the deceased, it became incumbent upon the commission to determine "the extent of their dependency" as of the time of the employee's death.

[2-4] In our review of the record we are unable to find any evidence supporting the commission's finding that the minors were partially dependent upon deceased to the extent of $1,200 a year. The testimony of the father discloses that he had at no time relinquished his rights or obligations as a parent of the applicants, but that he had accepted sums of money from the deceased for the care and support of the children in accordance with the assurance of the deceased that he desired to take care of these children. There was no evidence that these moneys, or any particular portion of them, were actually devoted to the support of these minors. The father testified that the deceased paid him $45 a month for his board and room and that he gave this money to his wife and thought she had used it for these minors. He also testified that during the three months from January to April, 1930, the deceased purchased many pairs of shoes, suits, and dresses for the minors and gave him some additional money which he in turn handed to his wife and which he thought his wife applied to the board and lodging of these minors at the rate of $35 each per month. The witness testified that he was a barber earning between $100 and $140 a month with which he supported himself, his wife and four children; that it cost him about $175 a month to keep his family; and that the money received from his brother and from the deceased for board and room was turned over to his wife who made the purchases and paid the bills for the maintenance of the family. As to the money actually spent by the deceased for the benefit of the applicants and as to the money devoted to that purpose by his wife the witness stated that he had no knowledge. The wife was not called as a witness and the "extent of their dependency" is, therefore, left wholly to conjecture. If the witness had testified as to what his wife had told him, such hearsay evidence would have given some support to a finding (Perry v. Ind. Acc. Comm., 180 Cal. 497, 498, 499, 181 P. 788), but the witness having said that he had no knowledge of the subject matter, he thereby disqualified himself as a witness on that subject. Code Civ. Proc. § 1845. We are not, therefore, confronted with a question of the weight of the evidence to sustain the finding, or of the admissibility of any kind of evidence. It is merely a difference between evidence and conversation.

The rule applicable is found in Great W. P. Co. v. Industrial Acc. Comm., 191 Cal. 724, 739, 218 P. 1009, 1015: "It is the amount actually devoted by the employee to such support that fixes the compensation. The amount, it would seem, must not only be contributed for support, but it must be actually applied wholly to that purpose." See, also, Owl Drug Co. v. Industrial Acc. Comm., 71 Cal. App. 303, 307, 234 P. 921. In the record there is no evidence showing the amount contributed by the deceased for the support of these minors and there is no evidence showing that any particular sum was actually applied to that purpose. At the most we find inconsistent statements of what the amount contributed might have been and the witness' conjecture that these sums were used principally for the support of these minors. But, even so, the finding of the commission is far beyond the estimates of the witness and is inconsistent with the physical facts in evidence: That for many years the father had supported his entire family of six on an income estimated at from $100 to $140 a month, an average of less than $25 each; that the deceased was a migratory employee who had been out of employment for eighteen months; and that, at the time of his death he was earning approximately $150 a month. From these facts, and from other facts in evidence, it is apparent that the sum of $100 monthly was not necessary for the "support" of these two minors, and that, though the father may have used the moneys contributed by deceased "principally" for the support of the minors a large part of it was used either as a loan to himself or as an investment. That an award on such a basis cannot be sustained is the rule of Great Western Power Co. v. Industrial Acc. Comm., supra, and Owl Drug Co. v. Industrial Acc. Comm., supra.

It would serve no purpose to discuss the evidence on the issue of deceased's membership in the "family." The petitioner insists that the evidence merely shows that he was a "boarder" who made voluntary contributions to the support and comfort of the minors. On a rehearing this issue might be cleared by additional evidence.

The award is annulled, and the matter is remanded for further proceedings.

We concur: STURTEVANT, J.; SPENCE, J.

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112 Cal. App. 535

PEOPLE v. MILLER.

Cr. 2024.

District Court of Appeal, Second District, Division 2, California.

March 13, 1931.

1. Automobiles 🔑355(13).

Evidence that defendant collided with another automobile when driving 50 miles per hour while under influence of liquor sustained conviction for manslaughter resulting from reckless driving of automobile.

2. Criminal law 🔑742(1).

Where evidence is contradictory, jury are sole judges of credit to be given witnesses.

3. Criminal law 🔑1163(2).

Remarks of court were not grounds for reversal, where defendant did not attempt to indicate in what respect remarks were prejudicial.

4. Criminal law 🔑655(1).

Remarks of court during rulings, adding nothing to effect of its action, do not invade jury's province.

5. Criminal law 🔑811(6).

Giving portion of charge on measure of defendant's testimony was not erroneous as singling out defendant's testimony, where remaining requests were otherwise charged.

6. Criminal law 🔑655(1).

Court need only state what law is, without exposition of its reasons.

7. Criminal law 🔑982.

Denial of probation after conviction for manslaughter because not sought before trial was erroneous, requiring reversal for consideration of application for probation on merits (Pen. Code, § 1203, as amended in 1929).

Appeal from Superior Court, Los Angeles County; K. S. Mahon, Judge.

Frank M. Miller was convicted of manslaughter, and he appeals.

Affirmed in part, and reversed, with directions in part.

Kaye & Johnstone, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for the People.

CRAIG, Acting P. J.

Following conviction by a jury upon a charge of manslaughter resulting from recklessly driving an automobile, and the denial of a motion for a new trial, the defendant asked for probation, which was also denied. He appealed from the judgment and from the order denying a new trial.

[1, 2] Appellant has minutely reviewed the evidence in his briefs, and, while it is stated therein that he entertains an "honest feeling that the evidence as it appears in the reporter's transcript will not support the verdict," this point is not seriously urged. There is direct evidence that he was driving his machine at the rate of about 50 miles per hour, that he collided with another automobile occupied by several persons, and that the impact fatally injured one of the latter. There was testimony tending to show that the defendant was under the influence of intoxicating liquor, but this is denied. An exhaustive recital of the evidence is not neces-

sary, since the rule applicable to such cases is recognized by appellant that, where the evidence is contradictory, the jury are the sole judges of the credit to be given the various witnesses.

[3, 4] Numerous instances of colloquies between the trial court and defendant's counsel are criticized as improper, and are characterized as a "running debate throughout the trial." Considering the length of the trial, such instances were but momentary and infrequent. People v. Fritz, 54 Cal. App. 137, 201 P. 348, cited by appellant, is not controlling. It is admitted in the instant case that no single remark was seriously detrimental, and appellant has not attempted to indicate in what respect the remarks of the court were or could have been prejudicial to his interest. Hence they do not furnish ground for reversal. People v. Bruno, 49 Cal. App. 372, 193 P. 511. Remarks of the court which during its rulings add nothing to the force or effect of its action are not addressed to the jury, nor do they invade their province. People v. Mayes, 113 Cal. 618, 45 P. 860; People v. Pera, 36 Cal. App. 292, 171 P. 1091.

An instruction consisting of four paragraphs was offered by the defendant, the first paragraph of which was given, and the others were refused. The court read to the jury the following:

"You are instructed that the law makes a defendant in a criminal action a competent witness, and you have no right to disregard his testimony on the ground alone that he is the defendant and stands charged with the commission of crime. The law allows him to testify in his own behalf, and you should fairly and impartially consider his testimony, applying the same rules as to weight and credibility as you apply to other witnesses, and if, after weighing all the evidence, including the testimony of the defendant, you have a reasonable doubt of his guilt, you should give him the benefit of such doubt and acquit him."

[5, 6] While the court may properly refuse an instruction which measures the defendant's testimony in accordance with that of other witnesses, it has been held not prejudicial error requiring a reversal. People v. Ridgeway, 89 Cal. App. 615, 265 P. 349. It is complained that the refusal of the remaining portions deprived the defendant of their curative effect by way of explanation of that portion which singled him out and directed attention to his testimony, even at his own request. The jury were expressly informed by other instructions that witnesses are presumed to speak the truth, and that they should not surrender their honest convictions concerning the effect or weight of evidence, upon full consideration of all of the evidence and of the strength or weakness of the testimony of all of the witnesses. The only omitted portion not elsewhere covered consisted of statements as to the object of the law in permitting a defendant to testify in his own behalf. It is sufficient that the trial court state what the law is without an exposition of its reasons. People v. Ramirez, 56 Cal. 533, 38 Am. Rep. 73; Id., 73 Cal. 403, 15 P. 33; People v. Piner, 11 Cal. App. 542, 105 P. 780.

Other points involve testimony which was given without objection as tending to impeach a defense witness, and examination of another witness, which ceased immediately upon objection by the defendant. Since there is no merit in these contentions, they do not require discussion.

[7] A motion for new trial having been denied, the defendant requested permission to file an application for probation, which was summarily denied. He challenges the power of the superior court to deny him the right to file, and to consider upon its merits, such application. The statute (Pen. Code, § 1203) expressly confers upon the court entire discretion in such cases, providing that it may summarily deny probation, or, if probation be not denied that the matter shall be referred to the proper authority for investigation and report for further consideration. However, in ruling upon the defendant's request, the judge expressed reasons therefor which we think clearly departed from fixed legal principles to an extent prejudicial to his substantial rights. In response to the motion it was said in part: "If a man wanted probation, he would come forward and show his good character and things that ordinarily are considered on probation, and have it inquired into before the trial. Then you would save the expense of a trial. This way of pleading not guilty and going before a jury and being convicted, and then coming forward and asking for probation, I don't much approve of. * * * There are cases in which probation could do some good, but it does not do any good to society to have everybody probated that is convicted, and it ought to be fixed so that probation is either granted or denied before trial, and obviate the trial, if the man is of such a character that he is entitled to be put on probation; not wait until after we have spent several days in the development of testimony and have the jury bring in a verdict of guilty and then have the judge set aside the verdict of the jury and tell them to go."

The language and reasoning in this proceeding was so nearly identical with previous rulings which have met with disapproval that the judgment must be reversed for the purposes hereinafter expressed. People v. Jones, 87 Cal. App. 482, 262 P. 361, 368; People v. Freithofer, 103 Cal. App. 165, 284 P. 484. In People v. Jones, supra, the Supreme Court upheld the decision of the District Court of Appeal under similar circumstances. As there said: "If the record is silent as to the grounds of the ruling, the presumption would be, under the general rule as to presumptions on appeal, that it was founded upon a consideration of the merits of defendant's application, but here there is an affirmative showing to the contrary. When the court undertakes to deal with the question whether a particular case or a particular defendant is within the scope of the probation law, then it is dealing with fixed legal principles, and a departure from those principles is an abuse of discretion and raises a question of law which may be reviewed on appeal." It must be observed that, since the amendment of 1929 to said section of the Penal Code, a defendant may ask probation and is entitled to like consideration "after the conviction by plea or verdict of guilty of a public offense."

The order denying a new trial is affirmed. The judgment is reversed, with directions that the defendant be again arraigned for judgment, the trial court to hear and determine on its merits the motion for permission to file an application for probation, and to proceed in such manner as may be in accordance with law and with its decision upon the matter of probation.

We concur: IRA F. THOMPSON, J.; ARCHBALD, Justice pro tem.

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112 Cal. App. 448

McWHINNEY et ux. v. EWERS et al.

Civ. 7351.

District Court of Appeal, First District, Division 2, California.

March 11, 1931.

Rehearing Denied April 10, 1931. Hearing Denied by Supreme Court May 4, 1931.

1. Vendor and purchaser 🔑86.

Evidence showed that both vendor and purchasers had completely abandoned every covenant of contract except amount of price, and under such circumstances formal notice of rescission by purchasers was unnecessary.

2. Vendor and purchaser 🔑86.

Whether evidence showed that both parties abandoned contract of sale was largely question of fact.

3. Appeal and error 🔑931(4).

To support judgment for purchasers for return of payments, appellate court must infer that judge believed abandonment of contract by both parties was complete.

4. Vendor and purchaser 🔑338.

Where both parties abandon contract of sale, action as for moneys had and received is proper remedy for purchasers to recover payments.

5. Principal and agent 🔑184(1).

Vendor's agents rather than vendor *held* properly sued in purchasers' action for moneys had and received to recover payments under contract of sale, since agents had retained payments.

Under terms of contract in question, agents could not properly have surrendered purchasers' money before vendor delivered deed to agents in behalf of purchasers.

6. Evidence 🔑400(2).

Written contract of sale could not be altered by parol evidence.

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Action by George M. McWhinney and wife against John Doe Ewers and another. as individuals and copartners, doing business under the firm name and style of Ewers & Gorham, and others. Judgment for plaintiffs, and defendants appeal.

Affirmed.

Superseding opinion in 291 P. 867.

W. D. Brown and Henry F. Wrigley, both of San Francisco, for appellants.

Joseph A. Brown, of San Francisco, for respondents.

STURTEVANT, J.

The plaintiffs commenced an action to recover a judgment for money. The defendants answered denying the allegations of the complaint. A trial was had before the trial court sitting without a jury. The court made findings in favor of the plaintiffs, and, from the judgment entered thereon, the defendants have appealed.

The defendants assert that plaintiffs did business with them knowing that they were acting as agents of a disclosed principal. Continuing, they assert that any moneys they received were received for account of their principal and not for the account of the plaintiffs. On the first day of February, 1928, plaintiffs entered into a written agreement to purchase from the defendants as such agents a lot near the corner of Sixteenth avenue and Aloha street in San Francisco. The price was $9,250. At that time there was being constructed on the lot a dwelling. The record shows that at that time the Pacific Title & Trust Company held a trust deed dated January 13, 1928, to secure the payment of a promissory note in the sum of $4,800. That mortgage was recorded January 14, 1928. It shows also that the same company as trustee held a trust deed dated January 9, 1928, to secure another note in the sum of $2,070. That instrument was recorded later on the same day. The plaintiffs paid down $100, which is acknowledged in the contract of purchase. The contract was signed by the purchaser and by the defendants as agents of the seller, and an approval in writing was signed by the owner. Among other passages contained in the contract are the following:

"Buyer to pay $500.00 down and the balance of the purchase price at $75.00 per month including interest at the rate of 6% on the first mortgage and at the rate of 7% on the balance * * * and $250.00 on or before February 21, 1929.

"Conditions of Sale: ten days from date of filing notice of completion are allowed the purchaser to examine the title to said property and to report in writing any valid objection thereto, to Ewers & Gorham at their office. If no such objection to title is reported, the balance of said purchase price shall be paid by said purchaser at the expiration of said time to said Ewers & Gorham for account of the seller, and said seller shall thereupon deliver to said office, a properly executed and acknowledged deed of grant, bargain and sale of said property."

Under the plain words used by the parties said contract provided that the sales price would be $9,250; that the purchasers were to pay $500 down and $250 on or before February 21, 1929. One interpretation of the contract is that, deducting the $500 payment, the seller would cause two mortgages to be placed on the property before the transfer was made, and that such mortgages would be in the total sum of $8,750, one bearing interest at 6 per cent. and one bearing interest at 7 per cent. and the purchasers covenanted to pay such "balance of the purchase price at $75 per month including interest at the rate of 6% on the first mortgage and at the rate of 7% on the balance," and on or before February 21, 1929, the purchasers would pay an additional sum of $250. Another interpretation is possible, and that is, if no objection to the title was made within ten days after notice of completion, then the balance of the purchase price ($8,500) shall be paid by said purchaser at the expiration of said time and $250 on February 21, 1929. But, under neither interpretation were the purchasers required to execute any mortgage or deed of trust. Now let us see what the parties did or failed to do. On May 8, 1928, the owner filed for record a notice of completion. Under the clear terms of the contract said notice started the time running within which the respective parties should have acted. There is no claim that the purchasers found any defect in the title or that they "* * * reported in writing any valid objection thereto. * * *". As they did not report any objections within ten days they were bound to have tendered the balance of the purchase price "* * * at the expiration of said time * * *" to these defendants for the account of the seller, and the seller at the same time was bound to tender to these defendants for the purchaser a deed. Neither act was done by either party. On May 31, 1928, the purchasers paid $505.86 and executed a note for $3,700 and one for $250, and a trust deed to secure both notes. No part of the contract called for any one of these acts on said date. At the time the purchasers paid the $505.86 these defendants executed a document in which for our own purposes we have interpolated (a), (b), and (c). With such interpolations that instrument is as follows:

"Real Estate
"Ewers & Gorham
"1600 Taraval Street
"Phone Sunset 8300

"San Francisco, Calif. May 31st, 1928.

"Received from George McWhinney, the sum of $505.86, (a) to be disbursed as hereinbelow set forth, upon the receipt and recordation of a joint tenancy deed to the property as described in application 7693, of the Northern Counties Title Insurance Co., of San Francisco, vesting title to the said property in George A. McWhinney and Bernice McWhinney, his wife, as joint tenant, (b) subject to exceptions 1, 2 and 3, and 4 and a deed of trust in favor of Bernhard Kari and Lydia Kari for $3,950.00 only. (c) Interest on deed of trust set forth in exception 4, to be paid to June 1st, 1928. Said exceptions set forth in preliminary report dated May 22nd, 1928, covering the said property.

Balance on purchase	$400.00
Pro-rata of taxes to June 30th, 1928	1.26
Pro-rata of policy #24747 of the American Ins. Co. $2500.00—Premium $17.50—Expires 4/25/31	17.40
Pro-rata of Policy #24860 of the American Ins. Co.—$3000.00—Prem. $21.00—Expires 6/12/31	21.00
Recording deed and deed of trust	5.20
Notary fee	1.00
Title fee	60.00
	$505.86

"Ewers & Gorham
"George Gorham."

That instrument was not signed by the plaintiffs. In division (a) wherein it calls for a joint tenancy deed, said passage departed from the terms of the contract which called for a grant, bargain, and sale deed. Wherein in division (b) it provides for certain exceptions as against a marketable title, it violates the provisions of the contract which had no covenant as to exceptions. Wherein division (c) calls for the payment of pro rata charges of taxes and insurance computed as of the date June 30th, said passages departed from the terms of the contract which provided that such pro rata charges would run "from date of recordation of deed." On June 1, 1928, the purchasers took possession of the house and occupied it until September 27, 1928. Nothing contained in the contract authorized such an act. In the meantime mechanics' liens aggregating over $1,600 were filed. The plaintiffs offered testimony that they frequently asked these defendants to clear the title, presumably, of those liens, but it was not cleared.

After May 31, 1928, the owners' assignee visited the house and made the statement that the house in fact was not completed. As to whether the house was then completed according to the model (the house across the street) the record does not disclose. However, the record discloses that the owners' assignee took from that date until September 27, 1928, to do some alleged finishing work. Finally, on the date last stated the owners' grantee sent the plaintiffs a letter as follows:

"September 27, 1928.

"Mr. George A. McWhinney and Mrs. Bernice McWhinney, 2451—16th Avenue, San Francisco, Calif.

"Dear Sir and Madam: Please be advised that all papers necessary and proper for the closing of the deal relating to the purchase by you of the property at the above address are now in file with Northern Counties Title Insurance Company, 374 Bush Street, San Francisco, California—pursuant to the agreement entered into between you and Bernhard Kari under date of February 1, 1928. You will please call there and sign the two promissory notes—one for $250.00 payable February 21, 1929, and the other for $3750.00, payable $51.-00 monthly, each bearing interest at 7% per annum—together with the deed of trust securing same and the same will be completed in due course thereafter, as soon as the title can be run down to date to insure that the said deed of trust is a second lien, subordinate only to exceptions 1, 2, 3 and 4 in the current report of said title company. All other exceptions have been arranged to be removed upon notice that the above mentioned notes and deed of trust have been executed by you.

"Very truly yours,

"Henry F. Wrigley."

[1-4] On September 22, 1928, the plaintiffs vacated the house, surrendered the keys to these defendants, and made a formal demand on these defendants that their payments be returned to them. In this connection it should be stated that the record discloses the fact that these defendants never surrendered any part of the money which they had received either to the former owners or to Mr. Wrigley as assignee of such owners. From the foregoing facts we think it is clear that the instant case shows that both parties to the contract had completely abandoned it and had wholly departed from every covenant contained in it excepting the amount of the purchase price. Under such circumstances no formal notice of rescission was necessary. Bray v. Lowery, 163 Cal. 256, 261, 124 P. 1004; McNeese v. McNeese, 190 Cal. 402, 404–405, 213 P. 36.

Whether the foregoing facts showed an abandonment by the parties was largely a question of fact. Fountain v. Semi-Tropic L. & W. Co., 99 Cal. 677, 683, 34 P. 497. In support of the judgment this court is bound to infer that the trial court was of the opinion that the abandonment was complete. Lemle v. Barry, 181 Cal. 6, 10, 183 P. 148. As there was an abandonment, it is settled law that an action as for moneys had and received was a proper remedy. 25 Cal. Jur. 738; Bray v. Lowery, supra.

[5] The defendants claim that the suit should have been brought against the owner and not against these defendants. They cite and rely on Bogart v. Crosby, etc., 80 Cal. 195, 22 P. 84. The case is not in point. In that case the money had been turned over. In this case it had not been turned over, and under the terms of the contract it would have been a breach thereof if the defendants had surrendered plaintiffs' moneys before they received a deed in behalf of the plaintiffs.

[6] During the trial the defendants attempted to show by oral testimony that the plaintiffs and the defendants agreed on May 31, 1928, that the deal should not be closed until the house was fully completed. The written contract could not be altered in that manner.

We find no error in the record. The judgment is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

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112 Cal. App. 511

WILSON v. ROSENKRANZ et al.

Civ. 7675.

District Court of Appeal, First District, Division 1, California.

March 13, 1931.

Rehearing Denied April 11, 1931. Hearing Denied by Supreme Court May 11, 1931.

1. Vendor and purchaser ⚿350.

Vendor could negative bad faith in failing to perform upon purchaser's exercising option by proof of false representation by purchaser before execution of option.

Evidence was admitted to effect that, before execution of option, vendor informed purchaser's agent that property was incumbered by deed of trust of which vendor was unable to obtain reconveyance, and that purchaser's agent promised to obtain such reconveyance.

2. Vendor and purchaser ⚷350.

Vendor's statements made to purchaser's agent as guess regarding extent of liability under trust deed *held* not to show "fraudulent representation."

[Ed. Note.—For other definitions of "Fraudulent Representation," see Words and Phrases.]

3. Vendor and purchaser ⚷350.

Purchaser had burden of proving by preponderance of evidence his affirmative allegation that vendor acted in bad faith.

4. Vendor and purchaser ⚷350.

Evidence supported finding that vendor did not act in bad faith in failing to perform upon purchaser's exercise of option.

Appeal from Superior Court, Los Angeles County; William Hazlett, Judge.

Action by Philip L. Wilson against J. A. Rosenkranz and another. From a judgment for defendants, plaintiff appeals.

Affirmed.

Overton, Lyman & Plumb, of Los Angeles, for appellant.

Dana R. Weller, of Los Angeles, for respondents.

GRAY, Justice pro tem.

Vrena A. Rosenkranz gave to appellant, upon terms herein expressed, an exclusive option to purchase her real property "free and clear of encumbrance." After her failure to perform, upon the exercise of his option, appellant, alleging she acted in bad faith, sued to recover, under section 3306 of the Civil Code, "the difference between the price agreed to be paid and the value of the estate agreed to be conveyed, at the time of the breach." As J. A. Rosenkranz was joined as a party solely because of marriage, he will be eliminated from this discussion and Vrena A. Rosenkranz considered as the sole respondent.

[1] Appellant seeks a reversal of the judgment in favor of respondent because of (1) the alleged erroneous admission of testimony as to conversations between respondent and appellant's agent at and prior to the execution of the option, and (2) alleged insufficiency of the evidence to support the finding that respondent did not act in bad faith. Overruling appellant's objection that such testimony attempted to vary the terms of the written option, which obligated respondent to convey title "free and clear of encumbrance," the court admitted, solely on the issue of bad faith, testimony that, at and prior to the execution of the option, respondent informed appellant's agent that her property was incumbered by a deed of trust of which she was unable to obtain a reconveyance, and that the agent promised to obtain such reconveyance. Obviously, if respondent sought by this testimony to prove that she was not obligated to convey title "free and clear of encumbrance," but was only obligated to convey subject to the deed of trust, the objection would have been well taken (Civ. Code, § 1625; Code Civ. Proc. § 1856), but that was neither the purpose nor the effect of such testimony, since the respondent offered it solely on the issue of bad faith and the court expressly limited its reception to the offer. Respondent, by her answer and admission at the trial, conceded that the option correctly expressed the agreement of the parties. If her answer attempted to plead facts sufficient to entitle her to a reformation of the option, it was clearly insufficient for that purpose, nor did she by her theory of trial present such issue. The only issue here material, presented by the pleadings, was the question of her bad faith in failing to perform. As to that issue, the terms of the option are silent, and therefore the only evidence that could be presented would be as to matters outside of the option. In Johnson v. Schimpf, 197 Cal. 43, 239 P. 401, it was held that pleading of false representations, made by the seller prior to the execution of the agreement, as to the ownership of the property to be conveyed, sufficiently charged bad faith. If the purchaser can establish bad faith on the part of the seller by proof of the latter's false representations prior to the execution of the agreement, the seller should likewise be permitted to negative bad faith on her part by proof of false representations, made by the purchaser prior to the execution of the option.

[2-4] Appellant argues that the finding that respondent did not act in bad faith is not supported by the evidence because such evidence shows that the agent's promise to obtain the reconveyance was induced by respondent's false representation as to the extent of her liability under the deed of trust. An examination of the evidence as to respondent's statements as to her liability shows that they fall short of a fraudulent representation, because they were not made or understood as a positive statement of an existing fact, but were made as a guess by which the agent was not misled. This argument also is predicated upon a shifting of the burden of proof from the appellant to respondent. It was incumbent upon appellant to prove, by a preponderance of the evidence, his affirmative allegation that respondent acted in bad faith. Yates v. James, 89 Cal. 474, 26 P. 1073. It is questionable whether respondent's refusal to convey as obligated

(which is all of appellant's proof on this issue) is sufficient to establish bad faith (opinion of Supreme Court in denying a hearing in Shaw v. Union Escrow, etc., Co., 53 Cal. App. 66, 200 P. 25). On the other hand, respondent's showing that the agent was informed as to the existence of the deed of trust (48 A. L. R. 12, 50), and that he promised to obtain a reconveyance (Hamaker v. Bryan, 178 Cal. 128, 172 P. 391), is sufficient to support that finding.

Finding no error as to matters urged by appellant, the judgment is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

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112 Cal. App. 533

LIBBY, McNEILL & LIBBY v. MARCEL CAFE et al.

Civ. 6468.

District Court of Appeal, Second District, Division 1, California.

March 13, 1931.

Corporations ⚷268(1).

In suit on account of stockholder's liability, allegation there were issued and outstanding specified number of shares was sufficient as allegation of number of shares subscribed.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by Libby, McNeill & Libby against Marcel Café and Benjamin Fink and others. From the judgment, defendant Fink appeals.

Affirmed.

Henry O. Wackerbarth, of Los Angeles, for appellant.

Gibson, Dunn & Crutcher and Norman S. Sterry, all of Los Angeles (T. L. Smart, of San Francisco, and Keith Bullitt, of Los Angeles, of counsel), for respondent.

HOUSER, J.

Benjamin Fink has appealed to this court from a judgment which was rendered against him in the lower court in an action which here may be considered as having been brought for the sole purpose of recovering a judgment against each of several named defendants on account of his liability as a stockholder in a corporation.

Regarding the liability of defendant Fink as such stockholder, the complaint in the action contained the following averment: "That during the times herein mentioned there were issued and outstanding six hundred seventy (670) shares of the capital stock of said Marcel Café and no more and that the defendant A. E. Brandstatter was on said dates the owner of three hundred (300) shares thereof and that the defendant Benjamin Fink was the owner of three hundred sixty (360) shares thereof."

The point presented by appellant as suggesting a sufficient reason for a reversal of the judgment is that the complaint failed to state a cause of action, and that the evidence was insufficient to support the judgment.

From an examination of the record herein it appears that the evidence adduced on the trial of the action clearly established the facts pleaded as hereinbefore set forth, excepting only as to the exact number of shares of stock actually owned by said defendant Fink; and, as to which latter fact, the judgment, as rendered, was amply supported by the evidence.

With reference to the point that the complaint failed to state a cause of action, specifically, it is contended by appellant that the allegation contained in the complaint that "there were issued, and outstanding 670 shares of the capital stock of said Marcel Café and no more" is insufficient as an allegation as to the number of shares of said corporation which were subscribed. Authorities cited by appellant in support of his contention are to the effect that in an action of the character of that here involved, the complaint must contain an allegation as to the number of shares of stock of the corporation which had been subscribed at the time the debt for which the stockholder is sued was incurred; and that "the averment that a certain number of shares were issued is not the equivalent of stating that only that number of shares were subscribed." Bidwell v. Babcock, 87 Cal. 29, 25 P. 752; Roebling's Sons Co. v. Butler, 112 Cal. 677, 45 P. 6; San Francisco Commercial Agency v. Miller, 4 Cal. App. 291, 87 P. 630.

Not to the contrary of the foregoing authorities, but more directly in point on the question at issue, is the case of Thomas v. Wentworth Hotel Co., 158 Cal. 275, 277, 278, 110 P. 942, 139 Am. St. Rep. 120. It is there held (syllabus): "In an averment that at the time the indebtedness was incurred, 'the total number of shares of the capital stock of the said defendant * * * then outstanding was thirty-five hundred,' though the word 'outstanding' is not the exact equivalent of 'subscribed,' and its use in the pleading is not to be commended, yet it is evident that the pleader was endeavoring to set forth the amount of the total subscribed stock, and that the form of the averment is merely im-

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

perfect or ambiguous. In the absence of any demurrer, general or special, the pleading should be treated, after trial and judgment, as a case of defective pleading, which may be waived, and not as an entire omission to plead a material fact, which is fatal." See, also, Knowles v. Sandercock, 107 Cal. 629, 40 P. 1047.

From such authorities, it becomes apparent in the instant case that the pleading to which exception is taken by appellant was sufficient.

The judgment is affirmed.

We concur: CONREY, P. J.; YORK, J.

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112 Cal. App. 374

FAWKES et al. v. FARM LANDS INV. CO.

Civ. 344.

District Court of Appeal, Fourth District, California.

March 7, 1931.

Rehearing Denied April 6, 1931. Hearing Denied by Supreme Court May 4, 1931.

1. Corporations 🔑174.

Articles of incorporation create contractual relation between corporation and stockholders and between stockholders themselves.

2. Corporations 🔑187.

As between themselves, stockholders may make lawful contracts not infringing upon rights of public or creditors of corporation to have capital stock remain unimpaired.

3. Corporations 🔑152.

Directors may not declare dividend upon stock, common or preferred, unless dividends are earned.

4. Corporations 🔑156.

Corporation cannot agree to pay annual dividends on preferred stock at all events without regard to sufficiency of earnings.

5. Corporations 🔑629.

Corporation may contract as to manner in which assets of corporation shall be distributed on dissolution or liquidation (Civ. Code, § 309).

6. Corporations 🔑629.

Code section regarding dividends does not inhibit contract providing for distribution of corporation's assets on dissolution or liquidation by payment of face value of preferred stock with all cumulative dividends in preference to any payment upon common stock (Civ. Code, § 309).

Civ. Code, § 309, provides expressly that nothing therein prohibits a division and distribution of capital stock which remains after payment of all of corporation's debts, upon its dissolution or expiration of its term of existence.

7. Corporations 🔑629.

Provision in articles of incorporation that, on dissolution, preferred stock has priority over common stock and is entitled to face value with all "cumulative dividends," gave preferred claim therefor, even if dividends were not earned (Civ. Code, § 309).

Articles of incorporation, indorsed upon certificate, provided that holders of preferred stock should be entitled to receive, when and as declared, cumulative yearly dividends in preference to any payment of dividends on common stock for such year, and that, in case of dissolution, preferred stock shall be entitled to preference, and "assets and property" of corporation shall be applied first in payment of preferred stock at par, with all "cumulative dividends" thereon, in preference or priority to any payment upon common stock.

[Ed. Note.—For other definitions of "Cumulative Dividends," see Words and Phrases.]

8. Corporations 🔑629.

Right of action of preferred stockholders for cumulative dividends upon dissolution was predicated upon contract, not commissioner's permit.

9. Estoppel 🔑81.

Having applied for and acted under permit in distributing dissolution dividends, corporation could not urge permit to distribute was invalid.

Appeal from Superior Court, Los Angeles County; Harry R. Archbald, Judge.

Action by C. F. Goodwin against the Farm Lands Investment Company, wherein F. W. Fawkes and Hiram C. Hubbard, as executors of the estate of C. F. Goodwin, deceased, were substituted as parties plaintiff. From a declaratory judgment in favor of plaintiffs, defendant appeals.

Affirmed.

Victor Ford Collins, Arnold M. Cannan, Paul S. Honberger, and Stanley Guthrie, all of Los Angeles, for appellant.

Merriam, Rinehart & Merriam and Harvey M. Parker, all of Pasadena, for respondents.

LAMBERSON, Justice pro tem.

The action is one to have declared and determined the rights of C. F. Goodwin, former plaintiff (for whom F. W. Fawkes and Hiram

C. Hubbard, as executors of the estate of C. F. Goodwin, deceased, have been substituted), as the owner of ten shares of the preferred capital stock of the defendant corporation, and to recover cumulative dividends thereon, amounting to the sum of $426.33.

The trial court found that the principal purpose for which the defendant corporation was organized was to buy, sell, and deal in real estate; that its articles of incorporation provide that the capital stock of the corporation should consist of five thousand shares of the par value of $100 each, forty-five hundred shares to be common stock and five hundred shares to be preferred stock; that the terms of the preference were set forth in the articles of incorporation, and were indorsed upon the certificate of stock which was issued to said C. F. Goodwin on or about April 2, 1912; that on or about April 2, 1915, said C. F. Goodwin received from the corporation cumulative yearly dividends upon his ten shares of stock for the preceding three years, but has received no other sum on account of dividends; that on the 8th day of June, 1921, the board of directors adopted a resolution authorizing the discontinuance of the business of the defendant, and the final dissolution of the corporation, and the division and distribution among the stockholders of its capital assets in accordance with their respective interests; that pursuant to said resolution the defendant thereafter caused application to be made to the commissioner of corporations of California for permission to divide and pay out of the capital stock of the corporation 100 per cent. of the par value of the preferred stock and 10 per cent. of the par value of the common stock; that on June 15, 1921, the commissioner of corporations issued a permit authorizing the defendant to distribute a portion of its capital assets among its stockholders, first, to the preferred stockholders as their interests should appear, and thereafter to the holders of the common stock as their interests should appear, subject to several conditions, among them being that no final distribution of the capital assets should be made unless and until dissolution proceedings had first been had, and a final decree entered therein under the provisions of the Code of Civil Procedure; that no indebtedness of said corporation should thereafter be created or permitted to exist in excess of the reasonable value of the then existing capital assets, and, further, that the consent in writing of holders of not less than two-thirds of the outstanding capital stock agreeing to the distribution of the capital assets must be filed with the state corporation department before the permit should become effective; that pursuant to said resolution and permit defendant paid to plaintiff Goodwin on May 12, 1922, the sum of $1,000, being the par value of his preferred stock, but that defendant has made no further payment, and has insisted that no additional payments can be made except out of profits and net earnings, and disclaims all further liability to said C. F. Goodwin on account of cumulative dividends; that defendant has distributed to the holders of common stock, dissolution dividends aggregating $53 per share, but that defendant is still possessed of property and assets which are more than sufficient to pay any and all dissolution dividends due to the holders of preferred stock under the terms of the preference clause.

The preference clause set forth in the articles of incorporation, so far as material here, was substantially as follows: That holders of preferred stock shall be entitled to receive, when and as declared, cumulative yearly dividends at the rate of 6 per cent. per annum in each and every year in preference and priority to any payment of dividends on common stock for such year; that the preference stock or any part thereof shall be subject to redemption at the option of the company at any time after January 1, 1916, at the price of $105 per share, plus the amount of dividends cumulative and unpaid thereon at the date of redemption. (Apparently no action was taken by the corporation to effect a redemption.) The preference agreement then provides as follows: "In case of dissolution or termination of the corporation, the preferred stock and the holders thereof, shall also be entitled to preference in the distribution of the assets and property of the corporation, and any and all such assets and property in case of such dissolution, shall be applied first, to the payment in full of the principal of the said preferred stock at par, with all cumulative dividends thereon, in preference or priority to any payment upon the common stock; and second, any balance remaining shall be divided equally per share among the holders of the common stock."

The trial court by its judgment decreed that said plaintiff, C. F. Goodwin, as the holder of the preferred capital stock of defendant, was entitled to receive and have paid and distributed to him upon and in connection with the liquidation of defendant, and out of the assets and property thereof, and in addition to the full principal par value, cumulative dividends thereon computed at the rate of 6 per cent. per annum upon the par value from April 2, 1915, to and including May 12, 1922, aggregating the sum of $426.33, with interest at the rate of 7 per cent. per annum from May 12, 1922, to date of payment before any payment or distribution shall thereafter be made to any holder of common stock; that, prior to distribution of any portion of the assets of said corporation to holders of common stock, the corporation shall pay said sum of $426.33, with interest, out of the principal and assets belonging to said corporation.

Defendant appeals from the judgment and urges that, inasmuch as no profits were earned during the period covered by the failure of the corporation to declare or pay dividends upon the preferred stock, no dividends could have been declared, and that the directors are not empowered to distribute any sum other than the amount of the par value of the preferred capital stock. Furthermore, that the word "dividend" can only be construed in the light of its use in the statutes of California, and that the directors of the corporation must not make dividends except from the surplus profits arising from the business thereof.

The complaint alleged that the defendant had realized profits on sales of lands, and that the lands held by the corporation had greatly increased in value, and that such profits were far in excess of expenses. The answer denied these allegations and alleged that between December 31, 1915, and December 31, 1922, there was a deficit each year between the resources and liabilities of the corporation. The court found that the allegations of the answer were not true, but there was no affirmative finding in regard to surplus or net profits during such years. In view of the conclusions which we shall announce, we regard the absence of such a finding as immaterial.

The evidence is amply sufficient to sustain the findings of the court that the corporation had, after the distribution of dissolution dividends aggregating $53 upon each share of the common stock, property and assets more than sufficient to pay any and all dividends due to the holders of the preferred stock under the terms and provisions of the preference clause.

Section 290 of the Civil Code authorizes the classification of the capital stock of corporations into preferred and common stock, and provides that the articles of incorporation shall state in clear and succinct manner the nature and extent of the preference granted, and, except as to the matters and things so stated, no distinction shall exist between said classes of stock or the owners thereof.

[1-4] The articles of incorporation create a contractual relation between the corporation and its various stockholders and between the stockholders themselves. Fundamentally, as to rights between themselves, the stockholders of a corporation may agree among themselves and enter into such contracts as are not in contravention of any law of the state, and as do not infringe upon the rights of the public or the creditors of the corporation to have its capital stock remain unimpaired. It is also fundamental in the law of corporations that the directors have no authority to declare a dividend upon any of its stock, common or preferred, unless the dividends are earned, and a corporation, therefore, cannot agree to pay annual dividends on preferred stock at all events without regard to the earnings of the corporation being sufficient to pay them.

[5, 6] The corporation is, however, free to contract as to the manner in which the property and assets of the corporation shall be distributed in the event of dissolution or liquidation. Section 309 of the Civil Code of California, as it read at the time of the incorporation of the appellant, recognized this condition in a provision as follows: "Nothing herein prohibits a division and distribution of the capital stock of any corporation which remains after the payment of all its debts, upon its dissolution, or the expiration of its term of existence."

This provision was repeated in later amendments of that section. There is nothing in the section in question which inhibits a contract providing for the distribution of the assets of the corporation in the event of dissolution or liquidation in the manner set forth in the articles of incorporation of appellant. Dominguez Land Corporation v. Daugherty, 196 Cal. 468, 238 P. 703.

The provisions of the preference agreement amount to nothing more than a plan for the division of the property of the corporation upon its dissolution, and the measure or standard of such division was the dividend rate fixed by the articles of incorporation to be paid to the owners of the preferred stock.

The object to be achieved in the issuance of preferred stock is ordinarily twofold. First, the investor is to be assured of a continued or periodical return, or dividend or dividends from the profits of the corporation without the uncertainty attendant upon the ownership of common stock; and, secondly, the investor is to be assured, as an additional inducement to invest, that in the event of dissolution and distribution of the assets of the corporation between the two classes of stockholders, if the anticipated profits have proved insufficient to produce such a dividend or return upon its capital stock, then he shall receive it upon such distribution of the capital assets in preference to any distribution to the holders of the common stock. Johnson v. Johnson & Briggs, Inc., 138 Va. 487, 122 S. E. 100, 102.

Such a plan is often used and plays a prominent part in the recognized business practice of the country. The plan is without value if cumulative dividends are to be paid only out of net earnings. In discussing the meaning of the terms "dividends" and "cumulative dividends," the court in the last-cited case, said:

"The contrary view unduly emphasizes the conceded fact that it is fundamental that capital cannot be impaired by the declaration of dividends out of the capital assets of a corporation, but they must be declared out of earnings, and hence that 'cumulative dividends' like other dividends must be always limited by such earnings to dividends which having been earned, the board of directors, in the exercise of a proper discretion, should have also declared. This view, however, apparently ignores the fact that when the capital assets are being finally distributed, this reason fails. As here used, the words 'cumulative' and 'accumulative' amplify the word 'dividends' and signify continuing growth in volume by periodical accretions. The word 'cumulative,' as commonly used in such contracts, refers to dividends which accumulate only because they have not been earned, or if earned, which have neither been declared nor paid. Cumulative dividends generally signify returns which gather volume by addition—delayed payments on account of anticipated dividends, which, although not presently earned, confer upon the stockholder the contractual right to require payment thereof in full out of future earnings before there can be any dividend on the common stock. Cumulative dividends in a going concern, under the provision here being considered, and generally, can only be declared out of earnings by the directors but not otherwise, because the capital cannot be thus impaired.

"What then results if the company dissolves, pays its debts, and then proposes to distribute its assets? Why allude to dividends at all in the provision for the distribution of the assets of the company, if it is intended only to include dividends which have been earned and declared? As to such profits so earned, no one would question that the holder of this preferred stock has a prior claim therefor in the distribution of the assets of the company over and above the common stock, upon which no dividend can be declared until after the dividends on the preferred stock have been first paid or provided for. The earning of such profits confers this preference. This being true, the references to unpaid cumulative dividends in the provisions for the distribution of the assets of the company are mere surplusage, if construed merely to secure dividends which have been earned. * * *

"There has, as it seems to us, been too much refinement of reasoning and literal construction in some of the cases. The case cited in the opinion of the arbitrator (Michael v. Cayey-Caguas Tobacco Co., 190 App. Div. 618, 180 N. Y. S. 532) supports the contrary view, and there have been several English cases which are cited in the extended note in 6 A. L. R. 822, with the same tendency, though the language slightly differs in each case. All agree, however, that the solution of the question depends upon the proper construction of the contract in the particular case. * * *"

[7] While there is some division of authority, and the question has not been passed upon by the courts of California, we are of the opinion that the weight of authority and sound reasoning is with the decision of the court in the case of Drewry-Hughes Co. v. Throckmorton, 120 Va. 859, 92 S. E. 818, in which it was held that a provision in a corporate charter and preferred stock certificate giving preferred stock cumulative dividends, and providing that in case of dissolution such stock should have a prior claim for its face value, and any arrears of dividends due and unpaid to it, gives a preferred claim for the face value of the preferred stock and cumulating dividends to the date of the corporation's dissolution, although such dividends may not have been earned. To the same effect are Westerfield-Bonte Co. v. Burnett, 176 Ky. 188, 195 S. W. 477; Johnson v. Johnson & Briggs, Inc., supra; National Bank v. Amoss, 144 Ga. 425, 87 S. E. 406, Ann. Cas. 1918A, 74; Page v. Whittenton Mfg. Co., 211 Mass. 424, 97 N. E. 1006.

Appellant places considerable reliance upon the case of Michael v. Cayey-Caguas Tobacco Co., 190 App. Div. 618, 180 N. Y. S. 532, 533, heretofore referred to. While the language of the opinion in that case supports the contrary view already referred to and is one of the leading authorities for such view, it should be noted that the preference clause under consideration in that case was materially different from the preference clause now under consideration. It read as follows: "The surplus assets and funds of the company shall be applied, first, to the payment in full par value of said preferred shares, and all accrued and unpaid dividends thereon." The distinction between that provision and the terms of the preference clause contained in appellant's articles of incorporation is obvious.

[8, 9] Appellant makes the point that the permit issued by the commissioner of corporations was invalid because not authorized by any statute in force at the time the permit was granted. Respondents' right to enforce their claims to preferred dividends was founded upon a contractual relation which was not invalid under the laws, and the corporation commissioner simply recognized the contract as a valid contract. The right of action was predicated upon the contract and not, as appellant contends, upon the permit. Having voluntarily made application to the commissioner, mistakenly or otherwise, and having assumed to act under such permit in the distribution of dissolution dividends, the appellant corporation cannot now be heard to say that the action of the corporation commissioner was without authority.

In the case of Burne v. Lee, 156 Cal. 221, at page 229, 104 P. 438, 442 the court said: "The very section of the Civil Code relied on by appellants (section 309) while prohibiting a division or distribution among the stockholders of any part of the capital stock, declares further that 'nothing herein prohibits a division or distribution of the capital stock of any corporation which remains after payment of all its debts upon its dissolution or the expiration of its term of existence.' As the owners of all the capital stock, and hence beneficially interested in all the property of the corporation after satisfaction of the claims of its creditors, the contracting parties may obtain a dissolution of the corporation, wind up all its affairs, dispose of its property, and, being entitled to the proceeds, be able to carry out the terms of the agreement. This would be one method of carrying out their contract; and, as it is a legal one, and one which it is possible to pursue, the contention of the appellant that the contract is in violation of the prohibitory legislation of the Civil Code is disposed of."

We are of the opinion that respondents are entitled to the declaratory relief decreed by the trial court, and the judgment is therefore affirmed.

We concur: MARKS, Acting P. J.; JENNINGS, J.

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112 Cal. App. 507

PEOPLE v. RAMIREZ. *

Cr. 209.

District Court of Appeal, Fourth District, California.

March 12, 1931.

1. Records 🔑7.

"Filing of papers" is accomplished by depositing with proper officer at place for performing duties paper to be filed.

[Ed. Note.—For other definitions of "File," see Words and Phrases.]

2. Clerks of court 🔑6.

Deputy county clerk is ex officio clerk of superior court, and has authority coextensive with principal (Pol. Code, §§ 4152, 4178).

3. Records 🔑7.

Failure of clerk to file certain papers when delivered does not forfeit any right of party offering papers for filing (Pol. Code, § 4178).

4. Criminal law 🔑1132.

On motion to dismiss appeal, affirmative showing that necessary appeal papers were given clerk of court but lost *held* entitled to prevail over negative showing that papers were not filed (Pol. Code, § 4178; Rules of Judicial Council, rule 2, § 7).

Motion to dismiss appeal from conviction was filed on ground that appellant failed, within five days after notice of appeal, to file general statements of points relied on for appeal and request preparation of transcript as required by Rules of Judicial Council, rule 2, § 7. Appellant, by affidavit, made affirmative showing that within five days after notice of appeal necessary papers were prepared, order for transcript was signed by trial judge and that papers were delivered to clerk of court. In opposition, affidavit of clerk was filed, with attached transcript of register of actions showing appeal papers were not entered on register as filed.

Appeal from Superior Court, Imperial County; A. C. Finney, Judge.

Juan Ramirez was convicted of burglary, and he appeals. On motion to dismiss defendant's appeal.

Motion denied.

Harry W. Horton, of El Centro, for appellant.

U. S. Webb, Atty. Gen., and John D. Richer, Deputy Atty. Gen., for the People.

LAMBERSON, Justice pro tem.

Motion to dismiss an appeal upon the ground that the appellant has not complied with the requirements of section 7 of rule II of the Rules of the Judicial Council promulgated for the Supreme Court and District Courts of Appeal, which provides as follows: "Upon an appeal by the defendant from a judgment of conviction or from an order denying his motion for a new trial, or from an order made after judgment, or upon an appeal by the People from an order granting a new trial, or from an order setting aside an indictment, information or accusation, or from an order made after judgment, the appellant must, within five days after giving notice of the appeal, file with the clerk and present an application to the trial court, stating in general terms the grounds of the appeal and the points upon which the appellant relies, and designate what portions of the phonographic reporter's notes it will be necessary to have transcribed to fairly present the points relied upon. If such application is not filed within said time, the appeal shall be dismissed; provided, that the appeal shall not be dismissed for any defect in the statement of such grounds or points which does not affect the substantial rights of the respondent."

Judgment was pronounced October 25, 1930, and appellant on the same day gave

*See, also, 298 P. 51.

oral notice of appeal. The record contained in the transcripts before the court fails to disclose that appellant filed any application to the trial court for a transcription of the phonographic reporter's notes, or a statement in general terms of the grounds of the appeal, or the points upon which the appellant relies, or what portion of the phonographic reporter's notes it would be necessary to have transcribed.

In opposition to the motion to dismiss, the appellant makes an affirmative showing by affidavits that, within five days after giving oral notice of appeal, appellant's attorney prepared an application for transcript on appeal and a statement of the points upon which appellant would rely upon appeal and designated the portions of the reporter's notes that the defendant desired to have transcribed as the record upon appeal, and also prepared and caused to be signed by the judge of the trial court an order for the transcription of the record upon appeal; that, immediately upon the signing of said order by the judge of the trial court, affiant forthwith deposited said papers with and delivered them to the clerk of said trial court at his desk in the courtroom of said trial court for filing, and also for the purpose of advising the court reporter of the making of the order for said transcribing. The order in which these papers were presented is not important. The affidavit of the attorney for appellant further states that, upon receipt of the people's motion for dismissal, he investigated the records in the office of the county clerk to ascertain the whereabouts of the original papers, but has been unable to find them among the files of the office of the county clerk, and that he was informed that the papers had been turned over to the phonographic reporter who had reported the case, and that the same had been either mislaid or destroyed.

The affidavit of the phonographic reporter states that immediately after the giving of the oral notice of appeal he received a request for transcribing the proceedings, specifications of points to be relied upon, and the order of the court ordering the transcribing of the record upon appeal; that he definitely remembers receiving said papers on or about October 28, 1930, but finds that he has either mislaid or lost said record. The affidavit of the trial judge states that on the 28th day of October, 1930, the attorney for appellant prepared and presented to the trial judge for his signature a request for the preparation of transcript on appeal, a statement of points to be relied upon by appellant on appeal, together with an order for transcribing the record, and that said judge signed said order on said date.

In opposition to the affirmative showing made by the affidavits referred to, the respondent has filed the affidavit of the county clerk, to which there is attached a transcript of the register of actions, from which transcript it appears that the papers referred to were not entered upon the register of actions as filed, and the county clerk states in his affidavit that the transcript is a complete list of all papers filed in his office.

In numerous cases it has been held that a dismissal is mandatory when the appellant has failed to comply with the provisions of the rule cited above. People v. Davis, 103 Cal. App. 318, 284 P. 516; People v. Riga, 104 Cal. App. 477, 285 P. 1069.

[1] A filing of papers is accomplished by depositing with the proper officer at his office or at any place at which he is called upon to perform his duties the paper which is to be filed. Very frequently, and as a matter of common practice, papers are filed with the clerk in the courtroom or in the judge's chambers, as well as at the principal office of the county clerk.

[2, 3] The county clerk is ex officio clerk of the superior court. Pol. Code, § 4152. It is his duty to take charge of and safely keep all papers and records which may be filed or deposited in his office, and also to act as clerk of the superior court and attend each session thereof and upon the judge at chambers when required. Pol. Code, § 4178. A deputy county clerk is ex officio clerk of the superior court. (People v. Collins, 6 Cal. App. 492, 92 P. 513), and as such has authority coextensive with that of his principal in the performance of his duties (Touchard v. Crow, 20 Cal. 150, 81 Am. Dec. 108). It is the rule that, where it is the duty of the clerk to file certain papers when they are delivered to him to be filed, his failure to do so does not forfeit any right of the party offering the paper for filing. Beck v. Pasadena Lake Vineyard Land & Water Co., 130 Cal. 50, 62 P. 219; W. H. Marston Co. v. Kochritz, 80 Cal. App. 352, 251 P. 959.

[4] The statement contained in the affidavit of the county clerk, to which was attached a transcript of the register of actions, is negative in character, and we are of the opinion that, in the absence of a positive contrary showing, the affirmative statements contained in the affidavits presented on behalf of appellant must prevail, and that the circumstances are such as to take the case out of the rule announced in the case first cited.

The ends of justice will be best subserved by denying the motion to dismiss the appeal, and it is so ordered.

We concur: BARNARD, P. J.; JENNINGS, J.

112 Cal. App. 514

ATLASS v. ATLASS.

Civ. 7728.

District Court of Appeal, First District,
Division 2, California.
March 13, 1931.

1. Divorce ⚷247.

Public policy would not compel husband to support divorced wife after she marries another, except where she can prove extraordinary conditions.

2. Divorce ⚷247.

Upon motion to be relieved of future alimony payments, court, on being advised of wife's remarriage, could order alimony to cease as of date of remarriage.

3. Divorce ⚷247.

Order requiring husband to pay for support of divorced wife for over three months after her remarriage to another *held* unauthorized.

Appeal from Superior Court, Los Angeles County; Fletcher Bowron, Judge.

Suit by Louise Adele Atlass against Mortimer Howard Atlass. From an order modifying a decree of divorce and alimony with reference to alimony, defendant appeals.

Reversed and remanded, with directions.

Woodruff, Musick, Pinney & Hartke and Warren B. Pinney, all of Los Angeles, for appellant.

Milton M. Cohen and J. D. Howe, both of Los Angeles, for respondent.

PARKER, Justice pro tem.

This is an appeal from an order purporting to modify a decree of divorce in so far as said decree provided for the payment of alimony by the defendant to plaintiff. The facts are not disputed. Plaintiff had obtained an interlocutory decree which provided that defendant pay to her a certain sum monthly for a period of two years and a less sum thereafter until further order of the court. A year having elapsed from the entry of the said interlocutory decree, there was duly made and entered the final decree of divorce in which the prior order with reference to alimony and support was continued in force. Subsequent to the entry of the final decree, and on January 9, 1928, the plaintiff remarried a person other than the defendant, and since her said marriage was at all times living with her husband. On March 31, 1928, appellant filed in the court below a notice of motion for an order modifying the decree by striking therefrom the portion thereof providing for payments for the support and maintenance of plaintiff. The facts were not disputed. The remarriage was conceded, having taken place in the state of New York on the date alleged. In view of the place of marriage, it sufficiently appeared that appellant's application was timely made. It is further undisputed that there were no children of the former marriage. The motion, coming on regularly to be heard, was submitted on the affidavits of the appellant and the affidavit of respondent's counsel, which latter affidavit, as hereinafter noted, set up no facts other than those supporting the contention of affiant that the purported alimony provisions were in fact intended as a property settlement. After hearing, the court entered its order as follows: "It is ordered, adjudged and decreed that the previous order of this court contained in the interlocutory judgment of divorce be and the same is hereby modified in the following particulars: From and after the 26th day of April, 1928, the defendant shall not be required to pay the plaintiff any further sums of money for her support and maintenance pending the further order of this court."

It is appellant's claim that the order should have provided that such payments cease as of the date of the remarriage, rather than as of the date the order was made; hence the appeal.

[1] As will be seen, the main question presented is as to the power of a court to enforce or order payments for the support and maintenance of a divorced wife after her remarriage. The general principle is announced in California Jurisprudence, volume 1 at page 1039. There it is stated in substance: The duty of the divorced husband towards his former wife is to support her while she remains single or until she dies, and, if she remarries again, or if she dies, that duty towards her will terminate. Good public policy would not compel a divorced husband to support his former wife after she has become another man's wife, except under extraordinary conditions, which she should be required to prove. The rule thus announced is amply supported by authority both in this state and in other jurisdictions throughout the United States. In the case of Cohen v. Cohen, 150 Cal. 99, 88 P. 267, 270, 11 Ann. Cas. 520, the rule is discussed at great length and many authorities cited in support thereof. The court, in that case, uses the following language: "We believe that the cases wherein the alimony should be continued after the remarriage are extremely rare and exceptional, particularly where there are no children of the former marriage. Good public policy would not compel a divorced husband to support his former wife after she has become another man's wife, except under extraordinary conditions, which she should be re-

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

quired to prove. Unless such conditions are shown by her to exist, the court should, on the former husband's motion, cancel all payments accruing after the remarriage, in all cases where, as here, there are no children and the allowance is based solely upon the husband's probable earning capacity, or upon his breach of the marriage vows, and not upon existing property rights."

There seems to be little dispute between the parties to this appeal on the principle of law involved. However, respondent makes a number of contentions in support of the order in this particular matter. Respondent contends that the original order for the payments in question was intended, not as alimony or by way of support as such, but that it was in the nature of a settlement of property rights of the parties. It might be conceded that, if this were true, the rule announced would not apply. At the hearing on the motion to modify, respondent offered the affidavit of her counsel in support of this contention. Appellant offered cross-affidavits, and thus issue was joined. There were no findings on the question, nor is it the practice or custom or requirement that specific findings be prepared on orders of this nature. However, the order itself may be and is construed as a finding on that issue. Presuming, as we must, the regularity of the proceeding, it is apparent from the order that the finding of the court below was contrary to respondent's contention. Had the court found the provisions for support to have been in fact by way of property settlement then the said provisions could not have been disturbed, and the order here appealed from on its face does disclose that no such finding could have been made. Without further discussion on this point, we might add that the question is of no import in view of the conclusion we have reached on the main question presented. And further, the earnestness of respondent might be questioned when it appears that she insists that the order appealed from be upheld notwithstanding the same deprives her of a sum of money many times larger than the few months' payments involved in the period between her remarriage and the date of the order. As the order will be reversed, the court below will be at liberty to make further inquiry on this point.

[2, 3] Next, respondent urges that the appellant is not aggrieved by the order inasmuch as the notice of motion to modify and the motion made pursuant thereto both expressly contemplated the cessation of future payments, and that the order responded fully to the motion. This is too narrow a view. When the court below was appropriately advised of the fact of remarriage and the demand for modification of the prior order, its action was not restricted to the prayer of the moving party, but it was the court's discretion to make such order in the premises as the law and the facts required. Respondent then further presents a number of arguments all going more to the invalidity of the order and lack of power in the court to make the same, but still insisting that it be affirmed. It is needless to catalog these contentions. If we should accept all of the respondent's contentions we would be in the anomalous position of affirming an order on the theory that it should not have been made and was of no effect. The sole effect of the order is that it requires the appellant to pay for the support and maintenance of his divorced wife following her remarriage to another. This, as we have seen, violates a sound principle of law and is against a recognized public policy. This much is conceded, and it would be a strange judicial procedure for a reviewing court to sanction and affirm such an order merely because of some claimed irregularity in its entry.

The order appealed from is reversed and the cause remanded for further proceedings not inconsistent herewith.

We concur: SPENCE, Acting P. J.; STURTEVANT, J.

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112 Cal. App. 502

In re CLAMPITT'S ESTATE.

JOHNSON et al. v. RILEY, State Controller.

Civ. 7774.

District Court of Appeal, Second District, Division 2, California.

March 12, 1931.

Rehearing Denied April 10, 1931. Hearing Denied by Supreme Court May 11, 1931.

Taxation ⚷893.

In inheritance tax case, evidence did not support finding deed from deceased delivered to third party for recording had not been delivered.

Appeal from Superior Court, Los Angeles County; Albert Lee Stephens, Judge.

In the matter of the estate of Margaret M. Clampitt, deceased. Proceeding between H. T. Johnson, guardian of the estate of Leah Clampitt (now Leah C. Kelly), and others, and Ray L. Riley, State Controller. From the judgment, the former appeal.

Reversed, with instructions.

Harold E. Prudhon and John W. Carrigan, both of Los Angeles, for appellants.

David Tannenbaum and Charles M. Cassin, both of Los Angeles, for respondent.

IRA F. THOMPSON, J.

This is an appeal from a decree settling and fixing the inheritance tax in the estate of Margaret M. Clampitt, deceased, at the sum of $54,830.64. The basic reason for the appeal is the inclusion in the estate as property upon which the tax is computed, of certain properties which it is claimed by appellants passed by deeds executed by Margaret Clampitt in her lifetime to her two children. The contention of respondent is that title did not pass because there was no delivery of the deeds; there being absent from the act of handing the deeds to a third party an intent on the part of Margaret Clampitt to divest herself of title. The trial court found that the deeds were not nor was an assignment of an oil lease delivered, and that they were made without a valuable or adequate consideration. The fundamental contention of appellants is that these findings are not supported by the evidence; hence we are under the necessity of setting forth the testimony.

It appears that the husband of Margaret M. Clampitt and the father of Leah and Barbara Clampitt died September 26, 1919, leaving a will in which he left his estate one-third to his wife and one-third to each of the children, with the proviso that the share of each child should be held in trust by the mother until the daughters should attain the age of 21 years. It transpired that all of the property was community, and upon distribution the decree distributed four-sixths to the widow and one-sixth to each daughter. For several years prior to the execution of the deeds in question and with several persons, Mrs. Clampitt had discussed the distribution of her husband's estate, saying that it did not carry out his intention, or, to put it in words used by a witness, "that in her opinion Mr. Clampitt intended that the Clampitt estate should be divided equally between the two daughters and herself, and the decree of distribution didn't follow out that intention for the reason the community property law interfered with his intention and she wanted to carry out that intention." She talked to her attorney about it on different occasions and also to the manager of the E. A. Clampitt Company and to the auditor, to the last of whom she said: "When I get ready to transfer I am going to telephone you." In accordance with that statement she telephoned Mr. Frederick Hoereth some time in August, 1926, asking him to take certain old deeds, seventeen or eighteen in number, to the office of Mr. Prudhon, her attorney, for the purpose of having deeds drawn to transfer the property to her two daughters. Mr. Prudhon was absent on vacation at the time, but one of his associates took the instructions and prepared the deeds. On Mr. Prudhon's return he found the deeds, checked them over with Mr. Johnson, manager of the Clampitt Company, and instructed him to take them to Mrs. Clampitt for her approval and say to her that he (Prudhon) would be out later for the purpose of taking her acknowledgments to the deeds. On September 4th Prudhon called on Mrs. Clampitt, where she acknowledged her signatures to the deeds. He then took the deeds to his office, where he affixed his own signature and notarial seal. On the day following he returned them to Mrs. Clampitt and advised her to have Mr. Johnson, who, as we have said before, was the manager of the Clampitt Company, record them. Pursuant to her attorney's advice, Mrs. Clampitt took the deeds to Mr. Johnson's home and told him to have them recorded. Johnson's own words succinctly state what happened thereafter. He said: "Took the deeds with me and I went by the office and found I had to go to Bakersfield for a few days and I put them in the safe. Didn't have time to stop to have them recorded that day, and when I came back I didn't think but what I had them recorded; put them in a safe that we didn't use every day and didn't run onto them." The company had three safes, one of which was used for deeds and such records, and it was the receptacle for the instruments in question. They were not found or removed therefrom until about a week after Mrs. Clampitt's death. Subsequent to the execution of the deeds, the Clampitt Company was incorporated, and, though respondent's attorneys attempt to argue that Mrs. Clampitt exercised dominion over the property after the execution of the deeds, from the fact that she received four-sixths of the capital stock, the fact remains that the undisputed evidence shows that none of the property involved in the problem before us was turned in to the corporation—its assets consisting of that which was formerly owned by E. A. Clampitt under the designation of the E. A. Clampitt Company. Mr. Johnson collected the income from the property (most of it not being income producing), and remitted to Mrs. Clampitt therefor, together with any profits from the Clampitt Company. Mrs. Clampitt herself made the division of the moneys to herself and the children. One bank account with a balance of $64,200 in the name of Margaret M. Clampitt bore this notation in her own handwriting: "This money for Leah and Barbara, one-half already theirs." Another note on another account read: "One-half or two thirds of this amount belongs to the girls." Still another was opened in the name of Barbara H. Clampitt by Mrs. E. A. Clampitt, trustee, and a fourth and fifth, Margaret M. Clampitt, trustee, for Leah M. Clampitt and Barbara H. Clampitt, minors. And on August 11, 1927, a sixth was opened in the name of Mrs. E. A. Clampitt and Leah M. Clampitt. Mrs. Clampitt died September 18, 1928, at which time Leah Clampitt was 20 years of age and Barbara was 16. It should be added that in September, 1926, she was apparently in the best of health. Also it should be noted that the property which was deeded to the daughters made about an equal division of the entire estate between the three, or, in other words, accomplished what Mrs. Clampitt declared her desire to be to divide the estate into three parts in accordance with her understanding of the will of her husband. No testimony was adduced by respondent in opposition to that of objectors, which we have already summarized.

Reduced to their fundamentals, all the contentions of respondent amount to this: That the evidence does not disclose an intent on the part of Mrs. Clampitt to effect a change of ownership. It is argued that the evidence is in such state that the following language from the case of Williams v. Kidd, 170 Cal. 631, 151 P. 1, 3, Ann. Cas. 1916E, 703, when applied here, establishes that there was no delivery: "It is essential to the validity of a transfer of real property that there be a delivery of the conveyance with intent to transfer the title, and the true test under which delivery is to be determined is in ascertaining whether in parting with the possession of the conveyance the grantor intended thereby to divest himself of title. If he did, there was an effective delivery of the deed. If not, there was no delivery. The solution of this question is grounded entirely on the intention of the grantor, and this essential matter of intention is a question of fact to be determined by the trial court from a consideration of all the evidence in a given case bearing upon the question. Bury v. Young, 98 Cal. 451, 35 Am. St. Rep. 186, 33 P. 338; Kenniff v. Caulfield, 140 Cal. 34, 73 P. 803; Estate of Cornelius, 151 Cal. 552, 91 P. 329; Follmer v. Rohrer, 158 Cal. 757, 112 P. 544." We are unable to agree with the contention of respondent, and the unsoundness of the position may be very shortly demonstrated. Let us suppose that Mr. Johnson had followed his instruction and recorded the deeds instead of leaving for Bakersfield to care for other matters and forgetting them, could it be seriously argued that the essential intent on the part of Mrs. Clampitt was lacking? We think not. There was a compelling reason in her mind to effect such a conveyance—expressed to her friends, her lawyer, and the business manager of the concern in which she was heavily interested. Her purpose was further made manifest by the very execution of the deeds, and the instruction of her attorney to have Mr. Johnson record them was complied with so far as she was able to do so. There is no evidence that Mrs. Clampitt exercised or attempted to exercise any dominion over the property after the manual delivery of the deeds to Johnson. There is no suggestion in the record that she was attempting to carry out a testamentary scheme to avoid probate or collateral inheritance taxes. In truth, the fact that she was in good health and retained one-third of the property in her own name repels such an inference. The only circumstance upon which the finding could have been made is from the inference which might be drawn from the failure to record. But this inference must disappear in the face of the positive testimony of the witness Johnson, which is diametrically opposed thereto. We have nothing left then but a suspicion, a conjectural hypothesis that Johnson's explanation is not in fact the true one. Such a foundation is insufficient to support the findings.

Judgment reversed, with instructions to the trial court to omit from the property upon which the tax is computed the real estate deeded by Mrs. Clampitt to Leah and Barbara Clampitt.

We concur: CRAIG, Acting P. J.; ARCHBALD, Justice pro tem.

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112 Cal. App. 402

JENKINS v. JENKINS.

Civ. 7727.

District Court of Appeal, First District, Division 2, California.

March 9, 1931.

Rehearing Denied April 8, 1931. Hearing Denied by Supreme Court May 4, 1931.

1. Insurance ⚷123.

Generally, valid life policy or designation of beneficiary remains so after latter's insurable interest or relationship ceases.

2. Insurance ⚷585(3).

Insured's divorced wife, named beneficiary in life policy, *held* entitled to proceeds as against second wife.

3. Insurance ⚷593(1).

Contract releasing divorced wife's interest in husband's property, shown on list not mentioning life insurance policy, did not assign her rights as beneficiary thereof.

4. Husband and wife ⚷273(1).

Proceeds of life policy *held* not property of insured's estate, though divorce decree recited truth of allegations in divorced wife's complaint, which alleged nonexistence of community property.

5. Husband and wife ⚷273(12).

Evidence in divorced wife's action on life insurance policy *held* to support finding that premium payments after insured's remarriage were not made from community funds.

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Appeal from Superior Court, Los Angeles County; Walter E. Desmond, Judge.

Action by Hilda B. Jenkins against the Bankers' Life Company, in which Hazel Stowall Jenkins was substituted as defendant and filed a cross-complaint. Judgment for plaintiff, and the substituted defendant appeals.

Affirmed.

Tanner, Odell & Taft, of Los Angeles, for appellant.

W. I. Gilbert, of Los Angeles, for respondent.

PARKER, Justice pro tem.

This action is one to determine conflicting claims to the benefits of a life insurance policy. Judgment in the court below was for the plaintiff. The policy in question was one issued by the Bankers' Life Company, a corporation, and according to the terms thereof a certain amount of money was to be paid to the named beneficiary upon the death of the insured, one John J. Jenkins. It is unnecessary to detail the original pleadings. Suffice it to state that the action was commenced against the insurance company and that this company thereafter deposited in court the full amount due under the policy, whereupon Hazel Stowall Jenkins was substituted as defendant and the company discharged from any further claim or liability and dismissed from the case. Therefore all questions affecting the said policy as between the insurer and the insured or his beneficiaries are not within the scope of the present appeal. The only question is as to which of the parties here is entitled to recover the amount now deposited in court. It might be further noted that the defendant Hazel Stowall Jenkins appears and urges her right in several capacities, namely, as the surviving wife of the insured, admittedly deceased, and as the executrix of the estate of said deceased spouse, and finally as the sole legatee under the will of the decedent, which said will is duly of probate. It might also be noted, merely by way of completing the record, that the issues between the parties are joined not only by the original complaint and answer, but also through a cross-complaint and answer thereto; the result of the pleadings being to assert the claims of both parties in the various capacities under which they or either of them claim. Inasmuch as both parties claim, to some extent, by virtue of marriage, and the plaintiff was the first wife of the decedent and the defendant the second, we will, with this fact in mind, and in order to avoid confusion, not make reference to the parties as the first or the second wife, but refer to each merely as plaintiff and defendant.

[1, 2] Plaintiff and John Jenkins were married in the year 1896, and were husband and wife on the 30th day of April, 1913, on which latter date the policy of insurance was issued. The policy by its terms obligates the insurance company to pay the sum named therein on receipt of due proof of death of John J. Jenkins, if such death occurs prior to the 30th day of April, 1939, and while this policy is still in force to Hilda B. Jenkins, wife of the insured, if living; otherwise as hereinafter designated, with the right of the insured to change the beneficiary. Thereafter marital difficulties arose between the spouses and on December 13, 1924, a final decree of divorce was entered between the parties; antedating this was the interlocutory decree of divorce entered December 12, 1923. Within a day after the entry of the said final decree, John J. Jenkins and the defendant Hazel Stowall Jenkins, intermarried and on February 3, 1926, the date of the death of John J. Jenkins, the said parties were husband and wife and the said Hazel Jenkins is the surviving widow of said John Jenkins. At no time was the beneficiary changed in the policy of insurance; at the date of the death of the insured, the beneficiary remained as originally named, to wit, Hilda B. Jenkins, plaintiff. At this stage of the record we meet the first contention of the defendant, and it may properly be disposed of at the outset. Indeed, if defendant were correct in this contention, there would be little need of further discussion. The contention of the defendant is that, while the policy designates as the beneficiary of the proceeds thereof "Hilda B. Jenkins, wife of the assured, if living," yet the designation "wife" is as controlling as the designation "Hilda B. Jenkins," and that therefore the person who was the wife of Mr. Jenkins at the time of his death, is the beneficiary named in the policy. Much authority is presented by defendant in support of this contention, and in many instances the language employed would give support to defendant's claim. It may be stated that such a rule is applied in many jurisdictions when dealing with insurance policies issued by benefit associations or fraternal orders, but the rule thus announced seems to be more one of construction of the by-laws or regulations governing the society or organization issuing the policy. And in those jurisdictions wherein this rule finds support there is a clear distinction made between policies of benefit or fraternal societies or organizations and policies issued by exclusively insurance corporations, or, as it is sometimes phrased, "old line companies." To the latter class of companies or policies by such companies the rule has no application. There is an exhaustive discussion of this entire subject to be found in 52 American Law Reports, commencing at page 381, in which will be found collected the authorities of many jurisdictions. The general rule is that a policy of life insurance or a designation of beneficiary valid in its inception, remains so, although the insurable interest or relationship of the beneficiary has ceased. And the authorities agree

that the words "wife of the assured" as used in the policies such as the one before us are purely descriptive. As the case presented will involve numerous points, each demanding discussion, we will leave this branch of the case with citation of authority supporting the views announced; it being our conclusion that under the terms of the policy the plaintiff was clearly the beneficiary thereunder, designated as such by the insured and remaining as such to the time of the death of said insured. Cor. Jur. vol. 37, p. 567; Connecticut Mutual Ins. Co. v. Schaefer, 94 U. S. 457, 24 L. Ed. 251; Filley v. Illinois Life Ins. Co., 91 Kan. 220; 137 P. 793, L. R. A. 1915D, 130; Filley v. Illinois Life Ins. Co., 93 Kan. 193, 144 P. 257, L. R. A. 1915D, 134; Courtois v. Grand Lodge, etc., 135 Cal. 552, 67 P. 970, 87 Am. St. Rep. 137; Sheehan v. Butchers' etc., Ass'n, 142 Cal. 489, 496, 76 P. 238; Caldwell v. Grand Lodge, 148 Cal. 195, 198, 82 P. 781, 2 L. R. A. (N. S.) 653, 113 Am. St. Rep. 219, 7 Ann. Cas. 356.

[3] Defendant next contends that whatever rights plaintiff may have had or which she may now claim to the proceeds of the policy were lost by reason of a property rights agreement entered into between plaintiff and her then husband, John J. Jenkins, on August 31, 1922. It is admitted that on the date claimed an agreement purporting to settle forever the property rights of plaintiff and her husband was signed. In that agreement the husband was described as the first party and the plaintiff as the second party. The provision thereof to which defendant in the present action directs attention is as follows: "The second party does hereby release and relinquish forever all right, title, and interest and claim of any kind or nature whatsoever, including all the rights of inheritance, maintenance, and community interest which said party now has or may hereafter in any manner acquire in or to any property which shall be a part of the estate of the said party of the first part in the event of his death, whether the same be real or personal property, or the separate property of said first party, or property of any kind acquired by said first party in which said second party but for this agreement might now or hereafter have any interest." The plaintiff, as stated, conceding the execution of the agreement and the provision quoted, insists, however, that there be considered therewith another provision in the same agreement, which is as follows: "It is further understood and agreed that the party of the second part has entered into this contract upon the direct representation, upon which, in signing the contract she has acted, that the party of the first part has made a full and complete disclosure to her of any and all properties which he now, either directly or indirectly owns, as shown by a list of properties hereto attached and made a part hereof, and that the party of the second part shall not be bound by the terms of this contract in so far as any property which is not listed on said attached list." There is no dispute as to the contract containing this provision, and it is not disputed that there was attached to the agreement the list referred to. This list enumerates much personal property even to the extent of including club memberships and other contracts, but it contains no mention of any insurance policy or policies nor any general language that by indirection might refer to any policies of insurance. Little further need be said regarding the contract. It is too plain that this contract could have no effect upon the policy here in question or the rights of either plaintiff or the deceased husband therein. Defendant here claims that the contract assigned to the husband all of the rights of the plaintiff in the policy, and that from the date of the contract the policy and the proceeds thereof, actual or anticipated, became the separate property of the husband. The contract negatives any such claim. The contract specifically designated the property involved or affected thereby and excludes the policy. The effect of the restrictive clause is claimed to have been aborted by the fact that at the time of the execution of the contract both parties knew of the policy of insurance and that there was therefore no need of specifically mentioning it. This argument would be as effective to support the conclusion that mention of the policy was intentionally omitted. Just why any mention of the policy was not made would be purely speculative, inasmuch as the record is silent thereon. We must concede the fact that it was not mentioned or by reference included amongst the items or properties to which the waiver of plaintiff was restricted. In leaving this branch of the case we might note that, even if we concede all that defendant here claims, it would amount only to a waiver of the wife's community interest in the policy and the question of what community interest, as such, she may have had in the policy or the proceeds thereof will be hereinafter discussed.

[4] The next phase of discussion involves the divorce action between the plaintiff and John J. Jenkins. The judgment roll in the divorce proceedings was offered in evidence. This discloses that in the complaint of plaintiff she alleged that there was no community property and the judgment and decree following recited that the allegations of the complaint were true; in other words, the decree in divorce determined that there was no community property. Defendant then urges, under the authority of Brown v. Brown, 170 Cal. 1, 8, 147 P. 1168, that, this judgment in divorce, having become final, determined that the policy of insurance was not community property. In the Brown Case the policy involved was of a different nature. There the proceeds were payable to the estate of the insured, and no question of gift was involved. The husband, Brown, was both the insured and the beneficiary, at least

for practical purposes, in that his estate was the beneficiary. The rights of no third persons intervened until the death of Brown, whereupon the proceeds of the policy would go to his heirs. The effect of the decision was that this policy was the separate property of Brown, and that, by reason of the divorce judgment, the wife was estopped from claiming any community interest therein. We might concede the principle of the cited case and yet be far from a solution of the problem before us. The plaintiff here occupies a dual position. If the doctrine of the Brown Case is applied to its utmost, the extent of the holding would be that, by reason of the decree in the case of Jenkins v. Jenkins, the plaintiff lost any claim to community rights in the policy. But it is obvious that her claim here is not being asserted upon a basis of community right. We may here, to identify the reference hereinafter to be made, cite the case of New York Life Insurance Co. v. Bank of Italy, 60 Cal. App. 602, 214 P. 61. With that case in mind, and it is unnecessary to quote therefrom, let us assume that the facts in this instant case were just a little changed. Assuming, for instance, that Jenkins was carrying a policy of insurance upon his life, the proceeds of which were payable to his sister or to his mother, and the premiums were being paid out of community funds. Under the Bank of Italy Case the wife would have an interest in the proceeds of the policy to the extent of her community interest in the amounts paid as premiums. Applying the doctrine of the Brown Case and conceding that the decree divested her of any community right in the policy, we would then be compelled to determine what, if any, effect the decree would have upon the beneficiary. The obvious answer is that such a decree would have no effect whatsoever upon the principal contract or upon the beneficiary thereunder, other than releasing the community claim of the wife. And, upon analysis, the facts here present a case no different. Under the doctrine of the case of Blethen v. Pacific Mutual Life Ins. Co., 198 Cal. 91, 243 P. 431, which, by the way, is an excellent treatise of the general principles covering the field of community interest in life insurance policies, proceeds of an insurance policy the premiums on which are paid from community funds are not arbitrarily classified as community property. If the husband procured a policy of insurance upon his own life, with the beneficiary a stranger to the community, and the premiums were paid from community funds, the beneficiary would, notwithstanding, be entitled to the amount of the policy, in the absence of any claim by the wife or if the wife had consented to the payments. From the Blethen Case it follows, and indeed is expressly decided, that, in the absence of a claim of community interest, the contract of insurance is valid and enforceable by the beneficiary under conditions such as we have here. Therefore, if we concede that Hilda Jenkins, the plaintiff, lost any and all community right that she may have had in the proceeds of the policy by reason of the decree in divorce, it means nothing more than that her right as a partner in the community to demand a proportionate share of the proceeds of the policy, regardless of who might be beneficiary, was lost. The effect would have been the same had there been no divorce and she had consented to the community disbursements at the outset. Going into perhaps exhaustive detail, if the decree of divorce had determined expressly that the policy in question was community property and apportioned equally all interest therein, the effect thereof would have been and could have been only on the policy or its proceeds as of the date of the decree in the absence of further order. The policy could have been sold and the then proceeds, if any, divided or, if it were carried through to the happening of the contingency upon which full payment would be made, the proceeds thereof would be divided proportionately to the community interest at the time of the decree. In no event would the policy or the contract of insurance evidenced thereby be held of no further effect or invalid for any purpose. The contract of insurance, if kept alive, would be subject to performance according to its terms, and the proceeds divisible according to the decree. The underlying theory of the Bank of Italy Case and the Blethen Case, both supra, is that, as between the beneficiary and the insured, the contract of insurance is in the nature of a gift, subjected to the general law that a husband, though in control of the community funds, cannot make a gift thereof without the consent of the wife. It is, however, settled law in this state that a transfer of community property by the husband to the wife is presumptively a gift and operates to vest the property thus given in the wife as her separate property. Pabst v. Shearer, 172 Cal. 239, 156 P. 466. It would then follow, though this point remains unnecessary to the decision herein, that the funds disbursed as premiums on the policy here in question having been community funds, under the cases cited each party had a right to one-half the proceeds. The husband having made a gift to the wife of his portion of those funds, then she alone would be entitled to the proceeds therefrom. That no misunderstanding result from the foregoing, it will be noted that the language is restricted to the policy in question, wherein the wife is the beneficiary. Where a stranger to the community was the beneficiary, obviously under this phase of the argument there would be no gift to the wife of the husband's community interest.

Keeping in mind these principles, the remaining questions are easy of solution. Adopting to the extreme the contentions of the defendant, we find this situation: John J. Jenkins, after the divorce, assumed the status of a single man, as far as his individual finances were involved. He had extant a policy of insurance upon his own life with Hilda Jenkins named therein as the beneficiary, legally competent as such, and reserving in himself the power of changing the said beneficiary, which power was never exercised. He continued payments upon the policy until his death at which time the right of the beneficiary, theretofore expectant, became vested. The defendant here as executrix and heir claims that under such conditions the proceeds of the policy became the property of the estate of the insured. A mere statement of the facts is a complete answer to the contention. To adopt such a theory would be to hold that policies of life insurance mean nothing and by such a holding the usefulness of life insurance would be at an end and this form of insurance would pass. Such a holding would necessarily mean that every insurance company would be restrained from paying out on any life insurance policy until a decree determining heirship had been entered or some other statutory mode of ascertaining the heirs had been pursued. The designation of beneficiary would mean nothing, and the beneficent objects of life insurance would be thwarted. Life insurance occupies a too important place in our national and economic life to be thus treated.

[5] There remains but one other point. As a final argument defendant contends that, after the marriage of the defendant and the decedent, approximately five quarterly premiums were paid, and that these payments were made out of the community funds of decedent and the defendant. The finding of the trial court is against this contention, and from the record sufficient is disclosed to support that finding, and nothing is presented sufficient to warrant our disturbing this determination of the fact. There was much from which it might be inferred that the payments were made during the last year from community funds, but the showing is not of a character which would compel an overthrow of a finding to the contrary. The decedent was shown to have been a man of much capital, with varied income producing interests. As president of different corporations he received a salary of some $1500 per month. From the date of his marriage with defendant it appears that these salary checks were deposited in a certain bank; that at the time of the marriage there was in said bank an amount in excess of the amounts paid out as premiums, and such excess was admittedly separate property. The evidence adduced upon which defendant seeks to have the finding upset shows that the premiums here involved were paid by check on this account. And likewise is there evidence purporting to show that after the marriage the old balance was dissipated in the payment of debts existing before the marriage. The evidence further disclosed that Jenkins had other bank accounts or at least one other bank account during the period of his marriage and showed further that during the time of the marriage that had come to him from admittedly separate funds a sum approximating $150,000 with other sources of income inferrable. It is not pointed out just what amount of money remained in the estate nor in the account at either or any bank as of the time of death. We have gone carefully into the transcript of the bank account and the evidence concerning deposits and withdrawals therefrom. The statement of account indicates that funds were deposited in the account referred to from sources not identified. Checking the items of the account carefully, the most that can be said is that these salary checks for personal services were deposited in the said account and that the premiums on the insurance policy were paid out of the same account. This alone will not overcome the trial court's finding. Obviously the account represents but one small phase of the decedent's business affairs and the question of community funds, embracing a short period of time, as in the instant case, is not one entirely of inference and presumption. From the entire record it was for the trial court to determine, as a matter of fact, whether or not the payments on premiums represented an outlay from the community funds of decedent and this defendant, and having found, as indicated, against the claim of defendant in this respect, we find nothing in the record that compels a contrary conclusion. The amount in this particular account at the time of the marriage was in excess of $800, and the amount expended as premiums is less than $300. The testimony of defendant is that the entire original sum was expended in the payment of personal debts existing before marriage. However, taking the figures as defendant presents them, we can see that at the date of Jenkins' marriage with the defendant he had in this account the sum of $993.73; the sum defendant claims was paid out in discharge of personal obligations previously contracted was $883.90. The date of the said marriage was December 13, 1924. The salary due Jenkins seems from the record to have been paid in two semimonthly installments and such was the course of payment throughout. Therefore, on December 15th, two days after the marriage, Jenkins had already earned his one-half month's salary of $750, and but two-fifteenths thereof would be community property. The account shows that on December 16th there was deposited therein the sum of $500. If defendant is correct in contending that this account was an account of salary earned, then we may likewise credit this first entry to that source. The rest then becomes a mere matter of calculation, from which it is evident that there was in said account, and as separate property of decedent, a sum more than sufficient to absorb the payments laid out as premiums, which amount was $259.80.

Defendant urges certain alleged errors in the admission of evidence. In view of what we have said, it becomes unnecessary to detail these claims. The evidence received in no event would have any bearing upon the rights of the parties hereunder.

The judgment is affirmed.

We concur: SPENCE, Acting P. J.; STURTEVANT, J.

HOOGBRUIN v. ATCHISON, T. & S. F. RY. CO.*

Civ. 514.

District Court of Appeal, Fourth District, California.

Feb. 28, 1931.

Rehearing Denied March 25, 1931. Hearing Granted by Supreme Court April 27, 1931.

1. Commerce ⟾8(6).

Exclusive remedy of railroad employee, injured while employed in interstate commerce, was under federal act (Federal Employers' Liability Act [45 USCA §§ 51–59]).

2. Commerce ⟾8(6).
Courts ⟾97(5).

Where railroad employee engaged in interstate commerce is injured, question of substantive liability is determined by Federal Employers' Liability Act and federal decisions construing such provisions (Federal Employers' Liability Act [45 USCA §§ 51–59]).

3. Commerce ⟾8(6).

State laws on subject of employers' liability to employee injured in interstate transportation by rail *held* superseded by federal act (Federal Employers' Liability Act [45 USCA §§ 51–59]).

4. Courts ⟾97(5).

State court *held* bound by construction placed on federal act by federal courts (Federal Employers' Liability Act [45 USCA §§ 51–59]).

5. Master and servant ⟾204(1).

Brakeman using known defective runway in unloading interstate shipment from freight car assumed risk, although brakeman relied on employer's promise of reparation (Federal Employers' Liability Act [45 USCA §§ 51–59]).

The circumstances disclosed that the brakeman was a man of at least 7½ years' experience in railroad work, and had on number of occasions utilized two planks placed on depot platform and extending into railroad car in unloading car, and that on occasion on which brakeman was injured a steel apron had been placed on the two planks leaving an opening about 3 feet long and ½ to 2 feet wide at the end of planks nearest depot platform through which opening the brakeman fell sustaining injuries.

6. Master and servant ⟾221(7).

Employee engaged in common labor assumes risk incident to use of known defective simple appliance, although employer's attention has been called to defects and employer has promised to remedy them.

7. Trial ⟾178.

Court may direct verdict for defendant only when, giving to plaintiff's evidence proper value and indulging inferences deducible therefrom, evidence is insufficient to support verdict for plaintiff.

8. Master and servant ⟾250¼.

In action in state court under Federal Employers' Liability Act, passing on motion for directed verdict is governed by rules of procedure in effect in state court (Federal Employers' Liability Act [45 USCA §§ 51–59]).

Appeal from Superior Court, San Bernardino County; Benjamin F. Warmer, Judge.

Action by William A. Hoogbruin against the Atchison, Topeka & Santa Fé Railway Company. Judgment for defendant, and plaintiff appeals.

Affirmed.

Bertrand J. Wellman, of Los Angeles, for appellant.

Robert Brennan, M. W. Reed, E. T. Lucey, Leo E. Sievert, and H. K. Lockwood, all of Los Angeles, for respondent.

JENNINGS, J.

This is an appeal by plaintiff from the judgment of the trial court made and entered after it had granted the motion of defendant for a directed verdict at the conclusion of the trial wherein evidence on the part of both plaintiff and defendant had been presented. The action was one for the recovery of damages for the injuries sustained by plaintiff by reason of the alleged negligence of defendant in failing to provide a safe place in which to work and safe appliances for use by plaintiff, who was an employee of defendant.

At the time when the injury of which plaintiff complains was sustained by him, he was employed by the defendant in the capacity

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⟾For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Hearing granted 2 P.2d 992.

of head brakeman on a freight train operating between San Bernardino, Cal., and San Jacinto, Cal., and while he was engaged in unloading certain merchandise from a freight car of said train onto a station platform at March Field in the county of Riverside, Cal. The merchandise which at the time was being unloaded by plaintiff was merchandise which had been shipped from some point in the state of Oregon. For the purpose of conveniently unloading freight from trains of the defendant at the March Field depot two planks had been used. These planks were approximately 7 feet long, 6 inches wide, and 2 inches thick. The ends of the planks were placed on the depot platform and the other ends extended about 6 inches into the freight car from which freight was to be unloaded, thus making a sort of runway. The planks were so placed that there was a distance of not to exceed 2 feet between their inner edges. The plaintiff had on a number of occasions made use of these boards in unloading freight at the March Field depot. However, the evidence discloses that complaint had been made by plaintiff and the rear brakeman to the conductor of the train in regard to the use of the planks and that plaintiff had asked for a bridge. On the day on which plaintiff sustained his injuries, a piece of boiler plate approximately 4 feet long, 3 feet wide, and ½ inch thick, and weighing 75 pounds, was sent out by defendant to be placed on the planks. This boiler plate is generally referred to in the testimony of the witnesses as a steel apron. Plaintiff assisted in unloading it from the express car of the train onto the depot platform. This steel apron was then placed upon the two planks and it was at once apparent that it was not of sufficient length completely to cover over the aperture between the planks, and as it was finally placed, there remained an opening about 3 feet long and from 1½ to 2 feet wide at the ends of the planks near the depot platform. The testimony indicates that plaintiff thereupon objected to the use of the steel apron, declaring that he preferred to use the planks without the steel apron. The conductor, however, said that as long as the steel apron had been sent out they would use it, but that he would get another on the following day. Thereupon, the plaintiff procured a small merchandise truck from the depot and conducted it over the runway into the box car where it was loaded with about 250 to 300 pounds of merchandise. The plaintiff, walking backward, then pulled this truck so loaded, onto the runway and when the steel wheels of the truck came in contact with the steel apron the weight of the loaded truck shoved the plaintiff backward so that he fell in the aperture near the depot platform and sustained the injuries of which he complains.

The evidence discloses that at the time plaintiff was injured he was 28 years of age and had been employed on different railroads in various capacities for about 7½ years prior to his accepting employment with the defendant in the month of July, 1927.

[1-3] It is alleged in the first paragraph of plaintiff's complaint that the defendant is a corporation duly organized under the laws of the state of Kansas and engaged in the operation of an interstate steam railroad between the cities of Chicago in the state of Illinois and Los Angeles in the state of California. In the second paragraph of the plaintiff's complaint it is alleged that on August 8, 1927, the date on which plaintiff was injured, he was transferring freight from a car containing interstate shipments onto the station platform of the defendant at March Field in the county of Riverside. Neither of these allegations is denied by defendant, and the record further discloses that at the time plaintiff was injured he was engaged in transferring merchandise shipped from some point in Oregon from a freight car of defendant onto the station platform at March Field. We have here, therefore, the case of an employee of a railroad engaged in interstate commerce, who at the time he was injured, was employed in interstate commerce. This state of facts brings the instant case squarely under the operation of the provisions of the Federal Employers' Liability Act (45 USCA §§ 51–59). And this act is the exclusive remedy, as was pointed out by the Supreme Court of California in the case of Hines v. Industrial Accident Commission, 184 Cal. 1, 192 P. 859, 14 A. L. R. 720.

Since the Federal Employers' Liability Act provides the exclusive remedy in a case of this character, the question of substantive liability is to be determined by the provisions of the act and federal decisions construing such provisions. That all state laws upon the subject of the employer's liability to the employee in interstate transportation by rail have been superseded by the federal act, since congress by its enactment took possession of the field of such liability, was unequivocally announced in the case of Seaboard Air Line Ry. v. Horton, 233 U. S. 492, 34 S. Ct. 635, 58 L. Ed. 1062, L. R. A. 1915C, 1, Ann. Cas. 1915B, 475, 8 N. C. C. A. 834. Our own Supreme Court has likewise so declared in the case of Smithson v. Atchison, etc., Ry. Co., 174 Cal. 148, 162 P. 111, wherein numerous decisions of the United States Supreme Court were cited and it was clearly decided that in actions brought in the state courts under the provisions of the Federal Employers' Liability Act, the decisions of the Supreme Court are controlling in the construction of the act. This was also the holding of the California Supreme Court in the case of Hines v. Industrial Acc. Com., 184 Cal. 1, 192 P. 859, 14 A. L. R. 720. The same conclusion was reached by the Appellate Court of California for the Second Appellate District in the case of Werner

v. Southern Pacific Co., 44 Cal. App. 76, 185 P. 1016. Authorities might be multiplied on this point, but perhaps it is nowhere more clearly stated than by the Supreme Court of Washington in the case of Bolch v. Chicago, etc., Ry. Co., 90 Wash. 47, 155 P. 422, 426, wherein the court said: "We shall not review the many decisions of the state court cited by respondent, since in any event we are bound by the federal decisions, and especially the recent decisions of the United States Supreme Court upon the subject."

[4, 5] Having arrived at the conclusion that in the instant case the Federal Employers' Liability Act furnishes the exclusive remedy and that the question of substantive liability is to be determined by it and that we are bound by the construction placed upon its provisions by the federal courts, we shall next consider whether the trial court erred in granting respondent's motion for a directed verdict at the conclusion of the trial. The solution of this problem involves a determination of whether under the facts delineated in the record it may be said as a matter of law that the appellant assumed the risk of using the particular appliance which it is claimed was defective and through whose use appellant received the injuries of which he complains. For the purposes of this decision it may be assumed that the appliance was defective, in that the so-called steel apron was not of sufficient length entirely to cover over the aperture between the planks that were placed to form a sort of runway between the freight car and the depot platform; that an opening about 3 feet in length and not more than 2 feet in width remained near the depot platform; that appellant observed the defectiveness of the runway and objected to the use of the steel apron, declaring that he preferred to use the planks as had theretofore been done without the steel apron; that the conductor of the train, who was appellant's superior, stated that since the steel apron had been sent down it would be used, but that another apron would be provided on the following day. Under this state of the facts it is earnestly contended by appellant that he did not as a matter of law assume the risk of using the defective runway and that the trial court erred in refusing to submit to the jury the question of whether or not appellant had assumed the risk.

The rule of the common law with respect to the assumption of risks of employment is declared by Mr. Justice Pitney in the case of Arizona Copper Co. v. Hammer, 250 U. S. 400, 39 S. Ct. 553, 556, 63 L. Ed. 1058, 6 A. L. R. 1537, as follows:

"It is to be borne in mind that the matter of the assumption of the risks of employment and the consequences to flow therefrom has been regulated time out of mind by the common law, with occasional statutory modifications. The rule existing in the absence of statute, as usually enunciated, is that all consequences of risks inherent in the occupation and normally incident to it are assumed by the employee and afford no ground of action by him or those claiming under him, in the absence of negligence by the employer; and even risks arising from or increased by the failure of the employer to take the care that he ought to take for the employee's safety are assumed by the latter if he is aware of them or if they are so obvious that any ordinarily prudent person under the circumstances could not fail to observe and appreciate them; but if the employee, having become aware of a risk arising out of a defect attributable to the employer's negligence, makes complaint or objection and obtains a promise of reparation, the common law brings into play a new set of regulations requiring the employer to assume the risk under certain circumstances, the employee under others."

In support of this statement of the rule the court cites the case of Seaboard Air Line Ry. v. Horton, 233 U. S. 492, 34 S. Ct. 635, at page 640, 58 L. Ed. 1062, L. R. A. 1915C, 1, Ann. Cas. 1915B, 475, where it is said:

"When the employee does know of the defect, and appreciates the risk that is attributable to it, then if he continues in the employment without objection, or without obtaining from the employer or his representative an assurance that the defect will be remedied, the employee assumes the risk, even though it arise out of the master's breach of duty. If, however, there be a promise of reparation, then during such time as may be reasonably required for its performance, or until the particular time specified for its performance, the employee, relying upon the promise, does not assume the risk unless at least the danger be so imminent that no ordinarily prudent man under the circumstances would rely upon such promise."

It is the exception to or modification of the general rule providing that in those cases where there is a promise of reparation upon which the employee relies during such time as may be reasonably required for its performance upon which appellant relies and which he contends warrants a reversal of the judgment in the instant case.

In opposition to appellant's position, respondent contends that assuming that the record herein discloses clearly and unequivocally a promise of reparation by the employer and a reliance on such promise by the employee, nevertheless the appellant must fail in his appeal because the appliance of whose defectiveness he complains was a simple appliance with which he was entirely familiar and whose defects were patent and obvious to him. That he was aware of the defective condition of the runway can scarcely be said to be open to doubt inasmuch as the record discloses that appellant testified that he objected to the use of the steel apron, declaring that he preferred to use the planks without the apron.

It is to be borne in mind that not only was the device or appliance of whose defectiveness appellant complains a simple one, but that appellant was a man of at least 7½ years' experience in railroad work, a mature man, and that he had on a number of occasions utilized the two planks hereinabove described for the purpose of unloading freight at the place where he suffered the injuries of which he complains.

Taking all the facts and circumstances shown into consideration, it would appear to be a proper case for the application of the simple tool doctrine. As was said by the Supreme Court of Ohio in the case of McGill v. Cleveland & S. W. Traction Co., reported in 79 Ohio St. 203, 86 N. E. at page 989, 992, 19 L. R. A. (N. S.) 793, 128 Am. St. Rep. 705: "He was familiar with and appreciated its condition and defects, all of which were alike open to his observation and within his comprehension, and it would seem from the averments of his petition that he was so impressed by this defective and unsafe condition that he not only complained of the same to his foreman, but to the master mechanic as well. Plaintiff knew as well as the foreman, master mechanic, or master that said stepladder in its then condition could not be used with any assurance of safety, and, having such knowledge he must be held to have assumed the risk of its use. To hold the master liable to an employee, under such circumstances, for injuries resulting to the latter from the use of so simple an implement or tool as an ordinary stepladder would be to extend the rule of respondeat superior beyond its reasonable limit and to apply it as never intended." The efficacy of the simple tool doctrine has been recognized in the following cases: Marsh v. Chickering, 101 N. Y. 396, 5 N. E. 56; Meador v. Lake Shore & M. S. Ry., 138 Ind. 290, 37 N. E. 721, 46 Am. St. Rep. 384; Corcoran v. Gas Light Co., 81 Wis. 191, 51 N. W. 328; Kistner v. American Steel Foundries, 233 Ill. 35, 84 N. E. 44; Gunning System v. Lapointe, 212 Ill. 274, 72 N. E. 393; G., C. & S. F. Ry. v. Brentford, 79 Tex. 619, 15 S. W. 561, 23 Am. St. Rep. 377; Brewer v. Tenn. Coal, Iron & Ry. Co., 97 Tenn. 615, 37 S. W. 549; St. Louis, etc., R. Co. v. Kelton, 55 Ark. 483, 18 S. W. 933; McCormick Harvesting Machine Co. v. Casimir Wojciechowski, 111 Ill. App. 641; International Packing Co. v. Kasimir Kretowicz, 119 Ill. App. 488; Webster v. Nisbett, 205 Ill. 273, 68 N. E. 936; Ohio Valley Ry. Co. v. Copley, 159 Ky. 38, 166 S. W. 625; York v. Rockcastle River Ry. Co., 215 Ky. 11, 284 S. W. 79. In a number of these cases the facts respecting the defective appliance complained of bear a rather startling resemblance to the facts disclosed by the record in the instant case.

A number of California cases are cited by appellant as supporting his contention that the trial court in the instant case should have submitted to the jury the question of assumption of risk. These authorities deserve consideration. In Notthoff v. L. A. Gas & Electric Co., reported in 161 Cal. at page 93, 118 P. 436, the Supreme Court of California decided that the trial court erred in granting a nonsuit on the ground that no reasonable inference could be drawn by the jury from the evidence introduced at the trial by plaintiff that plaintiff, in complaining of the unsafe condition of the premises where he was working was doing so on his own behalf as well as on behalf of men working under his direction, the Supreme Court holding that under the state of the evidence, the question of whether his complaint was made on his own behalf as well as on behalf of the workmen was one of fact for the jury. The opinion of the court as reported does not indicate that the simple appliance doctrine was suggested and at no place in the decision is it mentioned or discussed. The case of Anderson v. Seropian, reported in 147 Cal. at page 201, 81 P. 521, was a case where a defective stamping machine was being operated by a young man, inexperienced in its operation, who notified his employer of the defectiveness of the machine, but continued to operate it, relying on the employer's promise to repair it. The Supreme Court held that the questions of whether the employee in continuing to operate the machine, under promise to repair, and incurring the risks incident thereto, was acting as a reasonable and prudent man would act and whether the employee's complaint was made and the employer's promise given by reason of fear of increased danger in the use of the machine and whether the employee was induced to remain in employment by reason of the promise to repair were questions of fact and were properly submitted to the jury by the trial court. At no place in the court's opinion is the simple tool doctrine considered and from the description of the machine contained in the reported opinion, it is hardly conceivable that it could be embraced in the rather close confines of the doctrine. In the case of McGuire v. Miller & Lux, Inc., reported in 178 Cal. at page 644, 174 P. 898, the plaintiff, 24 years of age, who had little experience with machinery, was employed by defendant as an oiler on a caterpillar tractor whose machinery was by the court stated to be rather intricate. Certain parts of the machinery of the tractor used in its lubrication became defective and their defective condition was called to the attention of the engineer in charge of the tractor by the plaintiff. The engineer agreed to repair the defective machinery as soon as he could get around to it. On the same day plaintiff, while attempting to clean the defective parts of the machinery, suffered injuries. At the conclusion of plaintiff's case, defendant moved for a nonsuit, which motion was denied, and the defendant declining to present any evidence, the case went to the jury, which returned a verdict for plaintiff. On appeal it was contended by the defendant, appellant, that the evidence presented by plaintiff showed him to have been guilty of such gross negligence as to have precluded recovery as a matter of law. The Supreme Court held that the question of plaintiff's negligence was, under the circumstances shown, a question of fact for the jury. Among the circumstances specifically mentioned by the court is the lack of experience of the plaintiff in respect to what is termed intricate machinery. It is therefore obvious that this case is one of intricate machinery operated by an inexperienced employee, a state of facts that left no possibility for the application of the simple tool doctrine which so far as appears was not suggested. The case of La Fleur v. M. A. Burns Lumber Co., 38 Cal. App. 279, 176 P. 58, is one wherein the machinery operated by the injured employee was complicated machinery characterized by the finding of the trial court as dangerous to operate. This finding of the trial court was said by the Appellate Court to have been abundantly supported by the testimony. This case therefore presented no facts which permitted the application of the simple tool doctrine. The case of Hawley v. L. A. Creamery Co., 16 Cal. App. 50, 116 P. 84, was one where the lines used by the driver of a milk wagon in guiding and checking the team of horses drawing the wagon were defective and the manager of the employer promised to repair them. Within two weeks after the promise to repair had been made and while it was still unfulfilled the employee was injured by reason of the defective lines parting and the team thereby becoming unmanageable. The Appellate Court sustained the finding of the trial court that the employer was negligent in failing to provide suitable and proper appliances. It would appear that the circumstances of this case might well have justified the application of the simple tool doctrine, but the record fails to disclose that it was presented for the consideration of either the trial or appellate courts. In Diehl v. Swett-Davenport Lumber Co., 14 Cal. App. 495, 112 P. 561, an employee operating a planing machine in a lumber mill slipped into a hole in a platform attached to the machine and sustained injuries. The evidence disclosed that the defect in the platform was known to the employer's superintendent, who promised to repair it. The Appellate Court held that the trial court was not in error in refusing to charge the jury that an employee may rely on a promise to repair only for so long a time as is reasonably necessary to accomplish the reparation, holding that the promise to repair was definite and referred to the completion of work in which employer was engaged from the time the promise to repair was made until the accident occurred. There was no suggestion of the simple tool doctrine and it is not adverted to or considered by the Appellate Court in its opinion.

We have reviewed at some length the California authorities cited by appellant because in some cases it may appear that the simple tool doctrine has been considered and rejected by our courts. Careful analysis of appellant's California authorities convinces us, however, that in those cases wherein the narrow limitations of the doctrine would have permitted its application, it has not been considered. It is true that in some jurisdictions the doctrine has been definitely rejected as is noted in 39 Corpus Juris p. 761, § 959, where the author states as follows: "Except in a limited number of jurisdictions, it is very generally held that a servant assumes the risk of injury from defects and dangers in what are commonly designated as simple tools and appliances." The courts of Missouri and North Carolina appear to have declined to apply the doctrine. The general rule of nonassumption of risk of defective appliances by an employee after a promise by the employer to repair is said by the author of Corpus Juris to have been held to have no application where the servant is engaged in common labor with tools or appliances of simple construction except in a limited number of decisions. 39 Cor. Jur., p. 790, § 988. Among the decisions cited by the author wherein the doctrine thus announced has been rejected appears the case of Brouseau v. Kellogg Switchboard & Supply Co., 158 Mich. 312, 122 N. W. 620, 27 L. R. A. (N. S.) 1052, cited by appellant.

[6] This general rule that imposes upon an employee engaged in common and ordinary labor who, with full knowledge of the obvious defects of a simple appliance, the burden of assuming the risks incident to the use of such an appliance, even where the employer's attention has been called to the defects and he has promised to remedy them, would appear to be based upon sound public policy and a proper conception of the reciprocal duties of employer and employee.

[7, 8] With respect to the matter of the propriety of the trial court's granting a motion for a directed verdict the California rule in this regard appears to be stated correctly and comprehensively in the case of Bannister v. L. A. Ry. Corp. (a corp.), 203 Cal. 427, 429, 264 P. 756, 757, where it is said:

"The rule governing the power and propriety on the part of the trial judge in the matter of granting a nonsuit at the conclusion of the whole testimony in the case is clearly and correctly stated in the Matter of Estate of Caspar, 172 Cal. 147, 155 P. 631, wherein it is declared to be the rule that the right of the court to direct a verdict and the right of the court to grant a nonsuit at the conclusion of the evidence in the case are absolutely the same, and that the court may grant such a nonsuit only when, disregarding conflicting evidence and giving to plaintiff's evidence all the value to which it is legally entitled and indulging in every legitimate inference which may be drawn from that evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of plaintiff if such verdict were given."

The action of the court in passing upon a motion for a directed verdict would seem to be a matter of practice governed by the rules of procedure in effect in the courts of the state where an action of this character is brought.

It is contended by respondent that appellant has not perfected his appeal herein for the reason that this notice of appeal states that he has appealed from the judgment of nonsuit in favor of defendant, whereas it appears that no such motion for nonsuit was made or argued, but that it does appear that a motion for a directed verdict was made by the respondent herein and was granted. It has been assumed in this decision that a proper appeal has been perfected and the determination of this question is not necessary to the decision on the merits of the case.

The judgment is affirmed.

We concur: BARNARD, P. J.; MARKS, J.

DAUCH v. GINSBURG et al.

Civ. 7748.

District Court of Appeal, First District, Division 2, California.

March 9, 1931.

Rehearing Denied April 8, 1931. Hearing Granted by Supreme Court May 4, 1931.

1. Mortgages ⇨151(1).

Mortgagee's rights as mortgagee dated from time of execution of mortgage, and not from time of separate advancements for building operations.

2. Estoppel ⇨119.

Estoppel is generally question of fact.

3. Estoppel ⇨116.

Burden of proving estoppel rests upon party relying upon it.

4. Fixtures ⇨20.

There was no estoppel in mortgagee's favor, where conditional seller of plumbing fixtures contracted for sale of fixtures after considerable money was advanced under mortgage and entire amount was advanced before plumbing fixtures were fully installed (Code Civ. Proc. § 1962, subd. 3).

5. Fixtures ⇨35(3).

Whether plumbing fixtures installed in hotel building became part of realty *held* question of fact for trial court.

6. Fixtures ⇨35(2).

Evidence sustained court's finding that plumbing fixtures installed in hotel were personal property.

7. Fixtures ⇨5.

Necessity for use of article itself does not determine its character as personalty or realty.

8. Fixtures ⇨20.

Conditional sales contract retaining title to plumbing fixtures installed in hotel building *held* valid as against prior mortgage.

9. Fixtures ⇨20.

Title to plumbing fixtures being reserved in seller, they did not pass to mortgagee upon foreclosure sale because purchaser acquired only such title and interest as judgment debtor had.

10. Mortgages ⇨372(5).

Landlord having acquired no title to plumbing fixtures at mortgage foreclosure sale, it had no title in such fixtures to convey to lessee under lease.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by Al. Dauch, doing business under the fictitious firm name of Dauch Heating & Engineering Company, against Ella K. Ginsburg and another, doing business under the fictitious firm name of Maryella Hotel, and others. From the judgment defendants appeal.

Affirmed.

Joe Crider, Jr., John M. Martin, and Clarence B. Runkle, all of Los Angeles, for appellants.

Arthur V. Kaufman, of Los Angeles, for respondents.

Paul J. Ziegler, of Los Angeles, amicus curiæ.

NOURSE, P. J.

Plaintiff sued for the recovery of personal property or for the value thereof in case delivery could not be had, together with damages for its unlawful detention. The cause

★Hearing granted 6 P.(2d) 952.

was tried before the court without a jury and resulted in a judgment in favor of plaintiff for the return of the property or for the sum of $18,500 if the defendants could not make delivery. The defendants Standard Mortgage Corporation and Lincoln Investment Company alone appeal, upon typewritten transcripts.

On February 26, 1926, the defendants Ginsburg executed a promissory note secured by a deed of trust to the Lincoln Investment Company in the sum of $58,000. This security was second to a deed of trust in the sum of $175,000 held by the Mortgage Guarantee Company of Los Angeles, both loans being made for the purpose of enabling the Ginsburgs to erect an hotel building upon a tract of land located in Los Angeles: the value of the unimproved realty at that time being $90,000. On November 24, 1926, the defendants Ginsburg purchased the personal property described in plaintiff's complaint (consisting of plumbing fixtures) on a lease contract in writing, title being reserved to the plaintiff. By the terms of this contract these plumbing fixtures were so attached to the building by slip joint threaded unions and flanges that they could be easily removed from the premises without causing damage to the building, and the right to so remove was expressly reserved to the plaintiff by the terms of the lease contract. Installation of these fixtures commenced November 24, 1926, and was completed before February 24, 1927. The Standard Mortgage Corporation made its first advancement to the Ginsburgs under its loan on July 16, 1926, and by November 19 of that year had advanced a total sum of $46,740. After the execution of the lease contract with the plaintiff three additional advancements were made to the Ginsburgs: One on January 3, 1927, in the sum of $1,200; one on February 4, 1927, in the sum of $3,190; and another on the same date in the sum of $5,870. On November 10, 1927, the Standard Mortgage Corporation foreclosed the Ginsburg trust deed and purchased the property at the foreclosure sale. On January 16, 1928, it leased the premises to the Lincoln Investment Company for a period of fifteen years. On March 2, 1928, this action was commenced for the recovery of the plumbing fixtures, the complaint alleging their value to be $21,000. The defendants Standard Mortgage Corporation and Lincoln Investment Company filed general denials of the allegations in the complaint but set up no special or separate defenses.

On this appeal the appellants group their argument in two classifications: First, the priority of the rights of the Standard Mortgage Corporation under their deed of trust, and the rights of Dauch under his conditional sales contract; second, the validity of the conditional sales contract retaining title to personal property when the personal property has been installed in the hotel building as against innocent third parties without notice.

[1] The trial court found that the entire sum of $58,000 was advanced by the Standard Mortgage Corporation pursuant to the requirements of the building loan. The building loan was evidenced by a promissory note and a deed of trust for the full sum without any specifications as to the time or manner in which any portion of that sum was to be advanced by the mortgage corporation. Assuming that the obligation of the mortgage corporation was to make advancements as the building operations progressed, then these advancements were obligatory upon the mortgage corporation and its rights as a mortgagee dated from the time of the execution of the mortgage and not from the time of the separate advancements. 17 Cal. Jur. 898, 899. The mortgage corporation must, therefore, be treated as a prior mortgagee, that is, a mortgagee whose rights accrued prior to the sale and delivery of the personal property described in the plaintiff's complaint. This being so, the case differs from the case of Oakland Bank of Savings v. California Pressed Brick Co., 183 Cal. 295, 191 P. 524, where the Supreme Court held that title reserved by a conditional vendor is not good against a subsequent mortgagee without notice of the reserved title. The same rule is followed in Bell v. Mortgage Guarantee Co. (Cal. App.) 292 P. 660, under a similar set of facts. We find no authority in this state defining the rights of a prior mortgagee in relation to personal property going into the realty covered by the mortgage but where the vendor of the personalty has reserved title. Authorities from other jurisdictions are in conflict, with an equally respectable array on each side of the question.

[2-4] The real principle which is determinative of the rights of the parties, and which is the principle involved in the California cases above cited, is the principle of estoppel. But here the defense of estoppel was not pleaded nor proved nor found. The facts unquestionably are that the loan was made long prior to any sale or delivery of the plumbing fixtures. It was made for the purpose of enabling the Ginsburgs to construct the hotel, and no doubt the parties contemplated at the time that some plumbing fixtures would be necessary. But the very fact that the loans of the mortgage corporation were made as the building construction progressed was sufficient in itself to put the mortgage corporation on notice that the building cost must be paid for out of the loans advanced by the corporation. It therefore had every reason to exercise the precaution to see that these costs were paid in time and every opportunity to acquire knowledge of the method and time of payment. If, therefore, it did not have actual knowledge of the agreement made between the plaintiff and the Ginsburgs, it at least had the means of knowledge and every reason to be on notice as to the time and manner of payment. The facts are also un-

disputed that more than $46,000 was advanced by the mortgage corporation before any contract for the plumbing fixtures had been executed, and that the entire amount of the loan was advanced before these fixtures were fully installed. The definition of "estoppel" is found in subdivision 3, § 1962, Code of Civil Procedure, where it is declared that: "Whenever a party has, by his own declaration, act, or omission, intentionally and deliberately led another to believe a particular thing true, and to act upon such belief, he cannot, in any litigation arising out of such declaration, act, or omission, be permitted to falsify it." It is hardly necessary to say that estoppel is generally a question of fact and that the burden of proving it rests upon the party relying upon it. 10 Cal. Jur. § 31, p. 656. If the trial court had been asked to find on the question of estoppel upon the facts which appear in the record, it would have been compelled to find adversely to appellant; hence the point is not open to discussion on this appeal.

[5-7] Eliminating the question of estoppel, the inquiry resolves itself into whether the property described in plaintiff's complaint is personal property or whether, because of its affixture to the premises, it became a part of the realty. On this issue the trial court held that all this property could be detached and removed from the real property without any damage or injury to the realty, and that from the date of its sale, on November 24, 1926, it remained the personal property of the plaintiff. This, of course, was a question of fact which was squarely placed in issue. It is a question of fact to be determined by the trial court upon all the evidence, the intent of the parties often being a controlling factor. Hendy v. Dinkerhoff, 57 Cal. 3, 40 Am. Rep. 107; Gosliner v. Briones, 187 Cal. 557, 204 P. 19; Jahnke v. Jahnke, 81 Cal. App. 387, 253 P. 752. Our examination of the evidence convinces us that this finding of the trial court was amply sustained by the evidence. In fact, the only real attack made upon the evidence by the appellants is that these plumbing fixtures were necessary for the operation of the hotel as an hotel. The same may be said of beds, rugs, chairs, and other articles which are commonly used in the operation of an hotel. The necessity for the use of an article itself does not determine its character as personalty or realty.

[8-10] Such being the case, the rule applicable is clearly stated in Oakland Bank of Savings v. California Pressed Brick Co., 183 Cal. 295, 297, 191 P. 524, where the Supreme Court said: "The owner of personal property has the right to make an agreement to sell the same and deliver possession thereof to the buyer, upon the condition that the title thereto shall nevertheless remain in the seller until the price agreed on has been fully paid, and the title so withheld by the owner will until full payment, be superior to that of a subsequent mortgage or purchase of such personal property from the buyer, even if such subsequent mortgage or purchase was made without knowledge or notice of the reservation of title and paid full value for the property."

Thus, upon the second point raised by the appellants, the conditional sales contract retaining title to the personal property to the plaintiff was valid under the express rule announced in the Oakland Bank of Savings Case, because of the court's finding that this property was the personal property of the plaintiff and because there is not involved in this case, as in the cases cited, the doctrine of estoppel. This being so, the property of the plaintiff did not accrue to the mortgage corporation as additional security under its deed of trust, and the title being reserved in the plaintiff, it did not pass to the mortgage corporation upon the foreclosure sale, because upon this sale the purchaser acquired only such title and interest as the judgment debtor had. Hendy v. Dinkerhoff, 57 Cal. 3, 40 Am. Rep. 107; Jordan v. Myres, 126 Cal. 565, 567, 58 P. 1061. When the mortgage corporation purchased the realty at its own foreclosure sale, it did not acquire title to the personal property specified in plaintiff's complaint, and this being so, it had no title in the personalty to convey to the Lincoln Investment Company when it executed to the latter a lease of the hotel premises.

The judgment is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

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112 Cal. App. 397

GOATMAN v. PACIFIC READY-CUT HOMES, Inc., et al.

Civ. 7725.

District Court of Appeal, First District, Division 2, California.

March 9, 1931.

1. Principal and surety 🔑59.

In bonds and undertakings, duty of performance is limited to terms of contract.

2. Principal and surety 🔑118.

Mortgagee could not recover upon builder's bond, conditioned that builder would comply with contract between builder and mortgagor who owned lot on which builder was erecting building, where builder fully complied with contract up to time of mortgagor's default.

3. Principal and surety ⚿118.

Where principal is discharged, surety likewise escapes liability.

Appeal from Superior Court, Los Angeles County; Warren V. Tryon, Judge.

Action by William Goatman against the Pacific Ready-Cut Homes, Inc., and another. From the judgment, plaintiff appeals.

Affirmed.

L. C. Woods, of Los Angeles, for appellant.

Andrew J. Copp, Jr., of Los Angeles, for respondents.

PARKER, Justice pro tem.

The action results from a disagreement between the parties over the construction of the terms of a certain bond executed by defendant Pacific Ready-Cut Homes, as principal, and defendant Standard Accident Insurance Company, as surety, and plaintiff as obligee.

There is little, if any, dispute as to the facts and the due execution and delivery of the bond. The defendant Pacific Ready-Cut Homes Company, hereinafter called the builder, had entered into an agreement with one Lawrence Law by the terms of which the said company was to build upon a certain lot a building described as of the double stucco type. The said Lawrence Law was the owner of the lot upon which the said building was to be erected. After the work of construction had commenced, the said Law applied to the plaintiff Goatman for a loan, offering as security a mortgage on the lot together with the building to be erected. Plaintiff was willing to make the loan, as requested, but desired some further assurance or protection to the end that there would be no delay, cessation, or abandonment of the work of construction. Accordingly Goatman approached the builder and explained his situation and what he desired in the way of assurance of completion. Thereupon the matter of the bond was taken up and agreed upon as being the means of obtaining the end desired. Several forms of bond, at least three, were suggested and prepared, the third being the one found satisfactory and accepted. Before coming to the bond itself, and its terms, we might note the circumstances surrounding its delivery. No suggestion of fraud or mistake enters into the case. The plaintiff testifies that he accepted the bond, and that he was satisfied with its terms, and that, whatever is in the bond, he was, at the time of trial, still satisfied. This much, preliminarily, to indicate that the question to be determined narrows itself down to a construction of the terms of the bond and the liabilities arising therefrom.

Without detailing the facts which give to plaintiff a cause of action predicated upon the bond, it will suffice to say that, if the construction contended for by defendants and placed on the bond in the court below is the correct construction, then any further questions are immaterial. Continuing with the facts, it appears that the builder proceeded in the construction of the building. However, before the building was completed and at a stage far from completion, it developed that Lawrence Law was a fugitive from justice and he was taken into custody by local police authority. That thereupon Law defaulted in the terms of the building contract and abandoned the same entirely. Likewise the builder abandoned further construction, and its activities in that connection terminated. Plaintiff Goatman thereupon sought foreclosure, and, after carrying this proceeding to a sale, found the returns inadequate to satisfy the mortgage, and hence this action to recover on the bond.

The bond in dispute may now be considered. Under the terms thereof the principal and the surety are firmly bound unto the plaintiff in the sum of $5,600, and the condition of the bond is recited as follows: "Whereas the above bounden Principal has entered into a certain written contract with L. Law dated Febraury 28th, 1924, for the construction of a double stucco dwelling—four rooms to the side situate 7240-44 Hughes Ave., Los Angeles, California, which contract is hereby referred to and made a part hereof as fully and to the same extent as if copied at length herein. Now therefore the condition of the above obligation is such, that if the above bounden Principal shall well and truly keep, do and perform each and every, all and singular, the matters and things in said contract set forth and specified to be by the said Principal kept, done and performed at the time and in the manner in said contract specified, and shall pay over, make good and reimburse to the above named obligee all loss and damage said obligee may sustain by failure or default on the part of said Principal, then this obligation shall be void; otherwise to be and remain in full force and effect." The contention of the appellant is that the condition of this bond bound the builder to erect the building in question, irrespective of what the cocontracting Law might do or fail to do. In other words, that irrespective of any contract between Law and the builder, the latter were bounden to the plaintiff to carry the building to completion. We cannot so interpret the obligation. It was no doubt, the desire and demand of plaintiff that he be protected to an extent that would preclude Law absconding or abandoning the contract. This could easily have been accomplished by plaintiff taking over the contract in his own name, and, instead of advancing the money to Law, he could have withheld the same to be disbursed by

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⚿For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

himself as the building progressed. This he did not deem necessary. He went to the builder and required from a him a bond and surety to the effect, not that the builder would complete the construction of a building upon the lot, but that the builder would comply in every respect with the terms of the contract between the said builder and Law. The bond incorporated in full the contract between the builder and Law and limited the condition of the bond to that contract to the end that, if the builder should well and truly keep, do, and perform each and every, all and singular, the matters in said contract set forth and specified by the said principal to be done and performed at the time and in the manner in said contract specified, etc., then the obligation should be void. No matter how the words employed are construed or what liberality of construction may be indulged, we find ourselves tied to the limitations of the building contract.

[1] There is no dispute, and the trial court found that the builder fully performed in as far as it owed any duty to perform under the contract. The fact is, as found, that upon amply sufficient grounds the contract was rescinded by the builder and further performance excused. The trial court did expressly find as a matter of fact that the builder was excused from further performance; and (from other facts found upon sufficient evidence, not questioned here) it was the trial court's conclusion of law that performance was excused. We fail to find express authority covering any bond of the kind here before us. It is distinctly a private bond as distinguished from any undertaking provided for by statute. Parties have the right to contract in any legal manner desired, and there is nothing in a bond of this character that renders it unenforceable. However, there are many general principles applicable alike to any and all forms of undertakings. In bonds and undertakings, as in other forms of contract, the duty of performance is limited to the terms of the contract. Indeed, it may be said that in the case of bonds and undertakings the rule is more strictly enforced. The doctrine is announced in the case of W. P. Fuller & Co. v. Alturas S. Dist., 28 Cal. App. 609, 612, 153 P. 743, 745, as follows: "It is elementary that 'sureties are never bound beyond the strict letter of their contract; that they have a right to stand upon the precise terms of their agreement, and that there is no authority for extending their liability beyond the stipulation to which they have chosen to bind themselves.'" We may concede that this rule might relax in the face of compelling equities or that the appearance of fraud, misrepresentation, or undue advantage might compel such a construction as would meet the requirements of an even justice. None of these elements appears here.

It is true, likewise, that, where a bond or undertaking is a requirement of the law in order to give security against potential or threatened loss, the bond or undertaking would be construed with the purpose thereof always in mind, and the language employed would be subordinated to the result contemplated by the law. Again, this feature does not present itself here.

Surveying the situation it is apparent that the plaintiff had, within his own means, ample protection against any loss. The money he was to advance to Law was only to be advanced upon the security of the lot and the completed building, and the purpose of the advancement was to complete the construction of the said building. The plaintiff was in complete control of the funds to be advanced and all that he need do for complete protection was to have himself taken over the contract of Law and paid the sums direct to the builder as the building progressed. When he chose to advance the money to Law, regardless of the latter's use thereof and to accept as his protection the guaranty of the defendants that the contract would be performed on their behalf, it was at his own risk. It may here be noted that, when the builder contracted with Law, it took a trust deed upon the property as security for the performance of the contract on the part of Law. When plaintiff became the lender, then the defendants relinquished, for the purposes of the loan, its trust deed, and subordinated its claim of lien to the mortgage given by Law to the plaintiff. Thus it will be seen that the builder was at the complete mercy of plaintiff and Law with no assurance of protection other than that the advancements made by plaintiff to Law would be applied on the contract. Under these conditions there is no compelling equity demanding that the builder should be in the position of furnishing a building to plaintiff without payment, which would be the result of a construction of the bond such as plaintiff is contending for.

[2, 3] Therefore, we hold that the bond and undertaking in question, construed according to the terms thereof, absolved the builder from any liability upon compliance with the terms of its contract with Law, and that this contract had been fully complied with as far as the builder could be, or was, compelled to perform under the law. Accordingly, plaintiff cannot recover against the builder under the bond. As authority for the conclusion that the builder was excused from any further performance under the contract we cite the following out of hundreds of cases to the same effect: Ross v. Tabor, 53 Cal. App. 605, 200 P. 971; Porter v. Arrowhead Reservoir Co., 100 Cal. 500, 35 P. 146; Minaker v. California Canneries Co., 138 Cal. 239, 71 P. 110. It requires but little citation to support the rule that, where the principal is discharged, the surety likewise

escapes liability. Stockton, etc., Society v. Giddings, 96 Cal. 84, 30 P. 1016, 21 L. R. A. 406, 31 Am. St. Rep. 181; Holden v. Mensinger, 175 Cal. 300, 165 P. 950; Civ. Code, § 2836, 2809; San Francisco T. Seminary v. Monterey County G. & E. Co., 179 Cal. 166, 175 P. 693.

The judgment is affirmed.

We concur: SPENCE, Acting P. J.; STURTEVANT, J.

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112 Cal. App. 273

PEOPLE'S DITCH CO. et al. v. FOOTHILL IRR. DIST. et al.

Civ. 365.

District Court of Appeal, Fourth District, California.

Feb. 27, 1931.

Rehearing Denied March 25, 1931. Hearing Denied by Supreme Court April 27, 1931.

1. Appeal and error 🔑1011(1).

Appellate court will not disturb findings of trial court based on conflicting evidence.

2. Waters and water courses 🔑145.

Appropriator of water from stream may divide appropriation and change point of diversion of part of appropriation provided no injury results to others having vested rights in water (Civ. Code, § 1412).

3. Waters and water courses 🔑152(8).

Findings and judgment for appropriator, in suit to enjoin appropriator from dividing appropriation and changing point of diversion of part of appropriation, *held* supported by evidence (Civ. Code, § 1412).

4. Costs 🔑13.

In equitable action for injunction, allowance of costs rested in discretion of court (Code Civ. Proc. § 1025).

Appeal from Superior Court, Kings County; E. N. Rector, Judge.

Suit by the People's Ditch Company and others against the Foothill Irrigation District and others. From the judgment for defendants, plaintiffs appeal.

Affirmed.

See also 103 Cal. App. 321, 284 P. 514.

W. R. Bailey, of Visalia, and H. Scott Jacobs, of Hanford, for appellants.

A. E. Chandler, of San Francisco, Guy Knupp, of Porterville, R. C. Leib, of San Jose, and Sidney J. W. Sharp, of Hanford, for respondents.

JENNINGS, J.

Plaintiffs appeal from the judgment of the trial court denying an injunction.

Both appellants and respondents are appropriators of water from Kings river. Kings river is a natural water course having its source in the Sierra Nevada Mountains and flowing westerly and southwesterly through the Kings river alluvial fan. At a point approximately forty miles from the place where it leaves the foothills the river divides, one branch flowing in a southerly direction and the other flowing northwesterly through lands served by members of respondent Murphy Slough Association. At approximately the point where Kings river emerges from the foothills there is a government gauging station, also a gauge observer's station and various devices for measuring and rating the water of the stream. This point is called Piedra and the diversions from Kings river by all parties to the present action are downstream from Piedra. The diversions of appellants People's Ditch Company and Last Chance Water Ditch Company are upstream from the diversions of the respondent Murphy Slough Association and the diversion of appellant Lemoore Canal & Irrigation Company is downstream from the diversions of respondents. The distance from Piedra to the head of the ditch of the People's Ditch Company is approximately thirty-five miles. The diversion of the respondent Murphy Slough Association is approximately ten miles further downstream.

From time to time various efforts have been made by those having appropriative rights to the water of Kings river to allot the water of the stream among themselves. On May 3, 1927, an agreement entitled "Water Right Indenture" was entered into by the parties to the present action by which a monthly flow schedule establishing the quantity of water allotted to each party at the times specified was approved and adopted. On the same date, for the purpose of carrying into execution the plan and schedule of the "Water Right Indenture" an agreement entitled "Administrative Agreement" was executed by the parties to the former agreement. In both of these instruments, it is clearly and specifically stated that the respondent Foothill irrigation district had not theretofore diverted and appropriated water from Kings river, but that said Foothill irrigation district desired, if it could lawfully accomplish it, to become a diverter from the river.

On November 28, 1924, an agreement was entered into by the Murphy Slough Association and the Foothill irrigation district by which the association agreed that the irrigation district might enter upon Kings river at some convenient diversion point and take from the river such quantity of the water up to 250 second feet as the Murphy Slough Association should, during the term of the agreement, be entitled to divert therefrom subject to the right of the association to demand and receive all of the water in excess of 100 second feet; and the further right of the association to receive its total entitlement of water during the month of November in each year. In exchange for the river water thus proposed to be diverted by the Foothill irrigation district, the irrigation district agreed that it would acquire a certain tract of water bearing land in proximity to the intake of the Murphy Slough Association's canal and would bore wells and erect pumping plants thereon and would deliver to the Murphy Slough Association an amount of water pumped from such wells equal to the quantity that the irrigation district should divert from Kings river and 10 per cent. of such quantity in addition thereto. This agreement was throughout the trial referred to as the "Exchange Agreement." The evidence produced at the trial of the cause shows that the Foothill irrigation district proposed, in accordance with the provisions of the exchange agreement, to enter upon Kings river at a point called Avocado, upstream from the diversions of the appellants and distant approximately twenty-five miles from the head of the People's Ditch Company canal, and there to divert from Kings river such quantity of water as it should be entitled to take by virtue of its contract with the Murphy Slough Association. It is this proposed diversion which appellants sought by this action to prevent.

[1] At the conclusion of the trial, the court found specifically that the proposed diversion by the Foothill irrigation district might be made without injury to the appellants herein and rendered its judgment denying injunctive relief. Appellants contend that this finding of the trial court is not supported by the evidence. Upon this important phase of the case the evidence was in direct conflict, but a careful examination of the transcript discloses that there is ample evidence of substantial character to support the finding complained of. In accordance therefore with the familiar and well-established rule that an appellate court will not disturb findings of the trial court where there is a conflict in the evidence, the finding of noninjury to appellants by reason of the proposed diversion by the Foothill irrigation district must stand.

[2] It is, however, most zealously contended that the proposed diversion may not lawfully be made even though the finding of the trial court that it may be accomplished without injury to appellants is sustained. It is said that section 1412 of the Civil Code which permits a change in the point of diversion by an appropriator of water if others are not injured thereby is limited in its application to a change in the place of diversion of the entire quantity of water entitled to be taken and that it has no application to and does not permit a change in the place of diversion where it is proposed to split the appropriation. In support of this contention the case of Consolidated People's Ditch Co. v. Foothill Ditch Co. et al., reported in 205 Cal. at page 54, 269 P. 915, 921, is cited by counsel for appellants. This decision of the Supreme Court is obviously so thoroughly relied upon by counsel for appellants that careful consideration of it is warranted. The facts of the case are as follows: An irrigation district purchased stock in certain corporations which owned accrued rights of appropriation of the water of a stream and which possessed ditches for the diversion of such water as each corporation had become entitled to receive among the owners of capital stock of each. The irrigation district then contracted to purchase an interest in a ditch which took off from the river above the points of intake of plaintiffs' ditches and proposed to divert by this ditch an amount of water equaling the aggregate amount of water to which by virtue of its ownership of stock in the several corporations it would have been entitled to receive. The plaintiffs succeeded in securing a preliminary injunction the granting of which was sustained by the Supreme Court. It was decided by the Supreme Court that the owners of stock in those corporations in which the irrigation district had become a stockholder were equitable owners of that proportion of the properties of each of such corporations which their respective stock ownerships bore to the entire subscribed capital stock of each corporation and that only to that extent were such stockholders owners of the water rights which the corporation possessed and over whose distribution it exercised exclusive control. It was said by the court that the sole right of each stockholder in each corporation was the right to have his proportionate share in the water owned by the corporation supplied to him through the instrumentalities provided by the corporation for such distribution and in no other manner. The court then goes on to point out that to sustain the contention of the irrigation district that by reason of its ownership of stock in various corporations it was entitled to go higher up the river than the points of intake of each corporation of which it was a stockholder and there to establish a system of ditches sufficient in capacity to enable it to divert the amount of water represented in its aggregated holdings of corporate stock would necessarily result in the conclusion that each stockholder in each of said corporations would have similar rights and the court said: "It is too plain for argument that such an admission would result in a state of inextricable discord and confusion among the owners of wa-

ter rights of various sorts along the course, not only of the Kaweah river, but of every other river and stream of water in California where similar rights, by appropriation or otherwise, in the flowing waters of these streams are in the course of acquisition and exercise. The creation or threatened danger of such a consequence would of itself supply a sufficient reason for the use of the injunctive processes of the court in the way of its prevention."

This language of the Supreme Court, so strongly relied upon by appellants herein, must of course be read in connection with the main problem which the court had before it for solution. That problem had to do with the rights of stockholders in corporations which own water rights in streams and which possess ditches and other instrumentalities for the diversion and distribution of the water which they own to their respective stockholders. There is no holding by the court that there may not be a change in the point of diversion by an appropriator of water of a portion of the water to whose use he is entitled. In the case of Perry v. Calkins, 159 Cal. 175, 113 P. 136, 138, the trial court found that the city of Yreka was entitled to take fifty inches of water through a certain ditch one-half mile above the ditch of plaintiffs. The court also found that the city had a right to take thirty-five inches from the creek by reason of a submerged dam built by it about two miles above plaintiffs' ditch. In its decision the Supreme Court says: "If this 35 inches was claimed as a part of the 50 inches which the city had acquired the right to divert by means of the Scheld drain, it would be a mere change of the place of diversion which the city might make if it caused no injury to plaintiffs. Barton v. Riverside Water Co., 155 Cal. 517, 23 L. R. A. (N. S.) 331, 101 P. 790."

In this case therefore the Supreme Court recognizes the right of an appropriator to divide an appropriation. We fail to discover any sound reason why an appropriator of water from a stream may not divide the appropriation provided it does not appear that by such division injury will result to others who have vested rights in such water. It may well be that some inconvenience will result from the proposed division by the irrigation district of its appropriation. The division of the appropriation may even result in some confusion but unless it is made to appear that injury will result therefrom to appellants they are not entitled to the aid of equity to prevent the division. The limitation which counsel urge should be read into section 1412 of the Civil Code is not warranted.

[3] Numerous specifications of errors which it is contended were committed by the trial court and numerous particulars in which it is claimed that the evidence is insufficient to support the findings and judgment of the trial court are assignea. A careful review of the evidence appearing in the printed transcript fails to disclose any harmful errors committed by the trial court. Nor does it appear that the findings and judgment of the court in any material respect lack the necessary justification of evidence.

[4] In its conclusions of law the trial court determined that the defendants were entitled to recover two-thirds of their costs of suit and it was so decreed by the judgment. The contention of counsel for appellants that costs should have been allowed appellants is without merit. The complaint was for an injunction and the action is purely equitable in its scope. The allowance of costs rested therefore in the discretion of the court. Code Civ. Proc. § 1025; Abram v. Stuart, 96 Cal. 235, 31 P. 44; Gallatin v. Corning Irrigation Co., 163 Cal. 405, 126 P. 864, Ann. Cas. 1914A, 74.

The judgment is affirmed.

We concur: BARNARD, P. J.; MARKS, J.

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112 Cal. App. 431

RICHFIELD OIL CO. OF CALIFORNIA v. HERCULES GASOLINE CO. et al. (MARSHREY et al., Interveners).

Civ. 7742.

District Court of Appeal, First District, Division 2, California.

March 10, 1931.

Rehearing Denied April 9, 1931. Hearing Denied by Supreme Court May 4, 1931.

1. Licenses ⚷44(3).

"Profit à prendre" is "interest or estate in land," being right to take something out of soil of another, distinguished from "easement."

A "profit à prendre" is a right to take part of the soil or produce of the land of another, as a right to take timber or coal; it is a right to take something out of the soil of another, as a right of common, and also some minor rights as a right to fish, hunt, and hawk, or to mine metals, dig for oil, take oil from the land, the principal feature of which is that it is an interest or estate in the land itself which distinguishes it from a pure "easement," which is a right or interest without profit, there being in case of an easement an absence of all right to participate in the profits of the soil charged therewith.

[Ed. Note.—For other definitions of "Easement," "Estate In Land," "Interest

> (In Property)" and "Profit À Prendre," see Words and Phrases.]

2. Licenses 🔑44(1).

"Profit à prendre" creates interest in realty in nature of covenant running with land, distinguished from personal obligation of owner.

3. Licenses 🔑44(1).

"Profit à prendre" carries right of entry and right to remove from land designated products or "profits."

4. Licenses 🔑44(2).

Common oil or gas lease under which lessee is entitled to enter, develop, and remove oil or gas is "profit à prendre."

> This is so because oil and gas is part of "realty," and is "real property" until severed.
>
> [Ed. Note.—For other definitions of "Real Property" and "Realty," see Words and Phrases.]

5. Mines and minerals 🔑55(6).

There can be no grant or conveyance of oil or gas in place separate and apart from right to enter premises and extract them.

6. Mines and minerals 🔑48.

Oil and gas are part of "realty" until severed and controlled, and thereafter "personal property," subject to sale as such.

> [Ed. Note.—For other definitions of "Personal Property," see Words and Phrases.]

7. Mines and minerals 🔑55(2).

Contract to sell crude petroleum produced by owner from wells on premises, deliverable from tankage of owner, *held* executory contract for sale of personalty, conveying no interest in land.

> Such contract conferred no right on buyer to enter premises and develop oil, or to sever oil from realty. It was plain, executory contract for sale of personal property of and when property should come into possession of seller; exclusive right to develop and produce oil being left with seller. He retained exclusive possession and title of and to realty, and hence of oil in ground, until oil was severed and delivered to tanks maintained by him on own premises, and before oil was thus delivered to tanks buyer had no legal title.

8. Mines and minerals 🔑55(2).

Executory contract to sell oil produced on premises, deliverable from owner's tankage, conveys no title until oil reaches tanks, though contract permits buyer to construct pipe line to tanks to facilitate delivery.

9. Injunction 🔑59(1).

Injunction did not lie against seller to restrain breach of contract to sell oil to be produced, damages being ascertainable, since there was adequate remedy at law and contract not being specifically enforceable (Civ. Code, §§ 3308, 3387).

> Civ. Code § 3308, provides measure of damages for breach of agreement to deliver personal property, and section 3387 provides that it is to be presumed that breach of agreement to transfer personal property can be adequately relieved by pecuniary compensation; there being no evidence in record tending to rebut that presumption.

10. Specific performance 🔑68.

Contract for sale of personalty, damages for breach being ascertainable is not specifically enforceable; remedy being action for damages (Civ. Code, §§ 3308, 3387).

11. Evidence 🔑18.

It is common knowledge that daily flow of oil is readily measurable.

12. Mines and minerals 🔑55(2).

Assignees of proceeds of oil "sold" from wells had no right to designate buyer.

Appeal from Superior Court, Los Angeles County; Claude F. Purkitt, Judge.

Action by the Richfield Oil Company of California against the Hercules Gasoline Company and another, wherein E. H. Marshrey and others intervened for the aid of plaintiff. From a judgment in favor of plaintiff and interveners, defendants appeal.

Reversed.

Bernard Potter, of Los Angeles, for appellants.

Rohe & Freston, R. D. McLaughlin, Campbell & Campbell, and George W. Nilsson, all of Los Angeles, for respondents.

NOURSE, P. J.

Plaintiff sued for an injunction and for an accounting. The interveners entered the litigation for the aid of plaintiff. Judgment went for plaintiff and interveners, awarding them a permanent injunction and damages. The defendants appeal upon a bill of exceptions.

Plaintiff and one Horwitz executed a written contract whereby the former agreed to purchase, and the latter agreed to sell and deliver, the crude oil which Horwitz might produce from a certain well being sunk in the Alamitos Heights district. Deliveries were to be made from the tanks of the owner located on the property to which the oil company was permitted to connect its pipe lines. A maximum daily and monthly delivery was fixed by the contract, and the price agreed to be paid for the oil was the market price as determined by "the prices per barrel publicly offered by the Standard Oil Company of California at dates of delivery * * * for oil of like graivity and quality." A special price of ten cents a barrel below market was fixed for the first fifty thousand barrels delivered.

Horwitz deeded the property in fee simple to the defendant Clark after he had failed to develop oil and had abandoned work on the well. Clark then executed a contract with his codefendant, Hercules Gasoline Company, for the sale of the oil at a more favorable price than that covered by the Horwitz contract.

The theory upon which the interveners came into the litigation was this: Horwitz had assigned to these interveners certain percentages "of the gross production of all the oil, gas and other hydrocarbon substances saved and sold from any well drilled" upon the premises. The proceeds of the sale of the oil produced were to be deposited in a Long Beach bank which was authorized to pay over to the interveners their proportional shares. Alleging that the defendant Clark was insolvent, and that their damages for breach of their contracts could not be ascertained, they prayed for the same injunctive relief sought by the plaintiff. In order to bring the cause within the equity jurisdiction of the court, the plaintiff and the interveners pleaded that the defendant Clark was insolvent, and that the failure of Clark to abide by the terms of his contract with plaintiff would result in irreparable damage to them. The plaintiff also alleged that, in reliance upon the contract, it had installed expensive pipe lines for conveying the oil from the premises. The trial court found that it was not true that defendant Clark was insolvent; it failed to find on plaintiff's allegation that it made expenditures in reliance upon the contract, but all the evidence showed that the allegation was not true. It drew the conclusion of law that plaintiff and interveners would suffer irreparable damage because there was no way to ascertain the amount of compensation to afford them adequate relief.

On the appeal from the judgment in favor of the plaintiff, the appellants insist that the oil company failed to present a case for equitable relief upon the contract because (1) the contract did not create an interest in real property; and (2) it being merely an agreement to sell personal property which could not be specifically enforced, the plaintiff had an adequate remedy at law for damages for the breach. Many assignments of error are also relied on, but, as we are in accord with appellants in the two foregoing propositions, and as the judgment must be reversed for that reason, we will not discuss the other assignments in so far as they relate to the plaintiff.

[1-6] The theory upon which the plaintiff relies to maintain its claim that the contract created an interest in the land is that it establish a "profit à prendre." The courts of this state have never been in doubt about the true meaning and intent of the expression "profit à prendre." Ruling Case Law defines it as "a right to take a part of the soil or produce of the land," such as the right to take timber or coal, or to fish in the water of another. 9 R. C. L. p. 744. It is distinguished from an easement, one of the features of which is the absence of all right to participate in the profits of the soil charged with it. A "profit à prendre" is considered an interest or an estate in the land itself, and this is the principal feature which distinguishes it from a pure easement, which is a right or interest without profit. It is a right to take something out of the soil of another, as a right of common, and also some minor rights as a right to fish, hunt, and hawk, or to mine metals, dig for oil; take oil from the land.

The feature of the right which is of interest to the point under consideration is that it creates an interest in the real property in the nature of a covenant running with the land as distinguished from a mere personal obligation of the owner of the realty. The underlying principle of the right is that it carries the right of entry and the right to remove and take from the land the designated product or "profit." A typical case is the right to cut and remove standing timber and the right to mine and remove coal or other minerals. Thus, the common oil and gas lease under which the lessee is entitled to enter upon the land of the lessor and develop and remove oil or gas is a "profit à prendre." The authorities are agreed on this principle, basing their reasoning on the ground that the oil and gas is a part of the realty and is real property until severed. Out of this rule has grown the further doctrine that there can be no grant or conveyance of oil or gas in place separate and apart from the right to go upon the premises and extract them. Thornton's Law of Oil and Gas, vol. 1, p. 148; Rich v. Doneghey, 71 Okl. 204, 177 P. 86, 90, 3 A. L. R. 352; Campbell v. Smith, 180 Ind. 159, 101 N. E. 89. There are exceptions to this rule found in the decisions coming from the states of Texas and Kentucky, where the courts have held that oil and gas in place are minerals subject to separate ownership, severance, and sale in like manner as coal and other solid minerals. Stephens County v. Mid-Kansas Oil & Gas Co., 113 Tex. 160, 254 S. W. 290, 29 A. L. R. 566; United Fuel Gas Co. v. Swiss Oil Corp. (C. C. A.) 41 F.(2d) 4.

This difference of opinion as to the rights of the landowner in the oil and gas in place explains some of the authorities cited by respondent on the application of the doctrine of "profit à prendre"; but we have found the authorities agreed that these substances are a part of the realty until severed and brought under control, and that, when this has been done, they are personal property subject to sale as such. Southwest Pipe Line Co. v. Empire Nat. Gas Co. (C. C. A.) 33 F.(2d) 248, 252, 64 A. L. R. 1229; Ohio Oil Co. v. Indiana, 177 U. S. 190, 208, 20 S. Ct. 576, 44 L. Ed. 729.

[7, 8] Under the contract upon which plaintiff relies, the owner of the land agreed to sell to plaintiff all the crude petroleum produced by the owner from the wells located on the premises, deliveries to be made from the tankage of the owner. This contract confers no right upon the plaintiff to enter the premises and develop oil or to sever the oil from the realty. It is a plain executory contract for the sale of personal property of and when that property should come into the possession of the vendor. The exclusive right to develop and produce the oil is left with the vendor. He retains exclusive possession and title of and to the realty, and hence of the oil in the ground, until the oil is severed and delivered to the tanks maintained by him on his own premises. Before the oil is thus delivered to the tanks, the vendee has no legal title, and it matters not that it is permitted under the contract to construct a pipe line to the tanks to facilitate delivery. We can see no distinction between this situation and one where the owner of realty contracts to sell fruits raised on his premises, deliveries to be made at a warehouse maintained by him with a right to the vendee of ingress to, and egress from, the warehouse for purpose of delivery. Certainly in such a case no interest in the land is conveyed.

[9] Concluding, as we must, that the contract in suit did not convey any interest in the real property, but that it was merely a contract to sell personal property, it necessarily follows that plaintiff is not entitled to equitable relief, because (1) it has an adequate remedy at law; and (2) the contract is not subject to specific enforcement.

[10-12] Plaintiff's remedy for the alleged breach of the contract is statutory. Section 3308, Civil Code, provides that the detriment caused by the seller's breach of an agreement to deliver personal property shall be deemed to be the excess, if any, of the value of the property to the buyer over the contract price. Thus the plaintiff had an adequate remedy at law for the damages resulting from the breach, if any, with the measure of damages clearly fixed by law. Section 3387, Civil Code, provides that it is to be presumed that the breach of an agreement to transfer personal property can be adequately relieved by pecuniary compensation, and there is no evidence in this record tending to rebut that presumption. The trial court found that plaintiff's damages could not be "readily" ascertained, but there was no evidence supporting the finding, and, if the finding were true, it would be so only because there would be no excess of the value of the oil to the plaintiff over the contract (or market) price, and, hence, no damage to plaintiff. Thus the suit of plaintiff resolves itself into an action to compel the specific performance of a contract for the sale of personal property where the damages, if any, to the plaintiff could be ascertained in the event of a breach. That such an action does not lie under such circumstances is the rule of Poultry Producers, etc., v. Barlow, 189 Cal. 278, 288, 208 P. 93. Pertinent to the questions before us the court in that case (page 289 of 189 Cal., 208 P. 93, 97) said: "Growing out of the last of the three enumerated reasons for the rule that equity will not specifically enforce a contract for services that are of a strictly personal nature is the cognate rule that courts of equity will not decree the specific performance of contracts which by their terms stipulate for a succession of acts whose performance cannot be consummated by one transaction, but will be continuous and require protracted supervision and direction." To the same effect are: Chandler v. Hollingsworth, 96 Cal. App. 472, 478, 274 P. 581; Sheehan v. Vedder (Cal. App.) 292 P. 175; Moore v. Heron (Cal. App.) 292 P. 136; and Pomeroy on Specific Performance (3d Ed.) § 312.

In the same case it was held that an injunction would not lie to prevent a breach of such a contract, and this rule has been generally followed. See Duvall v. White, 46 Cal. App. 305, 308, 189 P. 324; Emirzian v. Asato, 23 Cal. App. 251, 255, 137 P. 1072. The reason for the rule is well expressed by Mr. Justice Chipman in the latter case (page 256 of 23 Cal. App., 137 P. 1072, 1075): "If the personal property has a market value, is bought and sold in the open market, and has no special or unique value, the remedy at law is sufficient, since with the unpaid purchase money and the moneys recovered by action the vendee can buy in the open market property of the same character as that contracted for, if the vendor is in fault."

The evidence is undisputed that there was a great oversupply of crude oil in the Alamitos fields, and that the plaintiff was obtaining all that its refineries could handle. It was also undisputed that the market price of crude oil was fixed periodically by the Standard Oil Company, and that these prices were treated as the daily market price by all those dealing in oil. Though no evidence was taken on the subject, it is a matter of common knowledge that the daily flow of oil can be readily measured. The case is not unlike the illustration given in the Emirzian Case, reading from page 257 of 23 Cal. App., 137 P. 1072, 1075: "We cannot see that this case is any different from that where a farmer agrees to sell, but afterward refuses to deliver, a certain number of tons of alfalfa hay or other product of his farm of which there is an abundance to be purchased in the open market. In such a case we do not think it would for a moment be contended that the vendee could go into an equity court and restrain this farmer from selling his hay to some other person, compel him to irrigate or otherwise care for it, and bale and deliver it to the vendee at some future time."

Stripping the appeal from all the byplay, we hold that the plaintiff did not present an action for equitable relief—its remedy is an action for damages for alleged breach of a simple contract to sell personal property, but, as to its right to recover damages on that contract, we express no opinion. The interveners had no place in the litigation at any stage of the proceeding. Their rights rest entirely upon their assignments of the proceeds of the sale of the oil—they had no right at any time to designate the vendee. If their assignments are valid and enforceable against these defendants, they could then be heard to insist that the proceeds of the sale of the oil be deposited with the Long Beach bank in accordance with the terms of their assignments. But these are questions which are not involved in this appeal.

The judgment is reversed.

We concur: STURTEVANT, J.; SPENCE, J.

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112 Cal. App. 370

MITCHELL v. HARTMAN et al.

Civ. 7678.

District Court of Appeal, First District,
Division 1, California.
March 7, 1931.

1. Municipal corporations 🔑211.

Members of board of education are officers of political subdivision of state distinct from city.

2. Municipal corporations 🔑742(5).

Evidence of use of city funds in erection or maintenance of school does not alone subject school to city's control.

3. Municipal corporations 🔑747(4).

City *held* as matter of law not chargeable with negligence in erection and maintenance of "tackling dummy" upon school campus, where charter granted control over schools to board of education (St. 1911, pp. 1913, 1916, 1924, 1938, §§ 6, 73, and 52, subd. 4).

4. Schools and school districts 🔑62.

Members of board of education *held* not individually liable for injuries resulting from negligent installation or maintenance of "tackling dummy" upon school campus (Pol. Code, § 1623).

Appeal from Superior Court, Los Angeles County; Arthur Keetch, Judge.

Action by John Mitchell against Frank R. Hartman and others. From a judgment of nonsuit, plaintiff appeals.

Affirmed.

Lorrin Andrews, of Los Angeles, for appellant.

Joseph A. Allard, City Atty., of Pomona, for respondent City of Pomona.

Everett W. Mattoon, Co. Counsel, and Ernest Purdum, Deputy Co. Counsel, both of Los Angeles, for other respondents.

GRAY, Justice pro tem.

Appellant sued the city of Pomona and the individual members of its board of education for the death of his son, who was killed by the fall, upon his body, of the supporting framework of a "tackling dummy" which he was then using. Respondents' liability, as alleged, is based upon their negligent erection and maintenance of the "tackling dummy" upon the campus of a junior high school, which deceased was then attending. Holding that the liability, if any, rested upon the school district, not joined as a party, the court granted motions for a nonsuit, separately made by the city and the members.

[1-3] Appellant argues that, because the city's charter (Stats. 1911, p. 1913) authorizes the city to acquire, establish, maintain, own, and operate schools, provides for the election of a board of education, and invests such board with the entire control and management of the schools in the city, the school in question owed its inception, existence, and maintenance to the city, and therefore the city is liable for the tortious acts of the board created by it. The accuracy of these conclusions is dependent upon the correctness of the premises, based upon the charter. Section 6

of the charter (page 1916) provides that: "The elective officers of the city shall be * * * a president * * * and four members of the board of education. * * *" Section 52, subdivision 4 (page 1924) reads as follows: "* * * The city of Pomona shall have the right and power: * * * To acquire * * * and to establish, maintain, equip, own and operate * * * schools. * * *" Section 73 (page 1938) states that: "The board of education shall have entire control and management of the public schools in the city *in accordance with the constitution and general laws of the state,* and is hereby vested *with all the powers and charged with all the duties provided* by this charter and *by the general laws of the state for city boards of education.*" (Italics ours.) While as to matters of tenure and compensation, which are matters that may be regulated by the charter (Const. art. 11, § 8½, subd. 2), members of the board of education have been treated as municipal officers (Stern v. City Council of Berkeley, 25 Cal. App. 685, 145 P. 167; Ackerman v. Moody, 38 Cal. App. 461, 176 P. 696; People v. Ralph, 67 Cal. App. 270, 227 P. 642), yet such members, after induction into office, become officers of a political subdivision of the state, separate and distinct from the municipality, within whose boundaries the school district is located. Hancock v. Board of Education, 140 Cal. 554, 74 P. 44; Ward v. San Diego School Dist., 203 Cal. 712, 265 P. 821. Although there is no evidence to show that city funds were used in the erection or maintenance of the school, yet, if there were, such fact would not make the school a municipal affair and subject it to the city's control. Kennedy v. Miller, 97 Cal. 429, 32 P. 558; Los Angeles School Dist. v. Longden, 148 Cal. 380, 83 P. 246; Ward v. San Diego School Dist., supra. Section 73 by its grant to the board of the entire control and management of the school "in accordance with the constitution and general laws of the state" not only negatives any idea that the charter considers the control and management of the schools a municipal affair, but expressly recognizes that the city schools form part of the state system and are to be managed and controlled in accordance with the state's laws. This is further emphasized by the imposition upon the board of the duties and powers provided by state law. We are satisfied that the city had no duty with reference to the erection and maintenance of the "tackling dummy," and therefore cannot be charged with negligence in that regard.

[4] We are also satisfied that the court correctly held that the members of the board were not individually liable. Section 1623 of the Political Code gives a right of action against the school district for an injury to any pupil arising because of the negligence of the district or its officers. Ahern v. Livermore Union High School Dist., 208 Cal. 770, 284 P. 1105. The last paragraph of this section expressly exempts members of city boards of education from personal liability for accidents to children on the playgrounds. Dawson v. Tulare Union High School, 98 Cal. App. 138, 276 P. 424.

The judgment is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

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112 Cal. App. 455

WILLIAMS v. FARIA et ux.

Civ. 4315.

District Court of Appeal, Third District, California.

March 11, 1931.

1. Damages 🔑85.

Lessees' covenant to pay $20 for each acre "not in first-class alfalfa stand" did not limit lessor's right to recover actual damages.

2. Landlord and tenant 🔑49(2).

Evidence of greater rental value of land in first-class alfalfa stand *held* to sustain award of damages for lessees' breach of covenant to produce such stand.

The evidence showed that rental value of lands covered with first-class stand of alfalfa is over $20 more per acre than land not so covered, and the court found that lessor was damaged in sum of $800 by lessees' failure to plant alfalfa on 40 acres of land.

3. Landlord and tenant 🔑55(3).

Evidence *held* to sustain finding that lessees took no reasonable precautions to prevent burning of silo and barn.

4. Landlord and tenant 🔑55(3).

Evidence *held* insufficient to support court's finding as to value of silo and barn when destroyed by fire because of lessees' negligence.

There was testimony as to good condition of barn and silo three or four months before fire and cost of constructing new ones of same dimensions, but no testimony as to depreciation of either since their erection.

Appeal from Superior Court, Stanislaus County; L. W. Fulkerth, Judge.

Action by Flora J. Williams against John Faria and wife. Judgment for plaintiff, and defendants appeal.

Affirmed in part, and reversed in part, with directions.

James F. Peck, of San Francisco, for appellants.

Edwin H. Williams, of San Francisco, for respondent.

Mr. Justice PLUMMER delivered the opinion of the court.

The plaintiff had judgment against the defendants for the sum of $2,050, based upon a complaint setting forth two causes of action. From this judgment the defendants appeal.

This first cause of action set forth in the plaintiff's complaint alleges the lease of certain lands and premises in Stanislaus county, whereby the plaintiff leased to the defendants the premises described in the complaint, and the defendants covenanted and agreed to set out, plant, and have standing on said premises at least 40 acres in a first-class stand of alfalfa, "and to maintain the same in first-class condition, and to turn the ranch back to the owner upon the termination of said lease, with at least 40 acres of first-class alfalfa stand thereon, or otherwise to pay to the owner $20.00 for each acre less than 40 acres which is not in first-class alfalfa stand."

After referring to the lease and making it a part thereof, the complaint further alleges that the defendants failed to put the demised premises in good order and condition; failed to clear the same of weeds, but allowed the same to become foul with noxious weeds, sand burrs, foxtail, etc., to the damage of the plaintiff in the sum of $1,000; and further alleges that the defendants failed to put any portion of said premises, or have on said premises a first-class stand of alfalfa; that the defendants failed to establish any alfalfa whatever on said premises, to the further damage of the plaintiff in the sum of $800.

While the form of the lease is such that an action might have been prosecuted as and for liquidated damages, the record before us shows that it was not so prosecuted. The second cause of action set out in the complaint is one for damages based upon the destruction by fire of a certain silo and barn standing on the leased premises, it being alleged that the destruction by fire of said buildings resulted from the carelessness, negligence, etc., of the defendants, to the further damage of the plaintiff in the sum of $1,600. In all, judgment for damages was asked in the sum of $3,400.

Two questions are presented to us for consideration upon this appeal, to-wit: Whether findings A and B are supported by the testimony. Finding A is to the effect that the defendants failed to set out and have standing upon said premises any marketable or first-class alfalfa, or stand of alfalfa whatsoever, to the damage of the plaintiff in the sum of $800. Finding B is to the effect that, by reason of the carelessness and negligence of the defendants, a silo and large barn situated on said premises at the time the defendants took possession of, and occupied, the same, were totally destroyed by fire, to the damage of the plaintiff in the sum of $1,250.

[1] The contention of the appellants is to the effect that the action could only be prosecuted, in relation to the alfalfa, as one for liquidated damages, and that, as the complaint does not set forth sufficient facts to sustain an action for liquidated damages, no cause of action is set forth as to said item. We do not find any merit in this contention. The fact that the parties entering into the lease did covenant to pay the sum of $20 per acre for each and every acre which they failed to set out and plant, and have standing in first-class alfalfa, in no wise limited the right of the plaintiff to sue for the actual damages resulting from the failure of the defendants to comply with the covenants of the lease to set out, and have standing, the alfalfa upon the premises according to the agreement. The question of $20 damages per acre may be admitted to be void, as claimed by the appellants, but this does not bar the plaintiff from proving or attempting to prove, or the introduction of testimony tending to prove, the actual damages suffered. While the testimony in the record is brief, it is to the effect that land in the district where the premises are situated, if covered by a first-class stand of alfalfa, is worth more than $20 per acre over and above land that does not carry such a stand of alfalfa.

[2] It is further shown in the record that the rental value of lands covered with a first-class stand of alfalfa is worth more than land not so covered, to an extent greater than $20 per acre, which, applied to the covenant of the lease entered into by the defendants to plant, set out, and have standing at least 40 acres of said premises, sustains an award of damages in the sum of $800. We do not need to quote the testimony as to the failure to establish a first-class stand of alfalfa, because it is practically all to the effect that the land is and was, at the time of the prosecution of this action, covered by foul weeds, sand burrs, and Bermuda grass, and that no stand of alfalfa whatever was established by the appellants.

Two elements enter into the determination of whether finding B, as to the damages to the barn and silo, caused by fire, can be sustained: First, as to whether the appellants are chargeable with negligence for their destruction; second, as to whether there is any proof of the value of the silo, and barn at the time of their destruction, and therefore whether there is any proof of the damages sustained by the plaintiff for their destruction.

[3] At the time of the fire, which occurred the latter part of May, 1928, the premises were in charge of an agent of the defendants named Silva, who, with his family, was residing upon the leased premises. According to his testimony dry grass, foxtails, weeds, and other rubbish had been allowed to grow up and around the silo and barn and over a small tract of the leased premises adjacent thereto; that at about 2 o'clock on the afternoon of the fire he went out and hoed about 10 feet of the grass and weeds adjacent to the silo, and thereafter set fire to the weeds and dry grass upon the tract to which we have referred; that he so set the fire as to burn away from the silo and barn, and so as to cause the fire to travel in a northerly direction from the silo and barn; that he had supplied himself with buckets and wet sacks for the purpose of protecting the silo and barn from fire, and also to protect the residence in which he and his family resided, from being burned. If the court were to accept the testimony of the witness Silva, and to disregard the circumstances surrounding the fire and the atmospheric conditions testified to by others, then and in that case a judgment for the defendants, upon the second count in the complaint, might readily be sustained on the theory that no negligence is shown by the record. However, there is testimony of other witnesses to the effect that the wind was blowing from the north, which would carry sparks to the silo and barn. There is also testimony in the record to the effect that very strong winds are to be anticipated every afternoon, and that the prevailing direction of the winds in the San Joaquin Valley where this fire occurred is from the north toward the south. The testimony also shows that no precautions had ever been taken to guard the silo and barn from fire by plowing around the same so as to kill or destroy or prevent the growth of noxious weeds adjacent thereto. The testimony is also entirely silent as to what Mr. Silva did to put out the fire after he discovered it in the silo, and also silent as to anything being done by his wife and children whom he stated were there ready to assist him. While the witness does state that he hoed a short space or area 10 feet in width on one side of the silo, it does not show that there was not sufficient rubbish left there to cause the fire to communicate with the silo. According to the testimony of the witness Silva the fire started in the silo at the base thereof. True, the witness testified that about 15 minutes of 5 in the afternoon a whirlwind came up and carried burning rubbish to the silo and caused the same to become ignited. On the other hand, there is testimony of other witnesses who arrived shortly after the fire started to the effect that dry grass, weeds, etc., were burning in close proximity to the silo, and that the fire entered the silo through a decayed hole therein. The burning silo communicated the fire to the barn and caused its destruction. Witnesses who were present said that the wind, blowing from the north at the time of the fire, carried shingles from the barn at least a quarter of a mile. All of these circumstances, taken in connection with the time of the year when the fire was started, sufficiently justified the trial court in coming to the conclusion that no reasonable precautions had been taken to prevent the burning of the silo and the barn prior to the time when Silva, the employee of the defendants, set fire to the dry grass, weeds, etc., adjacent thereto. From all of which we conclude that the charge of negligence and carelessness in the destruction of the silo and barn is sufficiently proven.

[4] The contention of the appellants that there is no testimony in the record to support the finding of the trial court as to the value of the silo and the barn at the time of their destruction appears to be well founded.

The reporter's transcript contains only the following testimony (so far as we have been able to discover it) relative to the value of the silo and barn: The witness E. H. Williams testified that he visited the premises either in January or February, 1928, preceding the month of May when the fire occurred; that the barn and silo were then in good condition. A witness by the name of Rebman testified as to the reasonable cost of constructing a silo in 1928, of the dimensions described to him corresponding with the dimensions of the burned silo, and stated that it would cost $700. This witness likewise testified that the cost of constructing a barn of the size and kind described to him would, in 1928, have been the reasonable sum of $1,600, and that the sum of $2,300 would be a reasonable sum to cover the costs of erecting a silo and barn of the dimensions described herein. It may be admitted, as contended by the respondent, that the barn and silo were in first-class condition in January, 1928, and it may be admitted that they were in such condition the latter part of May, 1928, there being no testimony one way or the other as to their condition. The facts are, however, that the barn was erected 15 years preceding its destruction, and also that the silo had been standing for about 11 years, and there is not a single scintilla of testimony in the record relative to the depreciation of the silo and barn during that period of time.

Even though it be admitted, as contended by the respondent, that the dryness of the atmosphere, in the locality where the barn and silo were situated, is such that depreciation is slow, we cannot shut our eyes to the fact that a barn that has been standing for

15 years, and apparently used during at least a considerable period of that time, has depreciated to a considerable extent, and the same must be true of a silo. There is not a word in the testimony indicating whether either of the structures had been protected from the weather by being kept painted or kept in repair, or any facts shown in relation thereto, save and except the opinion of one of the witnesses that they were in first-class condition.

The respondent has cited the cases of Sickles v. Mt. Whitney Power Co., 177 Cal. 278, 170 P. 599; Linforth v. San Francisco Gas Co., 156 Cal. 58, 103 P. 320, 322, 19 Ann. Cas. 1230; and Gosliner v. Briones, 187 Cal. 557, 204 P. 19, to the effect that the cost of reconstructing destroyed buildings may properly be admitted in evidence. But none of these cases support the contention that such proof is adequate to sustain a finding as to the amount of the damages, as the following excerpt from the case of Linforth v. Gas & Electric Co., supra, sufficiently shows: "Evidence of the original cost of the building was admitted. Under the circumstances it was proper so to do. This evidence of original cost, standing alone, would, of course, have slight or no weight in determining the award of damages." This was used in relation to the reconstruction and repairing of a damaged building. In this case, as in the other cases cited, such evidence is admissible, but, standing alone, is wholly insufficient.

In Cleland v. Thornton, 43 Cal. 437, an action prosecuted for damages caused to buildings by fire, evidence as to the cost of new buildings to replace those burned was admitted. The court held that the evidence was admissible, not as affording a criterion of damages, but merely as furnishing some data by which the court would be enabled to estimate approximately the value of the old building. The court said: "There was no error in the ruling of the Court admitting the evidence as to the cost of new buildings to replace those which were burned. The evidence was admissible as furnishing some data by which the Court would be enabled to estimate approximately the value of the old buildings; and it is evident from the opinion and order of the Court, that it was received and considered for this purpose only, and not as affording a criterion of damages."

Much confusion appears to have arisen by reason of the different views expressed by courts as to the proper method of ascertaining damages to property having no market value, and especially of buildings attached to the real estate. One method is that of ascertaining the value of the real estate before the destruction of the buildings, and the value of the real estate after their destruction. Other courts have sought to ascertain the value of the destroyed buildings separate and distinct from the real estate upon which they were erected. Some of the courts admit testimony as to cost of replacement; others, as to the original cost of the buildings.

In the case of Kennedy v. Treleaven, 103 Kan. 651, 175 P. 977, 978, 7 A. L. R. 274, these rules are considered, and in the annotations in this case may be found collected a large number of cases supporting the different methods adopted for ascertaining the value of destroyed buildings. In the case referred to the Supreme Court of Kansas thus expressed its views: "There being no malice nor intentional wrongdoing, compensation is the proper measure, and hence the defendant was liable for the reasonable value of the building burned at the time and place of its destruction. There is no universal test for determining the value of property injured or destroyed, and the mode and amount of proof must be adapted to the facts of each case." After speaking of the rule relative to the original cost of the destroyed buildings, the court approves the following: "One method of arriving at such loss is by estimating the cost of replacing the building, less any depreciation from use, age, or otherwise; and the other is by evidence of the value of the building at the time of its destruction, less the value, if any, of the ruins. * * * Evidence of the cost of a building, however, can hardly be said to be evidence of its value at a particular time."

The court likewise approves the rule laid down in 8 Ruling Case Law 485, which is substantially as follows: "To arrive at the damages sustained, where the building burned had no market value, resort may be had to any facts which fairly tend to show its actual value when it was destroyed, and a permissible method of proof is by showing the cost of replacing the building, less any depreciation from age, use, utility or condition." This case is also to the effect that, where a building has been standing for a great length of time, the original cost of the building is irrelevant. The majority rule, as shown by the annotations appended to the case of Kennedy v. Treleaven, supra, is to the effect that the cost of replacing the burned structure may be admitted, not as proof in and of itself as value, but may be considered in connection with testimony showing the age of the destroyed building, its depreciation, condition, use, etc., in determining the value of the destroyed building at the date of its destruction.

In the case of Jennings v. Oregon Land Co., 48 Or. 287, 86 P. 367, 368, we find the following relative to testimony concerning the value of a building destroyed by fire, to wit: "Testimony as to its cost was, therefore, proper, not as of itself proof of value, but to aid the jury to arrive at an accurate conclusion in the matter, and to enable them to test the worth of the opinion evidence on that subject"—citing a number of cases.

In the case at bar, as we have stated, there is no evidence whatever showing the extent of the depreciation of the destroyed buildings. There is, in fact, no evidence whatever as to their condition, except the expression of an opinion of one of the witnesses. There is no evidence whatever of the value of the buildings at the time of their destruction. The court in its findings fixed the value at $1,250. There is not a scintilla of evidence in the record indicating that the figure fixed by the court was the value of the buildings at the time of their destruction. For all that the record shows, the finding of the court is based upon the mere expression of opinion of one witness, that the reasonable cost of replacing the silo would be the sum of $700, and the reasonable cost of replacing the barn would be the sum of $1,600. The cases which we have cited, and the cases reported in the annotations found in 7 American Law Reports, beginning on page 277, are all to the effect that such testimony is insufficient to support a finding of the value of the destroyed building.

It follows from what we have said that the finding as to the damage suffered by the plaintiff by reason of the destruction of the silo and barn is not supported by the testimony, and that a retrial must be had as to this issue.

It is therefore ordered that, as to all other issues involved in this action, the judgment will be, and the same is hereby, affirmed, and that as to the one issue, to wit, the damage suffered by the plaintiff by reason of the destruction of the silo and barn, be, and the same is hereby, reversed, with directions to the trial court to proceed and determine the value of said buildings at the date of their destruction.

It is further ordered that neither party recover from the other costs of this appeal.

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112 Cal. App. 231

SHELLEY v. HART et al.

Civ. 4163.

District Court of Appeal, Third District,
California.
Feb. 26, 1931.

1. Sales 🔑88.

Whether conditions printed below buyer's signature and warranty on opposite side of page were part of automobile truck purchase contract *held* for jury.

2. Sales 🔑446(4).

Instructions *held* to fairly present question whether conditions printed below buyer's signature and warranty on opposite side of page were part of automobile truck purchase contract.

> The jury were instructed that it was for them to determine whether the portion of the printed document, from the beginning thereof extending down to and including the signature of the buyer, constituted the agreement and whether or not it contained all the terms and conditions entering into the agreement, and that if jury found that parties intended the entire instrument should constitute their agreement for the purchase of the automobile truck, then all of the terms and conditions constituted contract between the parties.

3. Evidence 🔑385.

Parol evidence may not ordinarily be received to contradict unambiguous written instrument.

4. Evidence 🔑413.

Parol evidence to identify document which is relied on as contract to bind parties is admissible.

5. Contracts 🔑147(1).

In construing contracts, mutual intention of parties must be ascertained, if possible.

6. Evidence 🔑413.

Parol evidence *held* admissible on question whether conditions below buyer's signature and warranty on opposite side of page were intended as part of automobile truck purchase contract.

7. Sales 🔑87(2).

Where issue existed whether conditions below buyer's signature and warranty on opposite side of page were parts of automobile truck purchase contract, conditions and warranty *held* admissible.

8. Evidence 🔑445(2).

Oral evidence of other conditions subsequently adopted which did not conflict with terms of automobile truck purchase contract which buyer actually signed *held* competent.

9. Evidence 🔑441(9).

Parol evidence of seller's guaranty regarding motortruck, if made subsequent to negotiations becoming part of written contract, *held* competent.

10. Sales 🔑445(2).

Whether seller made guaranty respecting motortruck subsequent to negotiations becoming part of written contract *held* for jury.

11. Sales ⚷48.

Buyer could not recover for breach of guaranty of seller that motortruck would haul material together with truck weighing approximately 21,000 pounds over state highway at 28 miles per hour, since measure of damages would be based on violation of statute (St. 1923, p. 555, § 118, as amended by St. 1927, p. 1439).

> California Vehicle Act (St. 1923, p. 555) § 118, as amended by St. 1927, p. 1439, provides that in addition to other regulations imposed by the act, it should be unlawful for the driver of any vehicle, the gross weight of which, including any load thereon, is 18,000 pounds or more, to drive the same on a public highway at a speed in excess of 20 miles per hour.

12. Costs ⚷32(5).

Where judgment for defendants on cross-complaint exceeded judgment for plaintiff, order taxing costs for plaintiff *held* erroneous (Code Civ. Proc. §§ 666, 1022, 1024).

Appeal from Superior Court, Sacramento County; John F. Pullen, Judge.

Action by Jerry Shelley against F. B. Hart and another. From judgment for plaintiff, and from an order taxing costs, defendants appeal.

Reversed.

Inman & West, of Sacramento, for appellants.

Fred J. Harris, of Sacramento, for respondent.

R. L. THOMPSON, J.

This is an appeal from a judgment for damages for the breach of a contract for the purchase of an automobile truck, and from an order taxing costs.

The plaintiff held a contract to deliver sixty tons of clay to the Lincoln pottery. He was engaged in hauling this material from a pit at White Rock, a distance of thirty-three miles by means of a Fageol truck. He desired a larger truck which could make greater speed. He purchased an International truck from the defendant for $7,600. He paid $2,500 on the purchase price at the time of the execution of the contract. He was also credited with the further sum of $2,600, the agreed value of a Mack truck which he traded to the defendant on the bargain. The balance of the purchase price was to be subsequently paid.

The chief controversy involves the question as to whether certain printed portions of a form of contract became part of the agreement to purchase the truck. The purchase was consummated at the defendant's place of business. The plaintiff was handed a copy of the usual form of contract. Most of the blank spaces on the upper half of the front page of this form were filled in by the defendant in typewriting. The spaces regarding the "rated capacity" and the "maximum capacity" of the machine were left blank. Below the typewriting, near the middle of the front page, a vacant line was left. Upon the lower half of this front page, below the blank line referred to, there were printed several paragraphs containing certain detailed conditions. At the bottom of the page there were blank lines for the signature of the purchaser and the acceptance of the seller. On the opposite side of this document there was a printed warranty. For convenient reference this document will be divided into paragraphs A, B, and C. This instrument appears in the following language:

[A]

"Order for International Harvester Motor Truck

"To F. B. Hart Town Sacramento State Calif.

"The undersigned of Roseville Post Office, County of Placer, State Calif., hereby orders of you, subject to all conditions and agreements herein contained, to be shipped on or about the 23 day of June 1928, to J. Shelley One Model 74C International Harvester Motor Truck

"Rated Capacity ——— Tons; Maximum Capacity ——— Lbs. excluding Body Weight

"Allowance of ——— Lbs.

"Tire Equipment (Size and Kind):

"Front 40x8 Firestone Pneumatic

"Rear 40x8 Dual Firestone Pneumatic

"Style of Cab ¾ Enclosed Cab

"Style of Body One 6 Yd. dump body

"Other Attachments Six wheel attachment with 40x8 Pneumatic for which I (we) agree to pay $7600.00 F.O.B. Sacramento as follows: $2500.00 on the signing of this order and the remainder of the purchase price to be paid as follows upon delivery or tender of said truck:

"Cash: $2600.00 To be allowed on Mack dump truck

"$1500.00 on delivery

"$1000.00 on thirty day note

"Jerry Shelley"

[B]

"In addition to paying the purchase price, the purchaser agrees to reimburse the seller for any amounts the seller has paid or may be required to pay on account of present or future U. S. excise taxes imposed upon any articles herein ordered or in connection with the purchase or sale thereof.

"In case of failure to make any payment when due the entire balance of the purchase price and all notes given therefor shall, at the election of the seller, become at once due and payable. It is agreed that title to the property herein ordered shall not pass to the purchaser until the full purchase price, and all notes given therefor have been paid in cash, but nothing herein shall release the purchaser from payment therefor, and after delivery to the purchaser said property shall be held and used at his risk and expense with respect to loss or damage and taxes and charges of every kind.

"Whenever the seller retains title or a lien or mortgage to secure deferred payments of the purchase price of a truck sold hereunder, the seller, unless otherwise agreed at the time, will take charge of insuring said truck against fire and theft for the benefit of all parties concerned for a period of one year from the date of delivery or until the maturity of the last deferred payment if maturing later than one year, the expense of said insurance to be covered by the time finance charge made against the purchaser for interest, handling and insurance.

"The purchaser agrees that the seller shall not be responsible for delay or failure to supply the goods ordered herein where prevented by act of God, strikes, fires, war conditions, Governmental action or other causes beyond his reasonable control, nor for damage or loss during transportation. In case the purchaser refuses to receive and pay for said property in full as above provided, the seller may retain as liquidated damages all moneys paid on account of said property, not exceeding, however, twenty-five per cent. of the purchase price.

"The motor truck herein ordered is sold under the Regular Printed Warranty given by the International Harvester Company of America as printed on the back hereof and no others. The purchaser agrees that this order contains the entire agreement relating to the sale of said motor truck and that he has received a true copy thereof.

"Note: If this order is addressed to the International Harvester Company of America, it is subject to the written acceptance of one of its Branch Managers. Purchaser's deposit to be returned if not accepted.

"Order dated this ——— day of ——— 192—.

"————, Purchaser.

"Accepted ——— at ———.

"————, Branch Manager.

"Order taken by ————."

"Warranty

[C]

"The International Harvester Company of America (Incorporated) warrants each new International Motor Truck to be free from defects in material and workmanship under normal use and service, its obligation under this guaranty being limited to making good at the factory any part or parts thereof, which shall within ninety (90) days after delivery of such truck to the original purchaser be returned to its Branch House or factory with transportation charges prepaid and which examination shall disclose to the Company's satisfaction to have been thus defective.

"This warranty shall not apply to any motor truck which shall have been operated at a speed exceeding the factory rated speed or loaded beyond the factory rated capacity as indicated on the plate attached to each truck, nor to any motor truck which shall have been repaired or altered outside of the Company's branch office or factory in any way so as, in said Company's judgment, to affect its stability or reliability, nor which has been subject to misuse, negligence or accident.

"The above warranties are in lieu of all other warranties express or implied and no person, agent or dealer is authorized to give any other warranties on the Company's behalf or to assume for it any other liability in connection with any motor truck.

"No warranties whatever are given in respect to tires, rims, electrical apparatus, horns, signaling devices, generators, batteries, speedometers, hubometers, or other trade accessories inasmuch as they are usually guaranteed separately by their respective manufacturers."

The plaintiff signed the foregoing instrument on the blank line beneath the typewritten portion near the middle of the front page. The printed conditions were all below his signature. The warranty was printed on the back of the form. The plaintiff testified that at the time he signed this document, he handed it back to the agent of the defendant, saying, "I am signing what is above my signature; I am not agreeing to anything below." It was stated by the plaintiff that it was agreed by the parties only that portion of the document which appears above his signature was to become the written contract, but that other conditions and guaranties were subsequently orally agreed upon. There is a conflict in the evidence regarding these matters.

The suit is based upon a claim for damages for breach of contract with respect to the subsequent oral agreement regarding the capacity, equipment, and ability of the truck to perform. The chief contention is that the truck was guaranteed to travel 28 miles an hour with a load consisting of six cubic yards of clay; whereas the plaintiff was able to drive it only nine miles an hour, and that he was thereby damaged in a substantial loss of profits.

The complaint alleges that the defendant orally represented that the truck had a capacity of six cubic yards of sand or gravel which it was capable of hauling from the pit to Lincoln at a speed of 28 miles an hour; that it would be equipped with six stock wheels with dual firestone pneumatic tires, together with one spare wheel interchangeable on all axles of the truck; that it would also be equipped with an automatic self-starting contrivance and an automatic airpump to be attached to the motor for the purpose of inflating the tires; that the defendant was familiar with the truck then in use by the plaintiff, and with the clay pit from which he was engaged in hauling materials together with the highway over which he was transporting the sand and clay, and assured the plaintiff that the new truck would haul as much material and make as good time as the Fageol truck then operated by the plaintiff. It was then alleged the foregoing representations were each false; that the truck would not haul a load of six cubic yards of sand or gravel from the pit, and when loaded to capacity would not attain a speed in excess of nine miles an hour; that the truck was not equipped with a self-starter or automatic pump, and that the spare wheel was not interchangeable on any of the axles of the machine.

All the material allegations of the complaint were controverted by the defendant. In a cross-complaint the defendant set up the document heretofore quoted as an exhibit and alleged the entire instrument constituted the sole contract of sale; that the only guaranty with respect to the truck, its equipment or ability to perform, are limited to the express provisions of the contract. The defendant then alleged the nonpayment of the balance of the purchase price of the truck in the sum of $2,500 and prayed for judgment for that amount. The cause was tried with a jury. A verdict for damages in the sum of $1,500 was rendered in favor of the plaintiff. A separate verdict for the sum of $2,500 was rendered in favor of the defendant on its cross-complaint, for the unpaid portion of the purchase price of the truck. On a motion to tax costs, the court found that the plaintiff was entitled to $224.20 costs, and the defendant was entitled to recover $64.80 costs. The defendant appealed from the judgment for damages which was rendered in favor of the plaintiff, and also from the order allowing plaintiff his costs of suit.

At the trial, over the objection of the appellant, the plaintiff was permitted to testify to the circumstances accompanying his signature of the purported contract of purchase, and that it was not the intention of the parties that paragraphs designated as "B" and "C" were to become a part of their written agreement. The plaintiff said that he told the defendant's agent: "I am signing what is above my signature; I am not agreeing to anything below." Thereafter the court refused to admit in evidence paragraphs B and C of said document. Over the objection of the appellant, to the effect that it tended to vary the terms of a written agreement, the plaintiff was permitted to testify to alleged terms and conditions of the sale in conflict with the provisions of paragraphs B and C of the foregoing document. Over the objection of the appellant the plaintiff was also permitted to testify to a measure of his alleged damages based upon his expectation of being able, under the defendant's guaranty, to haul from the pit three loads a day of not less than six cubic yards of material, the average net weight per load being in excess of 21,000 pounds.

The appellant contends that: (1) The court erred in permitting the plaintiff to testify that paragraph A of the foregoing document which appears above the signature of the plaintiff was the only portion of that written instrument which binds the parties; (2) the court erred in refusing to admit in evidence paragraphs B and C of the alleged contract; (3) the court erred in admitting evidence of alleged terms and conditions of the sale in conflict with the last two sections of the written agreement; and (4) the court erred in allowing plaintiff costs of suit.

[1, 2] We are of the opinion the court did not err in permitting the plaintiff to testify that he signed the first portion of the order of sale, herein designated as paragraph "A," with the intent and understanding that he was not to be bound by the printed portions of the document which followed his signature. The chief issue of the case was whether the printed paragraphs which we have designated "B" and "C" were intended to become a part of the written agreement for the purchase of the truck. Upon this subject there is a conflict of testimony. It became a question of the identity of the real contract. Under the circumstances of this case, the question as to what part of this document was intended by the parties to become their written agreement was one of fact to be determined by the jury. This question of fact must be decided from all the circumstances surrounding the execution of the document including the form, contents, and relative provisions of the entire instrument. The jury was clearly instructed, "It is exclusively for you to determine, as a question of fact, * * * whether that portion of the printed document, from the beginning thereof extending down to and including the signature of Jerry Shelley, * * * constituted a memorandum of the agreement between plaintiff and defendant F. B. Hart, * * * and whether or not it contained all of the terms and conditions entering into the agreement contemplated by said parties. * * *" The jury was further instructed that if they found that the parties, at the time of the signing of the document in question, intended that the entire instrument should constitute their agreement for the purchase of the truck, then "all of these terms and conditions made and constituted the contract between the parties." These instructions fairly presented to the jury the question as to whether the contracting parties intended to be bound only by the first portion of the written instrument which appears above the signature of the plaintiff, or by the entire document.

[3-6] It is a cardinal rule that parol evidence may not ordinarily be received to contradict or vary the unambiguous terms of a written instrument. Jones on Evidence (3d Ed.) p. 656, § 434. When a contract for the purchase of personal property is executed on a printed form, which contains certain specific conditions which are printed at the bottom of the instrument or upon the back thereof, to which no reference is made in the preceding contract, and which are readily severable therefrom and the signature of the purchaser appears above these printed portions, it may become a question of fact as to whether the contracting parties intended to adopt the separate printed conditions as a part of their contract. Under such circumstances extrinsic evidence is competent to determine just what portion of the document constitutes the real contract. Certainly it is proper to admit evidence to identify the document which is relied upon as a contract to bind the parties. It is a primary rule in the construction of contracts to ascertain and render effective, if possible, the mutual intention of the parties, so far as this may be done without violating legal principles. 13 C. J. 523, § 482. Since there was a clear issue of fact tendered by the pleadings in the present case as to what portions of the document the parties intended to include as their contract, we are of the opinion the court did not err in admitting oral evidence upon this subject.

[7] The court sustained an objection to the defendant's offer to introduce in evidence the remaining printed portions of the document following the signature of the plaintiff. Since there was an issue as to whether these portions of the instrument were component parts of the contract, and the jury was entitled to consider the language of paragraphs B and C in determining whether the context thereof had any application to or became a part of the preceding portion of the instrument, the entire document should have been admitted in evidence.

[8] The appellant contends that it was error to admit testimony regarding conditions of the alleged contract subsequently agreed upon which are in violation of the printed terms of the document, for the reason that such evidence tends to vary the terms of the contract. Assuming that the parties intended to deliberately exclude from their contract the printed terms and conditions thereof appearing in paragraphs B and C, oral evidence of other conditions subsequently adopted which are not in conflict with the terms of the instrument which the plaintiff did actually sign is competent. Moreover, the document which was signed by the plaintiff contains certain blank spaces regarding the rated and maximum capacity of the truck, which omissions it was competent to supply by oral evidence. On page 672 of Jones on Evidence (3d Ed.) § 441, it is said: "Where the contract is manifestly incomplete, or where an agreement wholly independent of and collateral to the written instrument is entered into, parol evidence is admissible."

On page 668 of the last cited authority, section 439, it is further said: "The general rule is not violated by allowing parol evidence to be given of the contents of a distinct, valid, contemporaneous agreement between the parties which was not reduced to writing, when the same is not in conflict with the provisions of the written agreement."

[9, 10] Assuming that the alleged guaranty of the defendant with respect to the equipment, capacity, and maximum speed of the truck were made subsequent to and distinct from the negotiations which became a part of the actual written contract, oral evidence thereof was competent. The questions as to whether these stipulations were or were not made at the same time, and whether they were made as a part of the transaction represented by the written agreement, were problems for the determination of the jury under the circumstances of this case.

[11] Evidence was adduced over the objection of the defendant to the effect that he guaranteed the truck would carry a load of six cubic yards of gravel or sand from the pit at White Rock to Lincoln, over the highway, at a rate of speed of twenty-eight miles an hour; that this load of material together with the truck weighed approximately 21,000 pounds; that the plaintiff was unable to operate the truck with this load at more than nine miles an hour; that the plaintiff held a contract to haul sixty tons of clay to the pottery; that he was paid $1.75 per ton for hauling the material; that relying on the representations of the defendant he planned to make three round trips per day which would enable him to earn $40 a day, but on account of the substantial decrease in the guaranteed rate of speed his income was materially diminished. The plaintiff testified:

"I expected to make three round trips a day and have six yards to the trip, for which I was paid $1.75 per ton, which would be about $40.00 per day; the distance one way from the pit to the pottery is about thirty-three miles.

"Q. If the International truck that you purchased had been able to pull a six-yard load of gravel, or clay, out of the pit at White Rock, and cover the distance between White Rock or the gravel pit, and the Lincoln pottery, at the rate of 28 miles per hour, how many loads could you have carried per day with that truck? A. Three."

It will be observed the measure of damages upon which the plaintiff relies, was his loss of income based upon his inability to haul three loads of material each day which, together with the truck, weighed approximately 21,000 pounds, over the state highway at a rate of 28 miles an hour. The plaintiff's profit therefore depended upon his violation of section 118 of the California Vehicle Act as it then existed (St. 1927, p. 1439). That section then provided:

"Speed limit for vehicles regulated according to weight and tire equipment.

"(a) In addition to any other regulations imposed by this act it shall be unlawful for the driver of any vehicle, or combination of vehicles, the gross weight of which, including any load thereon is eighteen thousand pounds or more, to drive the same upon a public highway at a speed in excess of twenty miles per hour."

This was clearly a measure of damages based upon a violation of the statute, and therefore incompetent. Objections to this line of evidence should have been sustained. In 17 C. J. p. 797, § 119, it is said: "Loss of profits may not be considered as an element of damages, where the business from which they would have resulted was, or would have been, conducted in violation of law."

It is impossible to determine what proportion of the verdict for damages is based upon this illegal estimated rate of speed. The evidence regarding this measure of damages was clearly erroneous, and requires a reversal of the judgment.

[12] Finally the appellant contends that it was error for the court to award the plaintiff his costs. It is asserted that since the defendant recovered judgment on its cross-complaint for an amount in excess of the damages recovered by the plaintiff, the defendant is entitled to its costs, and the court has no discretion to apportion the costs of suit. The plaintiff recovered judgment for damages for the sum of $1,500. Upon its cross-complaint, for a claim growing out of the same transaction, the defendant recovered judgment for $2,500. In effect, this amounts to a judgment in favor of the defendant for the net sum of $1,000. Judgment should have been entered for this net sum in favor of the defendant. Section 666, Code Civ. Proc.; Poswa v. Jones, 21 Cal. App. 664, 132 P. 629. Since this is not an equitable action, the court had no discretion to apportion costs. The net result of the judgment being favorable to the defendant, it is entitled to an award of its costs of suit. The order taxing costs in favor of the plaintiff was therefore erroneous.

Section 1024 of the Code of Civil Procedure provides: "Costs must be allowed of course to the defendant upon a judgment in his favor in the actions mentioned in section one thousand twenty-two. * * *"

This includes actions "for the recovery of money." Section 666 of the Code of Civil Procedure provides that: "If a counterclaim, established at the trial, exceed the plaintiff's demand, judgment for the defendant must be given for the excess. * * *"

The costs follow the judgment in this case as a matter of course.

The judgment and the order taxing costs are reversed.

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112 Cal. App. 525

GARRISON et al. v. HOGAN et al.

Civ. 7734.

District Court of Appeal, First District,
Division 2, California.

March 13, 1931.

1. Appeal and error 🔑836.

Reviewing court may at all times direct inquiry toward any showing from record impugning good faith of proceeding.

2. Mines and minerals 🔑78(7).

Complaint to set aside oil lease alleging plaintiffs' ownership of land at all times mentioned and defendants' present claim sufficiently alleged present ownership against general demurrer.

3. Pleading 🔑34(7).

Every permissible construction will be indulged to support judgment against attack on pleadings first made on appeal.

4. Mines and minerals 🔑78(7).

Complaint to set aside oil lease against defendant named and unknown defendants, alleging claims of all defendants were without right, sufficiently alleged named defendant's claim was without right.

Complaint to set aside oil lease in one paragraph set forth list of fictitious defendants whose names were unknown, and in such paragraph alleged that defendants had no right, title, or interest whatever in lands or any part thereof. Complaint further specifically alleged claim of named defendant, and facts thus pleaded showed nature of defendant's claim and that same was without right.

5. Mines and minerals 🔑78(7).

Complaint to set aside oil lease for breach by lessee *held* not insufficient for failure to allege lease contained forfeiture clause.

6. Mines and minerals ⇨78(7).

Complaint to set aside oil lease for breach of provision requiring drilling *held* sufficient to support judgment of forfeiture.

> Complaint alleged that owners of property leased premises to defendants under lease requiring lessee to start drilling for oil with adequate equipment within fifteen days from time lessee was furnished with policy and to continue drilling; that lessee was furnished with required policy, but failed to start drilling; that such refusal continued for period in excess of time requirements of lease; and that demand for surrender of premises and notification of forfeiture was given.

7. Appeal and error ⇨991, 1008(1).

Whether policy given lessee of oil lands was sufficient was question of fact determined by findings in action to set aside lease.

> Defendant in action to set aside oil lease relied in answer on plaintiffs' ownership and her rights thereunder as lessee, but claimed that policy of insurance issued to her pursuant to requirements of lease was insufficient and not as contemplated by lease. Complaint recited receipt of policy by lessee, which receipt stated that policy was in complete satisfaction of demands of lease.

8. Mines and minerals ⇨78(7).

Plaintiffs separately owning adjoining tracts, but leasing same under single instrument for oil development, were properly joined as plaintiffs in suit to set aside lease (Code Civ. Proc. § 378).

Appeal from Superior Court, Los Angeles County; Percy Hight, Judge.

Action by W. F. Garrison and others against Felicia M. Hogan and others. Judgment for plaintiffs, and defendant named appeals.

Affirmed.

S. C. Schaefer and Cooper & Collings, all of Los Angeles, for appellant.

Harry L. Cohn, of Long Beach, for respondents W. F. Pier and Agnes Pier.

Fred E. Helwig, of Long Beach, for respondents W. F. Garrison and Ellen I. Garrison.

PARKER, Justice pro tem.

The present appeal comes before us on the judgment roll alone. The only questions presented go to the sufficiency of the complaint and the sufficiency of the findings made, following, as the findings do, the facts alleged in the said complaint. It is to be noted that the briefs of counsel filed herein indicate a desire to argue everything except the points in issue. Although much of the argument is directed toward matters not before us for determination, nevertheless the persistency of the claims advanced does serve to accentuate a condition which might be inferred from the record properly before us.

[1] Plaintiffs were the owners of certain lands in this state. These lands appeared to be chiefly valuable on account of the oil deposits thought to be contained therein. A lease of the lands was made to the defendants with the object of exploration and development. The defendants seemingly violated the terms of the lease and thwarted the objects thereof. Other developments were made adjacent to the lands in question which as a matter of common knowledge impaired or would impair the value of these lands in the event of continued inactivity. Plaintiffs then commenced this action, the main purpose of which was to remove the defendant's claim. A process server called at the house of the defendant, Felicia Hogan, and made service of the complaint and summons upon a person then and there claiming to be the defendant. No appearance being made, plaintiff caused to be entered the default of the said defendant, now appellant, and proceeded to judgment. Thereafter said defendant made a sufficient showing to the effect that the person actually served was another person and procured an order setting aside the default. Upon the entry of such order defendant filed her answer herein, and thereafter the matter was set down for trial. When the case was called defendant moved for a continuance upon various grounds, the motion being based upon affidavits. Plaintiffs offered counteraffidavits, and the continuance was denied. Thereupon counsel for defendant withdrew from the case declaring his unwillingness to proceed further, and the court proceeded to hear the proof offered by plaintiffs and after consideration thereof the judgment complained of was entered. Much of the foregoing appears from the record before us, though not strictly speaking a part of the judgment roll. Yet counsel have been assiduous and untiring in their efforts to get this situation before the court; therefore it is meet that they should know their efforts were not unavailing. And, further explanatory, counsel for each party has been equally persistent, though from different motives. Plaintiffs desire this phase of the case known in order to support their claim here that the appeal is purely for delay; defendant, upon the same showing, urges her claim for justice in that she has never had a hearing on the merits. It might be noted that no complaint is made of the action of the trial court in denying the motion for a continuance; that is to say, the action of the trial court in that

behalf is not brought before us for review. While, as indicated, the foregoing recital may be deemed to an extent remote from the questions presented through the judgment roll, yet the inquiry of a reviewing court may at all times be directed toward any showing made from the entire record which may impugn the good faith of the proceeding. And further, from their record as a whole, may be disclosed the gravamen of the injury claimed by the errors complained of. We may now consider the pleadings and the findings thereon.

Plaintiffs in their complaint allege: That at all of the times therein mentioned they were the owners of the property described. That on January 26, 1926, the plaintiffs made, executed, and delivered to defendant Felicia M. Hogan (appellant herein) a lease to the said property. That the lease contained a provision that the lessee was to start the drilling for oil on the demised premises by spudding in with adequate equipment within fifteen days from the time she was furnished with a policy written by the Title Insurance & Trust Company and to continue the drilling of such well, etc. That on July 19, 1926, the plaintiffs furnished the policy required, insuring the lessee as to her rights to operate under the lease and the said defendant by written receipt acknowledged the said policy as being in conformity with the terms of the lease. That the defendant has failed, refused, and neglected to start drilling or any work on the property, and that such refusal has been and is for a period in excess of the time requirements of the lease; that in this connection demand has been made for a surrender of the premises and a notification of forfeiture. That the said defendant notwithstanding claims an interest in the property adverse to plaintiffs. Plaintiffs then set forth a number of John Does and Doe partnerships, and plaintiffs pray that the lease be canceled; that defendant be required to appear and set forth her claims; and that the court declare said claims invalid and enjoin a further assertion thereof. Defendant Felicia M. Hogan appeared and answered. In her answer she admits her failure to commence or begin drilling, and alleges that other persons are in possession of the property, and that the bond or policy given her was not in compliance with the requirements of the lease. She asserts her claim of interest in and to the property and asserts the same to be adverse to the rights of plaintiffs. Appellant attacks the sufficiency of the complaint on numerous grounds, each of which may be taken up as urged.

[2, 3] First, it is claimed no cause of action is stated for the reason that there is no allegation that plaintiffs were the owners of the property at the time of filing the complaint, the allegation being that "at all of the times herein mentioned" plaintiffs were the owners, etc. However, the complaint, in a succeeding paragraph, sets forth that defendants now claim an interest adverse to the rights of plaintiffs. The allegation that plaintiffs were at all of the times mentioned in the complaint the owners of the property, coupled with the allegations of defendant's present claim and her present and continuing failure of performance under the terms of the lease, and that such present claim and continuing failure are adverse to the rights of plaintiffs, taken as a whole, sufficiently allege a present ownership as against a general demurrer. And particularly is this true where, after trial had, judgment has been entered. The theory being that in such a case every permissible and logically possible construction will be indulged to support the judgment as against an attack made here for the first time.

[4] Next appellant urges that there is no allegation that defendant's claims are without right. The complaint in one paragraph sets forth a list of fictitious defendants whose names are unknown, with the usual prayer for permission to insert the true names when ascertained. Continuing along in said paragraph is the allegation "that the said defendants and neither of them, have any estate, right, title or interest whatever in or to said lands or premises or any part thereof." Appellant contends, in this connection, that the allegation is restricted to the fictitious defendants, and that by no stretch of construction can it supply the lack of averment concerning the quality of defendant's claim. The complaint, however, specifically pleads the claim of defendant, and the facts thus pleaded show the nature of defendant's claim and that the same is without right. The claim of appellant, when analyzed, is that the pleader should have more skilfully paragraphed the complaint so that the general allegation, rather than appearing as a distinct sentence in the paragraph which included the Doe defendants, should have been the subject of an independent paragraph. In the caption of the complaint the appellant is named as a defendant and in every allegation of the complaint, save the one referred to, she is likewise so named. We find no merit in the contention. Morton v. Shannon, 26 Cal. App. 689, 147 P. 1179; also 21 Cal. Jur. 58, and cases thereunder cited. We can and do hold that the complaint on this issue practically alleged that the defendant appellant claimed some interest in the lands, and that a number of defendants whose names were unknown also made similar claim or separate claim, and that the claims of all of the defendants were without right. And further plaintiff pleaded specifically the facts upon which it alleged the claim of defendant rested and if those allegations were true, as they are presumed to be, it showed affirmatively the wrongfulness of defendant's claim.

[5, 6] Another contention of the appellant is that the complaint does not allege that the lease contained a forfeiture clause, and, in the absence of such a clause, plaintiffs are entitled to no relief. The subject is fully discussed in the case of Hall v. Augur, 82 Cal. App. 594, 256 P. 232. The settled law of this and other jurisdictions is therein announced and a reading of the case with the authorities therein cited will disclose the utter lack of merit in this contention of the appellant. See, also, the following: 1 Thornton on Oil & Gas, pages 155, 398; Indiana Oil, Gas & D. Co. v. McCrory, 42 Okl. 136, 140 P. 610, and Patsy Oil & Gas Co. v. Baker, 127 Okl. 76, 259 P. 864. And whether or not the lease itself contained any specific provision for forfeiture, sufficient facts are alleged which would support a judgment of forfeiture.

[7] And so on throughout, each ground of appeal goes to some claimed defect in the complaint urged from a restricted viewpoint and upon an isolated fragment of the pleading. We have examined all of these grounds of complaint and find nothing of sufficient merit to warrant a disturbance of the judgment. It must be remembered that defendant appellant answered, and in that answer relied upon the ownership of plaintiffs and her rights thereunder as a lessee. Her only claim of right was that the policy of insurance issued to her, pursuant to the requirements of the lease, was insufficient and not such as contemplated by the lease itself. This was her only defense, and the complaint recited her own receipt and the recitals therein to the effect that said policy was in complete satisfaction of the demands of the lease. Obviously, under the pleadings, issue being joined, this question became one of fact determined by the findings which were against the contention of the defendant.

[8] Finally, appellant complains that plaintiffs are not united in interest, as it is alleged that the plaintiffs own individually two separate parcels of land, that is, one plaintiff owns one parcel and the coplaintiff is the sole owner of the second parcel. The lease is a single instrument reciting the several ownerships in the two separate parcels. There appears enough in the complaint to clearly indicate that, while the plaintiffs Garrison each owned a separate lot, the two constituting the premises leased, yet the intention was to treat the lots as one parcel, and the very terms and intent of the lease was that the conditions named therein were for the equal benefit of each parcel. No point in or on either parcel was designated for the commencement of operations, and, the lots being adjoining, it is obvious that with the underlying motive of the transaction being oil development the exploration on one tract would inure equally to the benefit of the other. And, under the terms of the lease, could defendant have shown that she had commenced operations on one lot she would have shown a complete compliance with the terms of the lease and thereby would have held the other lot subject to the terms thereof. Section 378 of the Code of Civil Procedure provides: "All persons may be joined in one action as plaintiffs who have an interest in the subject of the action or in whom any right to relief in respect to or arising out of the same transaction or series of transactions is alleged to exist, whether jointly, severally or in the alternative, where if such persons brought separate actions any question of law or fact would arise which are common to all the parties. * * *" The instant case comes clearly within the terms of that section.

Passing from the complaint to the findings, we are met with the same contentions. What has been said completely covers the objections urged as against the sufficiency of the findings to sustain the judgment. We therefore conclude that the appeal is completely lacking in merit and to an extent that the proceeding in this court might well be classed as frivolous and vexatious. No claim of defect in pleading was urged in the court below, and, when the cause was there called for trial, counsel for appellant, when and where full opportunity afforded itself to urge these identical matters as are urged here, abandoned the case and refused to proceed at all. Early in our jurisprudence the rule was announced that the failure of a complaint to state any cause of action could be urged at every stage of the proceeding. That such a point could be urged for the first time on appeal, and, if sustained, would overthrow all that preceded. It was found, however, that such a rule, in its most strict interpretation, would afford means of working severe injustice. And so, while not abrogated, it has been somewhat relaxed. California Jurisprudence, volume 2, at page 257, sets forth the attitude of the courts as follows: "The courts are not inclined to look favorably upon objections to the pleadings specifically made for the first time upon appeal, where upon suggestion before trial, the defect could have been easily overcome. And they will in aid of the judgment, therefore, give the complaint as favorable an interpretation as its general scope will permit." An interesting case, illustrative of this inclination of the courts, is Penrose v. Winter, 135 Cal. 289, 67 P. 772. In the instant case no demurrer was interposed and issue was joined only after the opening of a default which had been entered with the apparent knowledge of defendant, and that throughout the entire controversy it was appellant's desire and aim to obstruct rather than facilitate a disposition of the issues presented.

The judgment is affirmed.

We concur: SPENCE, Acting P. J.; STURTEVANT, J.

112 Cal. App. 285

MELVIN v. REID et al.

Civ. 346.

District Court of Appeal, Fourth District, California.

Feb. 28, 1931.

Rehearing Denied March 25, 1931. Hearing Denied by Supreme Court April 27, 1931.

1. Torts 🔑8.

Use in moving picture of incidents from woman's life, appearing in records of her trial for murder, *held* not actionable as violation of right of privacy.

2. Constitutional law 🔑86.

Constitutional right to pursue and obtain happiness includes right to freedom from unnecessary attacks on one's character, social standing, or reputation (Const. art. 1, § 1).

3. Pleading 🔑214(1).

On demurrer, allegations of complaint must be taken as true.

4. Constitutional law 🔑86.

Publication in moving picture of incidents in past life of reformed prostitute, with her true name, *held* actionable as invasion of her constitutional right to pursue and obtain happiness (Const. art. 1, § 1).

5. Literary property 🔑2.

There is no property right in one's life story, and cause of action for publication of incidents therein rests on tort alone.

Appeal from Superior Court, Los Angeles County; Clair S. Tappaan, Judge.

Action by Gabrielle Darley Melvin against Dorothy Davenport Reid and others. Judgment for defendants, and plaintiff appeals.

Reversed, with instructions.

M. W. Purcell, Ben F. Griffith, and Hugh W. Darling, all of Los Angeles, for appellant.

Walter E. Burke, of Los Angeles, for respondents.

MARKS, J.

Appellant filed her complaint in the court below seeking judgment against defendants for money. The complaint contains four causes of action separately stated. The first is based upon the violation of what has become known as the "right of privacy." The other three causes of action are based upon a supposed property right in incidents of her life and her maiden name. Respondents filed general and special demurrers to each count of the complaint which were sustained. Appellant refused to amend, and appealed from the judgment entered after the right to amend had expired. Respondents make no point on their special demurrers, and the sole question to be decided upon this appeal is whether or not causes of action are stated.

It is alleged that appellant's maiden name was Gabrielle Darley; that a number of years ago she was a prostitute and was tried for murder, the trial resulting in her acquittal; that during the year 1918, and after her acquittal, she abandoned her life of shame and became entirely rehabilitated; that during the year 1919 she married Bernard Melvin and commenced the duties of caring for their home, and thereafter at all times lived an exemplary, virtuous, honorable, and righteous life; that she assumed a place in respectable society, and made many friends who were not aware of the incidents of her earlier life; that during the month of July, 1925, the defendants, without her permission, knowledge, or consent, made, photographed, produced, and released a moving picture film entitled "The Red Kimono," and thereafter exhibited it in moving picture houses in California, Arizona, and throughout many other states; that this moving picture was based upon the true story of the past life of appellant, and that her maiden name, Gabrielle Darley, was used therein; that defendants featured and advertised that the plot of the film was the true story of the unsavory incidents in the life of appellant; that Gabrielle Darley was the true name of the principal character; and that Gabrielle Darley was appellant; that by the production and showing of the picture, friends of appellant learned for the first time of the unsavory incidents of her early life. This caused them to scorn and abandon her, and exposed her to obloquy, contempt, and ridicule, causing her grievous mental and physical suffering to her damage in the sum of $50,000. These allegations were set forth in the first cause of action. It will not be necessary to detail the other three causes of action which are based upon an invasion of a supposed property right.

The law of privacy is of recent origin. It was first discussed in an essay published in a law journal in 1860. It did not gain prominence or notice of the bench or bar until an article appeared in 4 Harvard Law Review, p. 193, written by the Honorable Louis D. Brandeis in collaboration with Samuel D. Warren. Since the publication of this article, a number of cases have arisen in various states involving the so-called doctrine of the right of privacy. It is recognized in some jurisdictions, while others have refused to put it into effect.

A reading of most of the decisions in jurisdictions recognizing this right leaves the mind impressed with the lack of uniformity in the reasoning employed by the various jurists supporting it. Most of the cases turn upon questions of breaches of contracts, either express or implied, such as the breach of an implied contract on the part of a photographer to print only such pictures as may be ordered by his subject, and not to print others and use them for purposes of advertising. Others are based upon the breach of a trust or confidence which one placed in or gave to another. Others recognize a property right in private letters and private writings which will not permit their publication without consent. In others, the publication is so nearly akin to a libel that the final conclusions could be supported under the law of libel without invoking the doctrine of the right of privacy. In practically all jurisdictions in which this right is not recognized, the decisions are based upon the lack of a statute giving the plaintiff the right to protect a likeness or an incident of life, since the ancient common law did not recognize any such right. In the leading case of Roberson v. Rochester Folding-Box Co., 171 N. Y. 538, 64 N. E. 442, 59 L. R. A. 478, 89 Am. St. Rep. 828, the decision was based upon the lack of any statutory enactment giving a cause of action to protect such a right and the failure of the common law to recognize it. Shortly after this decision was handed down the Legislature of New York enacted a law prohibiting the publication of a person's likeness, or the story of, or incidents in, his life, without his consent, for purposes of advertisement or gain. Since 1903, when this legislation was enacted, practically all of the New York cases are based upon it, and are therefore of little assistance to us here.

The question is a new one in California. The only case to which we have been cited which even remotely relates to it is that of Crane v. Heine, 35 Cal. App. 466, 170 P. 433. This case, however, furnishes us with no authority for adopting in this state the doctrine of the right of privacy as it is known in other jurisdictions.

No good purpose could be gained by reviewing in detail the many decisions from other jurisdictions in which this right has been discussed. For those who may be studiously inclined and who desire to pursue this question further we cite the following cases from courts which have both adopted, and refused to accept, the doctrine of the right of privacy: Monson v. Tussaud, [1894] I. Q. B. 671; Prince Albert v. Strange, 1 Macu. & G. 25; Dockrell v. Dougall, 80 L. T. (N. S.) 556; Clark v. Freeman, 11 Beav. 112; Pollard v. Photographic Co., L. R. 40 Ch. D. 345; Corelli v. Wall, 22 Times L. R. 532; De May v. Roberts, 46 Mich. 160, 9 N. W. 146, 41 Am. Rep. 154; Pavesich v. New England, etc., Co., 122 Ga. 190, 50 S. E. 68, 69 L. R. A. 101, 106 Am. St. Rep. 104, 2 Ann. Cas. 561; Schultz v. Frankfort, etc., Co., 151 Wis. 537, 139 N. W. 386, 43 L. R. A. (N. S.) 520; Schulman v. Whitaker, 117 La. Ann. 704, 42 So. 227, 7 L. R. A. (N. S.) 274, 8 Ann. Cas. 1174; Mabry v. Kettering, 89 Ark. 551, 117 S. W. 746, 16 Ann. Cas. 1123; Klug v. Sheriffs, 129 Wis. 468, 109 N. W. 656, 7 L. R. A. (N. S.) 362, 116 Am. St. Rep. 967, 9 Ann. Cas. 1013; Foster-Milburn Co. v. Chinn, 134 Ky. 424, 120 S. W. 364, 34 L. R. A. (N. S.) 1137, 135 Am. St. Rep. 417; Douglas v. Stokes, 149 Ky. 506, 149 S. W. 849, 42 L. R. A. (N. S.) 386, Ann. Cas. 1914B, 374; Edison v. Edison Polyform Co., 73 N. J. Eq. 137, 67 A. 392; Moore v. Rugg, 44 Minn. 28, 46 N. W. 141, 9 L. R. A. 58, 20 Am. St. Rep. 539; Marks v. Jaffa, 6 Misc. Rep. 290, 26 N. Y. S. 908; Murray v. Gast, etc., Co., 8 Misc. Rep. 36, 28 N. Y. S. 271; Munden v. Harris, 153 Mo. App. 652, 134 S. W. 1076; Kunz v. Allen, 102 Kan. 883, 172 P. 532, L. R. A. 1918D, 1151; Brex v. Smith (N. J. Ch.) 146 A. 34; Jones v. Herald Post Co., 230 Ky. 227, 18 S.W.(2d) 972, 973; Brents v. Morgan, 221 Ky. 765, 299 S. W. 967, 55 A. L. R. 964; Byfield v. Candler, 33 Ga. App. 275, 125 S. E. 905; Roberson v. Rochester Folding-Box Co., supra; Rhodes v. Sperry & Hutchinson Co., 193 N. Y. 223, 85 N. E. 1097, 34 L. R. A. (N. S.) 1143, 127 Am. St. Rep. 945; Henry v. Cherry & Webb, 30 R. I. 13, 73 A. 97, 24 L. R. A. (N. S.) 991, 136 Am. St. Rep. 928, 18 Ann. Cas. 1006; Corliss v. E. W. Walker Co. (C. C.) 57 F. 434, 31 L. R. A. 283; Id. (C. C.) 64 F. 280, 31 L. R. A. 283; Atkinson v. John E. Doherty & Co., 121 Mich. 372, 80 N. W. 285, 46 L. R. A. 219, 80 Am. St. Rep. 507; Hillman v. Star Publishing Co., 64 Wash. 691, 117 P. 594, 35 L. R. A. (N. S.) 595; Schuyler v. Curtis, 64 Hun, 594, 19 N. Y. S. 264; Id. (Sup.) 24 N. Y. S. 509; Id., 147 N. Y. 434, 42 N. E. 22, 31 L. R. A. 286, 49 Am. St. Rep. 671; Humiston v. Universal Film Co., 189 App. Div. 467, 178 N. Y. S. 752; Binns v. Vitagraph Co., 210 N. Y. 51, 103 N. E. 1108, L. R. A. 1915C, 839, Ann. Cas. 1915B, 1024.

The right of privacy as recognized in a number of states has been defined as follows: "The right of privacy may be defined as the right to live one's life in seclusion, without being subjected to unwarranted and undesired publicity. In short, it is the right to be let alone. 21 R. C. L. 1197, 1198. There are times, however, when one, whether willingly or not, becomes an actor in an occurrence of public or general interest. When this takes place, he emerges from his seclusion, and it is not an invasion of his right of privacy to publish his photograph with an account of such occurrence." Jones v. Herald Post Co., supra.

A few general principles, founded on authority or reason, seem to run through most of the better considered decisions from the jurisdictions which recognize the doctrine as well as those which do not. We may summarize them as follows:

(1) The right of privacy was unknown to the ancient common law.

(2) It is an incident of the person and not of property—a tort for which a right of recovery is given in some jurisdictions.

(3) It is a purely personal action, and does not survive, but dies with the person.

(4) It does not exist where the person has published the matter complained of, or consented thereto.

(5) It does not exist where a person has become so prominent that by his very prominence he has dedicated his life to the public, and thereby waived his right to privacy. There can be no privacy in that which is already public.

(6) It does not exist in the dissemination of news and news events, nor in the discussion of events of the life of a person in whom the public has a rightful interest, nor where the information would be of public benefit, as in the case of a candidate for public office.

(7) The right of privacy can only be violated by printings, writings, pictures, or other permanent publications or reproductions, and not by word of mouth.

(8) The right of action accrues when the publication is made for gain or profit. (This, however, is questioned in some cases.)

[1] From the foregoing it follows as a natural consequence that the use of the incidents from the life of appellant in the moving picture is in itself not actionable. These incidents appeared in the records of her trial for murder, which is a public record, open to the perusal of all. The very fact that they were contained in a public record is sufficient to negative the idea that their publication was a violation of a right of privacy. When the incidents of a life are so public as to be spread upon a public record, they come within the knowledge and into the possession of the public and cease to be private. Had respondents, in the story of "The Red Kimono," stopped with the use of those incidents from the life of appellant which were spread upon the record of her trial, no right of action would have accrued. They went further, and in the formation of the plot used the true maiden name of appellant. If any right of action exists, it arises from the use of this true name in connection with the true incidents from her life together with their advertisements in which they stated that the story of the picture was taken from true incidents in the life of Gabrielle Darley, who was Gabrielle Darley Melvin.

[2] In the absence of any provision of law, we would be loath to conclude that the right of privacy as the foundation for an action in tort, in the form known and recognized in other jurisdictions, exists in California. We find, however, that the fundamental law of our state contains provisions which, we believe, permit us to recognize the right to pursue and obtain safety and happiness without improper infringements thereon by others.

Section 1 of article 1 of the Constitution of California provides as follows: "All men are by nature free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing, and protecting property; and pursuing and obtaining safety and happiness."

The right to pursue and obtain happiness is guaranteed to all by the fundamental law of our state. This right by its very nature includes the right to live free from the unwarranted attack of others upon one's liberty, property, and reputation. Any person living a life of rectitude has that right to happiness which includes a freedom from unnecessary attacks on his character, social standing, or reputation.

The use of appellant's true name in connection with the incidents of her former life in the plot and advertisements was unnecessary and indelicate, and a willful and wanton disregard of that charity which should actuate us in our social intercourse, and which should keep us from unnecessarily holding another up to the scorn and contempt of upright members of society.

[3] Upon demurrer, the allegations of the complaint must be taken as true. We must therefore conclude that eight years before the production of "The Red Kimono" appellant had abandoned her life of shame, had rehabilitated herself, and had taken her place as a respected and honored member of society. This change having occurred in her life, she should have been permitted to continue its course without having her reputation and social standing destroyed by the publication of the story of her former depravity with no other excuse than the expectation of private gain by the publishers.

One of the major objectives of society as it is now constituted, and of the administration of our penal system, is the rehabilitation of the fallen and the reformation of the criminal. Under these theories of sociology, it is our object to lift up and sustain the unfortunate rather than tear him down. Where a person has by his own efforts rehabilitated himself, we, as right-thinking members of society, should permit him to continue in the path of rectitude rather than throw him back into a life of shame or crime. Even the thief on the cross was permitted to repent during the hours of his final agony.

[4] We believe that the publication by respondents of the unsavory incidents in the past life of appellant after she had reformed, coupled with her true name, was not justified by any standard of morals or ethics known to us, and was a direct invasion of her inalienable right guaranteed to her by our Constitution, to pursue and obtain happiness. Whether we call this a right of privacy or give it any other name is immaterial, because

it is a right guaranteed by our Constitution that must not be ruthlessly and needlessly invaded by others. We are of the opinion that the first cause of action of appellant's complaint states facts sufficient to constitute a cause of action against respondents.

[5] As we have observed, the other causes of action of the complaint are based upon a supposed property right in her name and in the incidents of her life. We have found no authorities sustaining such a property right in the story of one's life. Appellant's cause of action must rest on tort and tort alone. The general demurrer was properly sustained to the second, third, and fourth causes of action.

The judgment is reversed, with instructions to the trial court to overrule respondents' demurrers to the first cause of action of the complaint and permit them to answer should they be so advised.

We concur: BARNARD, P. J.; JENNINGS, J.

112 Cal. App. 557

HUNT v. BLANCHARD et al.

Civ. 7676.

District Court of Appeal, First District, Division 1, California.

March 16, 1931.

Appeal and error ⚷544(3).

On appeal on judgment roll, only question for consideration is sufficiency of findings to support judgment.

Such an appeal does not permit consideration of alleged errors in the admission of evidence, of alleged insufficiency of evidence to support findings, or of alleged omission to make findings.

Appeal from Superior Court, Los Angeles County; F. M. Jamison, Judge.

Action to quiet title by Emma Hunt against Josephine Blanchard and others. Judgment for plaintiff, and named defendant and others appeal.

Affirmed.

Sidney A. Shoop, of Los Angeles, for appellants.

Collamer A. Bridge, of Los Angeles, for respondent.

GRAY, Justice pro tem.

This appeal from a judgment quieting title, being based upon the judgment roll alone, does not permit consideration of alleged errors in the admission of evidence, of alleged insufficiency of the evidence to support the findings, or of the alleged omission to make findings, but confines consideration to the single question as to sufficiency of the findings to support the judgment. 2 Cal. Jur. 690. Our examination of the judgment roll satisfies us that the findings are decisive of the issues presented by the pleadings and amply support the judgment.

The judgment is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

112 Cal. App. 416

WILKINSON v. ZUMWALT.

Civ. 4187.

District Court of Appeal, Third District. California.

March 9, 1931.

1. **Attorney and client** ⚷72.

Administrator's letter to attorney, merely accepting prospective buyer's offer for intestate's negotiable reclamation district warrants, was no authority for district's secretary to deliver warrants to attorney.

Evidence disclosed that administrator had never placed any funds of estate in hands of attorney or authorized him to collect any moneys of estate; that there was nothing to show that attorney was either actual or ostensible agent of administrator; that reclamation district's secretary, merely on basis of letter in question, delivered warrants to attorney who thereupon transferred them to buyer without indorsement, notwithstanding they were made payable to order of intestate; and that buyer made check for warrants payable directly to attorney at his request.

2. **Attorney and client** ⚷72.

Evidence supported finding that administrator's attorney was unauthorized to obtain intestate's negotiable reclamation district warrants and sell them, making buyer liable therefor to administrator (Code Civ. Proc. §§ 283, 1517, 1523; Civ. Code, §§ 3082, 3111).

It appeared that buyer, when attorney delivered warrants in question to him, noticed they were payable to order of intestate, but he took the warrants without any indorsement, and made check payable to attorney at the attorney's request. Code Civ. Proc. § 283 specifies authority of attorney, and sections 1517, 1523 relate to sales of personal property by administrators. Civ. Code, § 3082, defines negotiable instruments, and section 3111 provides that negotiable instrument payable to order is negotiated by holder's indorsement.

3. Trial 🔑395(9).

Parts of finding which do not affect legal rights of parties may be disregarded as surplusage.

4. Executors and administrators 🔑432.

That administrator might be liable to heirs for intestate's warrants unauthorizedly sold by administrator's attorney is no defense for buyer in suit by administrator (Code Civ. Proc. §§ 283, 1517, 1523; Civ. Code, §§ 3082, 3111).

5. Executors and administrators 🔑80.

Since authority of administrator to sell intestate's personalty is limited, he cannot authorize attorney to sell negotiable warrants in his stead (Code Civ. Proc. §§ 283, 1517, 1523; Civ. Code, §§ 3082, 3111).

6. Attorney and client 🔑98.

Administrator's attorney, being unauthorized to sell intestate's reclamation district warrants, *held* unauthorized to receive payment, justifying administrator's recovery from buyer (Code Civ. Proc. §§ 283, 1517, 1523; Civ. Code, §§ 3082, 3111).

7. Waters and water courses 🔑222.

Buyer of unindorsed reclamation district warrants payable to order of intestate *held* charged with knowledge of statutes defining negotiability and requiring indorsement (Civ. Code, §§ 3082, 3111).

Appeal from Superior Court, Colusa County; Ernest Weyand, Judge.

Action by William P. Wilkinson, as administrator of the estate of J. F. Wilkinson, deceased, against I. G. Zumwalt. Judgment for plaintiff, and defendant appeals.

Affirmed.

See, also, 291 P. 869.

U. W. Brown, of Colusa, for appellant.

George R. Freeman, of Willows, for respondent.

Mr. Justice PLUMMER delivered the opinion of the court.

The plaintiff had judgment against the defendant for the return of 119 warrants of reclamation district No. 2047, or the value thereof, in the event that the return of the warrants could not be had. From this judgment the defendant appeals.

The findings made by the trial court establish the following facts: That J. F. Wilkinson, deceased, died on or about the 23d day of January, 1924, in the county of Colusa, state of California, of which county he was then a resident; that on February 25, 1924, William P. Wilkinson was appointed the administrator of the estate of J. F. Wilkinson, deceased, and letters of administration were issued to him; and that ever since said 25th day of February, 1924, the plaintiff has been the administrator of the estate of said deceased; that at the time of the death of the said J. F. Wilkinson, the decedent was the owner of 119 warrants issued by reclamation district No. 2047; that said warrants were negotiable instruments and were issued payable to the order of J. F. Wilkinson; that thereafter, and on or about the 16th day of July, 1928, one Charles K. Atran, an attorney at law who was acting as attorney for the plaintiff herein, as administrator of the estate of said deceased, presented to the superior court of the county of Colusa a petition on behalf of said administrator praying for an order authorizing the plaintiff, as such administrator, to sell the warrants hereinbefore referred to; that at said time said warrants were in the possession of the secretary of reclamation district No. 2047; that said warrants had not been indorsed by this plaintiff, nor at any time have said warrants, or any of them, been indorsed by this plaintiff; that the plaintiff did not authorize or direct the said Charles K. Atran to obtain possession of said warrants, or of any of them, from the secretary of said reclamation district, for the purpose of sale or delivery to the defendant herein, nor did he indorse said warrants, or any of them, to said Atran for any purpose; that on the 16th day of July, 1928, the court made an order authorizing the plaintiff, as such administrator, to sell said warrants at private sale, and thereafter, and on the same day, Charles K. Atran, without the knowledge or consent of plaintiff, obtained possession of said 119 warrants and delivered them to the defendant herein, and defendant paid to said Atran the sum of $1,514.70; that said plaintiff did not, at any time, authorize said delivery of said warrants, or any of them, to the defendant, nor did said plaintiff receive said sum of $1,514.70, or any part thereof.

The court further found that the plaintiff did not sell said warrants; did not convey or deliver the same to the defendant; and that no sale of said warrants had been confirmed by the court. The court further found that the plaintiff did not know of the delivery of said warrants to the defendant until several months thereafter, and that on or about the 15th day of June, 1929, the plaintiff made a demand upon the defendant for the return of said warrants. The description of the warrants contained in the findings not being necessary for the purposes of this decision, such description is omitted.

[1] Upon this appeal the appellant contends that as Atran was an attorney for the plaintiff as administrator of the estate of J. F. Wilkinson, deceased, he was the agent of the plaintiff, and that any loss suffered by the plaintiff or the estate of J. F. Wilkinson by reason of Atran's derelictions or defalcations, must be borne by the plaintiff. It may be stated here that a search of the record fails to disclose that the plaintiff ever placed any funds of the estate in the hands of attorney Atran, or authorized him to collect any moneys belonging to the estate; that there is nothing in the record to show that Atran was either an actual or ostensible agent of the plaintiff. All that the record shows is substantially as follows: That attorney Atran had some negotiations with the defendant relative to the purchase of the warrants involved in this action, and that the defendant offered to buy the same, and pay therefor 80 cents on the dollar for the original warrants and 60 cents on the dollar for the interest warrants; that Atran communicated this offer to the plaintiff, and the plaintiff wrote Atran that he would accept the defendant's offer of 80 cents for the original warrants and 60 cents for the interest warrants. Thereafter, on July 16, 1928, the defendant gave to Atran his personal check for the sum of $1,514.70, payable to the order of Charles K. Atran, and attorney Atran obtained possession of said warrants and delivered the same to the defendant; that said warrants were made payable to the order of J. F. Wilkinson, then deceased, and were delivered by Atran to the defendant without any indorsement thereon. The record shows that the warrants, in the condition which we have just stated, were brought to the office of the defendant by Atran and delivered to him, and that the check was made payable to attorney Atran at the request of said Atran. The letter from the plaintiff to Atran, relative to the acceptance of the defendant's offer to purchase the warrants, is in the following language: "Yours of the 10th received regarding the warrants. I will accept the offer of Mr. Zumwalt, 80 for the originals and 60 for the others. I trust we may now proceed to final settlement without further delay. Sincerely yours, William P. Wilkinson." At the time of the writing of this letter, the warrants were in the possession of the secretary of reclamation district No. 2047. The secretary, without any order from the plaintiff as administrator of the estate of J. F. Wilkinson, delivered said warrants to Attorney Atran. The answer of the secretary upon what authority he delivered the warrants to Atran is in the following words: "Why, Mr. Atran showed me a letter from Mr. Wilkinson whereby he had agreed to accept a certain price for the warrants, and I knew, from what had been going on in the office, they had been negotiating for the sale for some time, so when he called for them I gave them to him." It requires no argument to show that this letter did not authorize the delivery of the warrant by the secretary to Mr. Atran.

A certain letter introduced in evidence written by Mr. William P. Wilkinson, in relation to the warrants and as to where they should be placed, is as follows: "* * * In reply I told him I expected to be called over to Colusa most any day, and asked him to keep them there until I came. So the warrants are at the office over there. If you will get them and turn them over to the Colusa County Bank, it will save sending them here and back again. You can then have them issue the interest warrants covering the original ones." No other letter or authorization with regard to the disposition of the warrants or where they should be placed appears to have been made by the plaintiff.

The defendant testified that when the warrants were delivered to him by Atran he looked at the warrants and observed that they were made payable to J. F. Wilkinson, and that he took the warrants without their having been indorsed by the administrator of the estate, and that he made the check in payment of the warrants to Atran, at Atran's request. The letter which we have just quoted did authorize Atran to obtain possession of the warrants for a limited purpose, to-wit, to deliver them to the Colusa County Bank, the evident purpose being that the warrants should remain there until the plaintiff, whose residence was in Placerville, should go to Colusa, call at the bank and endorse the same.

Upon this appeal the appellant contends that the evidence is insufficient to support the finding of the court that said warrants were in possession of the secretary of the district on the 16th day of July, 1928, the secretary testifying that he thought the warrants were delivered after Atran had showed him a letter from Wilkinson which he thought was dated July 13, 1928. This is the letter in which the plaintiff had stated that he would accept an offer of 80 cents for the original warrants and 60 cents on the dollar for the interest warrants. This testimony, of course, is utterly insufficient to support the claim of the appellant that the finding of the court is unsupported. The mere matter of whether the warrants remained in possession of the secretary until the 16th day of July, 1928, is wholly immaterial, as it is evident by the testimony of the secretary that he had the warrants in his possession until the letter dated July 13, 1928, was exhibited to him. The matter of the dates in no wise affects the substance of the finding.

[2, 3] The finding of the court that the plaintiff did not authorize or direct the said Charles K. Atran to obtain possession of said warrants, or any of them, from the secretary of said reclamation district for the purposes of sale or delivery to the defendant herein, nor did he indorse said warrants, or any of them, to said Atran for any purpose, is challenged by the appellant as not being supported by the evidence. The evidence which we have set forth, however, conclusively shows that Atran was not authorized to obtain possession of the warrants, or any of them, for the purpose of delivery to the defendant. That he was authorized to obtain the warrants and deposit them in the Colusa County Bank is shown by the record. The words in the record, "nor did he endorse said warrants, or any of them, for any purpose," may be disregarded as surplusage, as they do not affect the legal rights of the parties involved in this action. At no time was Atran ever authorized to sell or deliver to any purchaser the warrants involved in this action. The finding of the court that the plaintiff never sold or delivered any of the warrants to the defendant is likewise challenged. A review of what we have hereinbefore set forth shows clearly that this assignment is without merit. There is no pretense anywhere that the plaintiff ever made any sale or authorized any one to make any sale, or ever indorsed the warrants to any one, which indorsement was necessary to transfer the title to the property.

Section 283 of the Code of Civil Procedure specifies the authority that may be exercised by an attorney and counsellor at law, to wit, to bind his client in any of the steps of an action or proceeding by his agreement filed with the clerk, or entered upon the minutes of the court, and not otherwise, to receive money claimed by his client in an action or proceeding during the pendency thereof, or after judgment, etc. Nothing of this kind appears in the record before us. The attorney was not acting in any proceeding in court, and he was not collecting any money due upon any judgment. The purchaser of the warrants in question, as shown by his own testimony, knew that the warrants were made and drawn in favor of J. F. Wilkinson, deceased, and that in order to transfer title they should be indorsed by William P. Wilkinson, as administrator of the estate of J. F. Wilkinson, deceased, and yet, notwithstanding this fact, he not only accepted the warrants without indorsement, but drew his check in favor of the attorney, and not in favor of the administrator of the estate.

[4] The appellant calls our attention to the case of In re Ogier's Estate, 101 Cal. 381, quoting from page 385, 35 P. 900, 901, 40 Am. St. Rep. 61, where it is said: "Every executor and administrator is chargeable in his account with the whole of the estate of the decedent which may come into his possession, * * * and while, in the settlement of his account, he will be allowed all necessary expenses in the care, management, and settlement of the estate, including reasonable fees paid to attorneys for conducting the necessary proceedings or suits in courts, * * * still, such allowance can be made only to him, and not to the attorney. * * * And if the attorney employed should be derelict in his duty, and should receive and misappropriate funds of the estate, the executor would be liable therefor to the legatees under the will." We may admit the correctness of this statement, but its application to the instant case is an entirely different matter. The fact that the administrator of the estate of J. F. Wilkinson might be liable to the heirs of J. F. Wilkinson for the value of these warrants does not relieve the defendant from his liability for having wrongfully and unlawfully obtained possession of the same. Having bought the warrants with his eyes open, without any indorsement from the administrator of the estate, and having paid some one wholly unauthorized to receive the money, the fact that the administrator might be liable for the value of the warrants when he comes to deliver the estate to the heirs of J. F. Wilkinson, deceased, is no defense to this action.

[5] In Woerner v. Woerner, 171 Cal. 298, 152 P. 919, we find the following relative to the power of an attorney: "An attorney has no general authority to act for his client. His stipulation for a disposition of his client's property cannot bind the client, if the attorney had no legal authority to make it; at least not unless it is acted on by the court and carried into the judgment"—citing authorities. The authority of the administrator being limited, we do not need to cite authorities to the effect that the administrator could not authorize any one to act in his stead or in his capacity.

Section 1517 of the Code of Civil Procedure, relative to the sale of personal property, is pertinent here. It reads: "All sales of property must be under oath, reported to and confirmed by the court, before the title to the property passes." Section 1523, Code of Civil Procedure, relative to sales of personal property, reads: "Any such sale shall take effect only upon confirmation by the court, except in the sale of stocks or bonds when the court has, upon a verified petition previously presented, made its order authorizing the sale and transfer thereof, and fixing the terms and conditions upon which the same is to be made."

[6] Not having any authority to sell, the conclusion is inevitable that attorney Atran

had no authority to receive payment from the defendant. There is nothing in the record indicating that the plaintiff ever gave or intended to give Attorney Atran any ostensible authority to act as his agent in the sale of the warrants, or to receive payment therefor. The appellant has not introduced in evidence any testimony indicating the existence of any such ostensible agency, or tending in any particular to show that he was misled by any act of the plaintiff. The defendant simply took the unindorsed warrants, as we have stated, and drew his check in favor of the attorney, instead of in favor of the administrator of the estate.

That the appellant in this action, by reason of his misplaced confidence, has lost the sum of $1,514.70, does not entitle him to reimbursement from the estate of the deceased, or from the administrator thereof.

[7] The defendant in this case was chargeable with knowledge of section 3082, Civil Code, defining negotiable instruments, and also with the provisions of section 3111, Civil Code, providing that, if a negotiable instrument is payable to order, it is negotiated by the indorsement of the holder, and that in this case, the owner being deceased, it was necessary for the warrants to bear the indorsement of the legal representative of the deceased.

The judgment is affirmed.

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112 Cal. App. 597

WILLIAMS v. PICKWICK STAGES SYSTEM et al.

WILLIAMS v. PICKWICK STAGES SYSTEM et al. (PACIFIC INDEMNITY CO., Intervener).

Civ. 353, 354.

District Court of Appeal, Fourth District, California.

March 16, 1931.

1. Automobiles 🔑244(12, 35).

Evidence established negligence of driver of stage in driving stage colliding with automobile at high rate of speed into left-hand curve on left-hand side of highway (St. 1923, p. 557, §§ 122, 125, subd. c).

2. Automobiles 🔑244(36).

Evidence established that negligence of stage driver in driving stage into automobile was proximate cause of collision between automobiles.

The evidence disclosed that the collision between the passenger stage being driven at high rate of speed into left-hand curve on left-hand side of highway and the automobile caused the automobile to swerve into the bank on side of highway, and then carom off from bank into the road and into the automobile of the plaintiff suing the stage company.

3. Automobiles 🔑245(79).

Contributory negligence of motorist in not stopping before collision with automobile after its impact with negligently driven passenger stage *held* for jury.

4. Automobiles 🔑246(48).

In action for injuries sustained in automobile collision, instruction regarding right to drive on left-hand side of highway *held* justified by evidence (St. 1923, p. 557, § 122).

The court instructed that a vehicle might be driven on left-hand side of public highway when it was overtaking and passing another vehicle, but that, in that event, it must not be driven on the left-hand side of the highway, unless the left-hand side was unobstructed for at least 100 yards ahead. The evidence strongly indicated that at the time the passenger stage started to pass automobile in which plaintiffs suing for personal injuries were riding the automobile struck by the stage was not 300 feet distant from the stage.

5. Automobiles 🔑246(48).

Instruction in action for injuries sustained in automobile collision regarding passing vehicles on curve *held* justified by evidence (St. 1923, p. 557, § 125, subd. c).

The court instructed that The State Motor Vehicle Act (St. 1923, p. 557, § 125, subd. c) provided that a driver of a motor vehicle should not drive the same so as to pass or overtake any vehicle going in the same direction on a curve where the driver's view along the highway was obstructed within a distance of 150 feet. The evidence indicated that at the point driver of defendant's stage attempted to pass plaintiffs' automobile the highway made a curve to the left so that a driver could not see down the road a distance of 150 feet; his view being obstructed by bank on the side of the road.

Appeals from Superior Court, Los Angeles County; B. Rey Schauer, Judge.

Separate actions by Geraldine E. Williams against the Pickwick Stages System and another, and by Arlo F. Williams against the same defendants, in which the Pacific Indemnity Company intervened. Judgments for plaintiffs, and defendants appeal.

Affirmed.

B. P. Gibbs, of Los Angeles, for appellants.

Samuel J. Crawford, of Santa Monica, for respondents.

C. X. Arnold, of Los Angeles, for intervener.

MARKS, J.

Arlo F. Williams and Geraldine E. Williams are husband and wife. On the 28th day of August, 1927, they were riding in an automobile easterly on a public highway between the cities of Fillmore and Piru in Ventura county. The automobile came into collision with a Ford being driven by Jose Reynoso. Both Mr. and Mrs. Williams suffered serious bodily injuries, and the car, which belonged to Arlo F. Williams, was demolished. They brought separate actions for damages, which were tried together, and which resulted in a judgment in favor of Geraldine E. Williams in the sum of $5.000, and Arlo F. Williams in the sum of $2,000. The Pacific Indemnity Company, a corporation, was the insurance carrier on the car of Mr. Williams. This company intervened in his action so that it might be subrogated to the amount expended by it for repairs to the automobile in any judgment rendered in his favor.

The accident happened about 8 o'clock at night at a point on the highway where the pavement was 16 feet in width, with shoulders on each side of about 6 feet. On the northerly side there was a bank from 8 to 10 feet high. At the point of the accident, and for a considerable distance on each side thereof, the road travels in a sweeping "S" curve.

The automobile in which the respondents were riding was traveling in an easterly direction. A stage, belonging to the Pickwick Stages System, a corporation, and driven by P. C. Madsen, was traveling in the same direction. It passed the Williams car and proceeded on down the highway. The Ford, traveling in a westerly direction, met the stage, its left front wheel coming into collision with the left rear fender of the stage. The Ford swerved to its right into the bank and caromed off across the road into the Williams car, causing the injuries complained of.

Appellants present the following grounds for a reversal of the judgments: First, that no negligence is shown on the part of the driver of the stage, which was the proximate cause of the accident; second, that the evidence shows that the driver of the Williams car was guilty of contributory negligence as a matter of law; and, third, that the trial court erred in giving two of the instructions to the jury.

[1, 2] While the evidence on the question of negligence is somewhat conflicting, that most favorable to the respondents shows that their automobile, just prior to the accident, was being driven at a speed of about 35 miles per hour; that the passenger stage, driven by Madsen, passed the automobile to its left on the curve which we have mentioned; that it proceeded down the highway on its left-hand side thereof, and, in entering a left-hand curve, came into collision with the Ford. At the time of this collision it was entirely over on its left-hand side of the road with its left wheels close to the northerly edge of the pavement. The Ford had pulled completely off from the paved portion of the highway onto the dirt shoulder on its right-hand side. The speed of the bus was given as being between 50 and 55 miles per hour. Under these circumstances negligence on the part of the driver of the stage is self-evident, as he was violating several provisions of the California Vehicle Act. Appellants maintain, however, that this negligence was not the efficient cause from which the injury followed in a natural and continuous sequence, unbroken by any efficient intervening cause. We cannot agree with them. It seems clear from the evidence that the collision between the passenger stage and the Ford threw the Ford into the bank; that it caromed off from the bank into the road and into the automobile of the respondents. The negligence of Madsen in driving the passenger stage at the high rate of speed into the left-hand curve and upon his left-hand side of the highway and into the Ford was the proximate cause of the accident.

[3] Appellants maintain that the driver of the Williams car was guilty of contributory negligence as a matter of law because he should have stopped before the collision with the Ford. After its impact with the stage, the Ford traveled about 40 feet before striking the Williams car. Between one and two seconds must have elapsed between the collision of the Ford and the stage, and between the collision of the Ford and the Williams car. During this time the Williams car traveled about 80 feet. The driver applied his brakes but did not stop. In this short space of time we cannot say as a matter of law that the driver had ample time and opportunity to stop his car even if he had realized that the collision with the Ford was imminent. We cannot predicate contributory negligence as a matter of law upon this state of facts.

[4, 5] The two instructions complained of by appellants are as follows:

"The State Motor Vehicle Act provides that a vehicle may be driven on the left hand side of the public highway when it is overtaking and passing another vehicle, but in that event it must not be driven on the left hand side of the highway unless the left hand side is clear and unobstructed for at least one hundred yards ahead."

"The State Motor Vehicle Act provides that a driver of a motor vehicle shall not drive the same so as to pass or overtake any other vehicle going in the same direction upon a curve where the driver's view along the highway is obstructed within a distance of one hundred fifty feet."

Appellants urge that the trial court erred in giving these instructions because they are not applicable under the facts of this case.

The first states the rule of law set forth in section 122 of the California Vehicle Act (St. 1923, p. 557). The second is based upon the provisions of subdivision (c) of section 125 of the same act. We have reached the conclusion that under the facts and circumstances of this case both instructions were properly given. The evidence, while not conclusive on the point, would strongly indicate that, at the time the passenger stage started to pass the Williams car, the Ford was not 300 feet distant from it. This being the case, the instruction was properly given. The evidence further indicates that at this point the highway made a curve to the left so that a driver could not see down the road a distance of 150 feet, his view being obstructed by the bank on the northerly side of the road. This evidence was contradicted by appellants, but this merely created a conflict with which we need not be concerned. The trial court was fully justified in giving the second instruction.

Both judgments are affirmed.

We concur: **BARNARD, P. J.; JENNINGS, J.**

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112 Cal. App. 487

In re WYSS' ESTATE.

Civ. 487.

District Court of Appeal, Fourth District, California.

March 11, 1931.

Rehearing Denied March 27, 1931. Hearing Denied by Supreme Court May 4, 1931.

1. Homestead 🔑181(3).

Evidence showed wife knew what she was signing when signing waiver attached to husband's will waiving rights in community property, husband's property, and homestead.

> Husband in will provided that all his property should be placed in trust fund, and that income therefrom should be given to his wife during her lifetime and to their daughter. Wife agreed to terms of will, and signed waiver which was attached to will, and in which wife waived all right to community property and to property of deceased and to homestead. Waiver was signed in presence of witnesses, and evidence was conflicting whether wife when signing knew of entire will and provisions of waiver.

2. Wills 🔑794.

Will by husband and waiver by wife of rights in community property, husband's property, and homestead must be read together in determining effect thereof.

3. Wills 🔑794.

Will creating trust for wife and waiver by wife of rights *held* intended to dispose of all community property and to constitute acceptance by wife of will in lieu of other rights.

> Testator in will conveyed to trustee all his property, and provided that provisions for wife should be taken by wife in lieu of all her rights in their community property and in husband's separate estate. The waiver signed by wife and attached to will provided that wife knew of manner in which estate both community and separate was being disposed of; that wife consented to disposal and waived all rights in community property and husband's separate property, including right to probate homestead. Wife testified that she read will and did not claim that she did not understand provisions thereof.

4. Husband and wife 🔑265.

Husband is owner and entitled to possession of all community property during his life.

5. Husband and wife 🔑266.

Husband and wife may legally agree or enter into transaction concerning their community property (Civ. Code, § 159).

6. Wills 🔑794.

Will conveying trust estate to wife for life and waiver by wife of interest in community property, husband's property, and probate homestead *held* contractual in nature.

7. Wills 🔑88(1).

Writing may be both will and contract.

8. Wills 🔑794.

Waiver by wife attached to will of interest in community property, husband's property, and probate homestead constituted election to take under will, which could not be changed after death of husband (Civ. Code, § 159).

> Waiver by wife attached to will of interest in community property, husband's property, and probate homestead recited election by wife to accept, acquiesce in, and consent to will and to be waiver of all claims in property.

9. Homestead 🔑122.

Husband and wife 🔑266.

Wife signing waiver of interest in community property, husband's property, and probate homestead *held* estopped to deny validity of instrument after death of husband (Code Civ. Proc. § 1962).

10. Wills ⚷778.

Generally, widow need not elect in advance whether she will take under will or under law.

11. Homestead ⚷139.

Right to a probate homestead is not vested right, but privilege, validity of which depends on conditions existing when application is made (Code Civ. Proc. § 1465).

12. Homestead ⚷150(1).

In passing on petition for a probate homestead, probate court must consider not only status of petitioner and nature of property, but whether homestead was waived by petitioner (Code Civ. Proc. § 1465).

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

In the matter of the estate of Fred J. Wyss, deceased. Petition by Dora Wyss, widow of deceased, to have set aside to her a probate homestead. From an order denying the petition, petitioner appeals.

Affirmed.

Glen H. Munkelt, of San Diego, for appellant.

James G. Pfanstiel, of San Diego, for respondent executor.

Harrison G. Sloane, of San Diego, for respondent Dorothea Wyss Jones.

BARNARD, P. J.

This is an appeal from an order in a probate proceeding denying the petition of the widow of the decedent to have set aside to her a probate homestead. Fred J. Wyss died on April 19, 1928. His will was admitted to probate on May 11, 1928. In this will, dated July 11, 1925, the testator devised and bequeathed to a named trustee "all of my property both real and personal of whatsoever kind or character and wheresoever situated," to be held in trust upon certain conditions which need not be here fully detailed. In general, it may be said that under the trust provisions the net income of the estate was to be paid to decedent's wife and daughter, $250 per month to the wife, $100 per month to the daughter, and the entire balance of the net income to the wife; the $250 monthly payment to the wife having a priority over any payment to the daughter. The will also provided that, in the event of the death of both the wife and the daughter, without the daughter leaving issue, then one half of the entire estate should go to the legal heirs of the wife and the other half to the legal heirs of the testator. The will then contained a paragraph reading as follows:

"Sixth: The provisions herein made for and the property herein given to my said wife, Dora Wyss, are, and shall be, taken by her in lieu of all her rights, claims and assets given to her by law, in our community property, if any there be, and in my separate estate as my surviving widow."

There was attached to this will, following the attestation clause and the signature of the witnesses, and as a continuation of the same document, the following instrument:

"I, Dora Wyss, the wife of said Fred J. Wyss, the maker of the foregoing will, having read it in its entirety, and clearly understanding that my said husband by his will disposes not only of all of his separate estate, but also all of our community property, in case there is any such, including the share thereof which I am entitled to take and receive by law upon his death, as well as his own share or interest therein, being fully convinced in my own mind of the reasonableness and equity of said will and the wisdom of its provisions, and in consideration of the provisions made for me therein, I hereby elect to and do accept, acquiesce in and consent to said will and all of its provisions, including disposition at the death of my said husband of all of our community property thereunder, and hereby waive all claims to my share of any community property, and any and all other claims, rights, interests and estates which I may have at the time of the demise of my said husband, upon or in all of his separate property and all of our community property, including all of his property exempt from execution and my right to a probate homestead, but not including, however, and expressly excepting therefrom my right to a family allowance out of the estate of my said husband during the probate administration thereon, and I hereby accept such of the said provisions of said will as apply to or concern me, except as above expressly excepted.

"In Witness Whereof, I have hereunto set my hand seal this 11th day of July, 1925, at the City of San Diego, County of San Diego, State of California

"Dora Wyss.

"On this 11th day of July, 1925, at San Diego, State of California, the said Dora Wyss, wife of said Fred J. Wyss, signed and executed the foregoing instrument in our presence, declaring that she did so freely and voluntarily in token of her acceptance of the provisions of and her assent to the will of her husband and her waiver of all her rights, claims and estate in both their community

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property and the separate property of her said husband.

"Laurence H. Smith Residing at 306 Prospect Street, San Diego, California.

"James G. Pfanstiel Residing at 1333 7th St. San Diego, California."

On May 4, 1929, the widow filed a petition to have set apart to her a probate homestead, which petition contained the following:

"That on or about the 11th day of June, 1925, your petitioner signed a document attached to the Last Will and Testament of said Fred J. Wyss; that petitioner is informed that said document is a waiver of her community interest in the estate of Fred J. Wyss and waives her right to a probate homestead.

"That said petitioner did not intend to waive her claim to a probate homestead at the time she signed said purported waiver, and did not understand that she was waiving her right to a probate homestead at the time she signed said purported waiver; that petitioner does not wish to be bound by said purported waiver, and for that purpose renounces and repudiates said waiver."

The respondent executor filed its answer and objection to this petition, which included the following:

"Admits that on the 11th day of June, 1925, petitioner, Dora Wyss, signed a document attached to the Last Will and Testament of said Fred J. Wyss; admits that said document is a waiver by the said Dora Wyss of her community interest in the estate of Fred J. Wyss, and is likewise a waiver of her right to a probate homestead.

"Denies that the said petitioner, Dora Wyss, did not intend to waive her claim to a probate homestead at the time she signed said purported waiver, and denies that she did not understand that she was waiving her right to a probate homestead at the time she signed said waiver.

"Your objector is informed and believes, and upon that ground alleges, that the said Dora Wyss at the time she signed said waiver of probate homestead fully understood the entire contents of said waiver of homestead, and was completely advised as to the legal effect and purport of said waiver."

Upon the issues thus raised, a hearing was had, and thereafter, on the 16th day of August, 1929, an order was entered denying said petition, from which order Dora Wyss, the widow, is prosecuting this appeal.

Appellant contends that she did not read the said waiver, nor was it read to her; that she did not know she was waiving her right to a probate homestead, and did not know the effect of said waiver; that the effect of said waiver is nothing more than an expression of her willingness to have taken under the will as of the date the waiver was signed; and that, at any time up to the distribution or until she has so conducted herself towards the property of the estate as to be estopped, she may change her election and elect to take under the law.

[1] The first question raised is whether or not appellant understood what she was signing at the time it was signed. The record shows that the evidence upon this point, while conflicting, is ample to sustain the conclusion of the trial court that she knew what she was signing. That particular point may be taken as settled.

[2, 3] The next and most important question presented is the effect of the instrument itself. The entire will and waiver must all be read together. Estate of Whitney, 171 Cal. 750, 154 P. 855, 857. From such a reading, as well as from surrounding circumstances, it is fully apparent that it was the intention of the parties at the time to dispose of and provide what should be done with all of the community property belonging to the parties thereto. In the case just recited, the court said: "The paper signed by Mrs. Whitney was attached to the will, and it evidently was the paper referred to in the preamble of the will as 'the written consent and acceptance of my wife Lucy.' We have no doubt that, as is urged by the appellants themselves, the will and this waiver are to be read together. Such a reading clearly shows what the husband and wife had in mind and what they were undertaking to deal with in the drafting and execution of the two documents."

[4] In the will before us, the testator first gave to a trustee all of his property "of whatsoever kind or character." He was then the "owner and entitled to the possession of all of the community property." Estate of Dargie, 179 Cal. 418, 177 P. 165. In the sixth clause of the will the testator set forth that the provision he had made for his wife, referring to the trust provisions which included his business as well as other property, should be taken by her in lieu of all her rights in their community property, and also in his separate estate. Not only does this refer in express terms to any community property there was, but the waiver signed by the wife clearly refers to the fact that she understands he is disposing in his will, not only of his separate estate, but also of their entire community property; and, in consideration of the provisions made for her she accepts and consents to the will, including its disposal of all of the community property, and she specifically waives any claim to her share of any community property, including her right to a probate homestead. Not only does the language used show that the intention of the parties was to provide

for the disposition of all of the community property, but this is also shown by appellant's testimony. She said she had read the will, and she does not yet raise the question that she did not understand that, including the sixth paragraph thereof. It appears from her testimony that she discussed the will with the deceased at the attorney's office in the forenoon of the day it was executed. She testified that at that time she suggested that "at the end of the will it was left rather vague, if my daughter should die without issue, and I did think it should go to my heirs. I didn't think that was quite fair and I suggested that it be put down definitely, it should be divided between the heirs on both sides. Then we went out for lunch." She then testified that after lunch they returned to the lawyer's office, where the instrument was executed, it having been changed in the meantime, in accordance with her suggestion. It is difficult to reconcile this testimony with appellant's present claim that she then thought that the will referred only to the testator's share of the community property. She further testified that she and her husband talked the will over at lunch time, and that, in reply to her question as to why he wanted to give it all to a trust company, he gave as one reason that it would ruin the factory and business to close it down for a year, and that she concurred in that view. This business constituted a large part of the estate at that time, and this evidence is hardly consistent with the idea that the parties then considered the will as referring to the husband's share in the community property.

A further consideration is the certificate attached to this waiver, signed by two of the same witnesses who had witnessed the attached will, in which it is stated that the appellant signed the waiver in their presence, declaring that she did so freely, in token of her acceptance of, and assent to, the will, and of her waiver of all claim to both their community property and the separate property of her husband. We think there can be no question that the effect of this instrument, so far as intended by the parties at the time, was that it should constitute a waiver as to all right of appellant in and to the community property of herself and her husband, including a probate homestead; that by its execution she was consenting to the making of a will by her husband, which disposed of all of their community property as well as his separate property; and that she was accepting the provisions made for her in this will in lieu of what would otherwise have been, under the law, her rights in the property.

[5-8] The only remaining question is as to whether this instrument, entered into with such intentions and under these circumstances, is binding and controlling upon the appellant, or whether she may at any time before distribution change her mind and elect to take under the law, rather than under the provisions of the will. A husband and wife may legally come to an agreement or enter into a transaction concerning their community property. Estate of Sloan, 179 Cal. 393, 177 P. 150; Civ. Code, § 159. No good reason appears why this could not be done in this case, nor why it could not include a waiver or relinquishment of a right to a probate homestead. The will and the waiver must be considered together, and we think they are contractual in their nature. Even one writing may be both a will and a contract. Norton v. Estate of Norton, 41 Cal. App. 614, 183 P. 214. While the instrument attached to this will was a waiver, it was also both a consent and an agreement. In the sixth paragraph of the will the testator states that the provisions made in the will for his wife are and shall be taken by her in lieu of her general legal rights in their community property. In her waiver the wife states, "I hereby elect to and do accept, acquiesce in and consent to said will and all of its provisions * * * and hereby waive all claims to my share of any community property," including her right to a probate homestead. This is not an agreement to do something in the future, but indicates a present agreement. Both the written instruments and the surrounding circumstances indicate a complete and completed plan for the disposition of their community property, in the event of the death of the testator. Whether or not the parties themselves could later have changed this plan, by agreement, or whether some subsequent act by one of the parties might have released the other, is not determinative of whether or not the wife is bound after the death of the husband, the event in contemplation of which the instruments were made, nothing having been done by the parties in the meantime. As was said in the case of Estate of Whitney, supra: "Here, then, we see that the parties executed writings in which they declared plainly that they were making arrangements and stipulations for the purpose of enabling the husband to dispose of the entire community property and of binding the wife to assent to such disposition. The husband was asserting his intention to devise and bequeath the half of the community property which would pass to his wife if she survived him. She was consenting to such disposition and waiving her right to object thereto. * * *"

In that case the will and an instrument attached thereto were very similar to those in the case at bar and the language used in that opinion indicates that the court viewed the two instruments as contractual in nature. In the case before us, even if the attached instrument be considered a waiver, it is one made upon an expressed consideration, and the combined instruments appear to us to have the effect of a contract.

[9] In stating her contentions, appellant urges that she had the right to change her election and elect to take under the law, rather than the will, at any time prior to distribution or until such time as she had conducted herself towards the property in a manner to estop her from so doing. We think she was estopped from denying the validity of the instrument she signed. If this was not true at the time the instrument was signed, it became true when she permitted the situation to remain unaltered until the death of her husband. He was lulled into a sense of security, believing he had made an adequate provision for those dependent upon him.

"Whenever a party has, by his own declaration, act, or omission, intentionally and deliberately led another to believe a particular thing true, and to act upon such belief, he cannot, in any litigation arising out of such declaration, act, or omission, be permitted to falsify it." Code Civ. Proc. § 1962.

[10] He was led to change his position in reliance upon her waiver and consent, and the provision he made for his daughter must be very greatly changed if the waiver here involved is set aside. The husband had the right to provide for his daughter to the extent of his share of the community property, which, in this case, was half of the estate; and in giving up this right in reliance upon the promise of appellant, he intended another result, which was approximately equivalent to the right given up, and to now permit the widow to set aside the waiver would alter his position to his prejudice and the prejudice of his heirs. At the time of the husband's death, through this promise and waiver, the appellant received a vested right to all of the income from the entire estate, under some circumstances, and under any circumstances to all of this income except $100 per month. Of course, as a general rule, a widow is not required to make her election in advance as to whether she will take under a will or under the law, but in the case of Dunne v. Dunne, 66 Cal. 157, 4 P. 441, 442, 1152, the court says: "But this rule, like all other general rules, should be applied only when it is reasonable to apply it, and when its application will promote, not defeat, justice."

In the present case, the appellant had already exercised her right of election, and it would neither be reasonable nor just to apply a rule which would be proper in a case where a husband made a will in which, without the consent of his wife, he undertook to dispose of their community estate. We think the appellant has so dealt with the property of this estate that she may not now set aside the election she made upon a definite consideration, and that she may not now make another election, when it is too late for the husband to protect the interests of himself and his heirs. As was said in the case of In re Whitney, supra: "The soundness of this claim involves an inquiry into the true meaning and intent of the writing. It is of no great consequence whether the instrument be viewed from the standpoint of contract, of waiver, or of estoppel. In any aspect its operative effect, as against the right here claimed by the widow, must depend upon an interpretation of its terms."

The effect of the waiver here in question not only depends upon an interpretation of its terms, but we think that, properly interpreted, it must be held to bind the appellant.

In our opinion every equitable consideration is in favor of enforcing the arrangement which these parties made in good faith. Not only was the arrangement an eminently fair one, but the purpose of the combined instrument was one entire plan, which covered all of the community property of the parties. If the purpose and intent of the arrangement is thwarted and changed, it not only leaves a situation contrary to the intention of the testator, but unjust to him and his heirs. If such a situation be brought about by operation of law, not only would the deceased, through his reliance upon the consent and agreement of the appellant, be deprived of an opportunity to make a different and a better provision for his daughter and his other heirs, but his widow would secure the resulting profit by repudiating her own agreement. In our opinion the appellant not only ought to be, but is, bound by the instrument she signed.

[11, 12] Appellant further contends that, even if the waiver is binding upon the appellant, it could not be considered by a probate court, but that, when the jurisdictional facts required by section 1465 of the Code of Civil Procedure appear, a probate court has nothing to decide, but must set apart a homestead. We are unable to agree with this contention. The right to a probate homestead is not only not a vested one, but is a privilege, the validity of which is to be determined from the conditions that exist at the time the application is made. Estate of Pillsbury, 175 Cal. 454, 166 P. 11, 3 A. L. R. 1396. In passing upon a petition for such a homestead, it was the duty of the court to consider not only the status of the petitioner and the nature of the property, but whether or not the probate homestead had been waived by the petitioner.

The order is affirmed.

We concur: MARKS, J.; JENNINGS, J.

112 Cal. App. 550

PEOPLE v. SCHROEDER.

Cr. 40.

District Court of Appeal, Fourth District, California.

March 14, 1931.

Rehearing Denied March 25, 1931.

1. Criminal law 🔑1069(6).

Failure to file application for appeal within five days after giving notice of appeal made dismissal of appeal mandatory (Rules of the Judicial Council, rule II, § 7).

> Rules of the Judicial Council, rule II, § 7, provides that, if an application for appeal in a criminal prosecution is not made within five days after giving notice of the appeal, stating in general terms the grounds of the appeal and the points upon which the appellant relies, and designating what portion of the phonographic reporter's notes it will be necessary to transcribe, the appeal shall be dismissed.

2. Criminal law 🔑1069(1).

Time for filing of application for appeal could not be extended because application was sent through mail (Rules of the Judicial Council, rule II, § 7; Code Civ. Proc. § 1013).

Appeal from Superior Court, Orange County; G. K. Scovel, Judge.

Leo M. Schroeder was convicted of grand theft, and he appeals. On motion to dismiss appeal.

Motion granted, and appeal dismissed.

Floyd H. Bowers and Earl F. Crandell, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and John D. Richer, Deputy Atty. Gen., for the People.

LAMBERSON, Justice pro tem.

The appellant was convicted of the offense of grand theft in the superior court of Orange county, and judgment was pronounced on November 22, 1930, on which day the appellant gave oral notice of appeal. No written notice of appeal was filed. The notice and application provided for by section 7 of rule II of the Judicial Council, promulgated for the Supreme Court and District Courts of Appeal, was filed on November 29, 1930. Respondent moves to dismiss the appeal upon the ground that said application was not filed within the time provided in said section 7, which reads in part as follows: "Upon an appeal by the defendant from a judgment of conviction or from an order denying his motion for a new trial, or from an order made after judgment, or upon an appeal by the people from an order granting a new trial, or from an order setting aside an indictment, information or accusation, or from an order made after judgment, the appellant must, within five days after giving notice of the appeal, file with the clerk and present an application to the trial court, stating in general terms the grounds of the appeal and the points upon which the appellant relies, and designate what portions of the phonographic reporter's notes it will be necessary to have transcribed to fairly present the points relied upon. If such application is not filed within said time, the appeal shall be dismissed; provided, that the appeal shall not be dismissed for any defect in the statement of such grounds or points which does not affect the substantial rights of the respondent."

[1, 2] By the affidavit of appellant's attorney, filed in opposition to the motion to dismiss the appeal, it appears that said attorney's office was in the city of Los Angeles; that immediately following the pronouncement of judgment, and after appellant's attorney had given oral notice of appeal, it was agreed between an assistant district attorney of Orange county and appellant's attorney that the assistant district attorney would attend to the filing of papers necessary to perfect an appeal if the attorney for appellant would mail such papers to such assistant district attorney; that the fifth day after the pronouncement of judgment was Thursday, November 27, which was a legal holiday; that on November 28, appellant's attorney placed the necessary papers in a sealed envelope and sent the same by special delivery in the United States mail, addressed to the district attorney of Orange county; that such papers were deposited in the postoffice prior to 8 o'clock a. m. on November 28; that there is hourly service by mail between Los Angeles and the county seat of Orange county, the actual running time of trains between the two places being 70 minutes; that the documents were delivered at the office of the district attorney of Orange county on the afternoon of November 28, but, through an oversight, were not presented to the trial judge or filed until November 29, 1930. The appellant contends that, by reason of the fact that the fifth day fell on a holiday, the time for filing the application and notice was extended to include all of Friday, November 28, 1930, and that appellant was also entitled to an allowance of one day, under the provisions of section 1013 of the Code of Civil Procedure relating to the service of papers by mail. The language of section 7 of rule II follows substantially the language theretofore used in section 1247 of the Penal Code, prior to its repeal in 1927 (St. 1927, p. 1048), and has been construed in the same manner as said section 1247 was interpreted prior to its repeal. The filing of the application within the time pro-

vided by law after giving notice of appeal is mandatory, and, if there has been a failure to conform to the rule, the court is without jurisdiction to consider the appeal. People v. Shaw, 81 Cal. App. 312, 253 P. 747; People v. Riga, 104 Cal. App. 477, 285 P. 1069; People v. Davis, 103 Cal. App. 318, 284 P. 516. The language of section 7 of rule II means that within the time provided by law there must actually be filed with the clerk, and presented to the trial court, the application provided for in said section 7, and the section does not contemplate any allowance of additional time for service of the application by mail as provided in section 1013 of the Code of Civil Procedure.

It is ordered that the motion of respondent to dismiss the appeal be granted, and the appeal is dismissed.

We concur: BARNARD, P. J.; JENNINGS, J.

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112 Cal. App. 622

FOSTER v. BANKS (two cases).

Civ. 6536.

District Court of Appeal, Second District, Division 2, California.

March 17, 1931.

1. Malicious prosecution 🔑24(1).

That jury in criminal prosecution were divided on question of guilt was slight, if any, evidence of existence of probable cause as basis for defense in malicious prosecution.

2. Malicious prosecution 🔑24(6).

In action for malicious prosecution, that plaintiffs were held to answer in criminal prosecution was prima facie evidence of probable cause.

3. Malicious prosecution 🔑56.

In action for malicious prosecution, burden of proof is on plaintiff to show want of probable cause.

4. Malicious prosecution 🔑64(2).

Evidence in malicious prosecution action *held* sufficient, if believed, to overcome prima facie evidence of probable cause established by showing that plaintiffs had been held to answer in criminal prosecution.

5. Malicious prosecution 🔑71(3).

Malice, in action for malicious prosecution, is for jury.

6. Malicious prosecution 🔑71(2).

Whether defendant, in action for malicious prosecution, had probable cause for instituting criminal prosecution, is matter of law for court.

7. Malicious prosecution 🔑71(2).

Where, in action for malicious prosecution, evidence as to ownership of personalty was conflicting, whether evidence warranted inference of probable cause in instituting larceny prosecution *held* for jury.

8. Malicious prosecution 🔑72(2).

Probable cause instruction, in action for malicious prosecution, *held* not ground for complaint by defendant.

> The court instructed the jury in part that, if, at time the defendant in the malicious prosecution action caused the arrest of plaintiffs, she did not honestly believe or had a well-founded justifiable suspicion that the plaintiffs had stolen some of her property, then there was no probable cause, but that, on the other hand, if, at time, she had any reasonable grounds for a justifiable suspicion that they had taken any of her property, then there was probable cause.

9. Malicious prosecution 🔑21(2).

If attorneys' advice on which larceny prosecution was instituted was based entirely on false statement of fact by defendant in malicious prosecution as to ownership of goods, such advice would be no defense to action of malicious prosecution.

10. Malicious prosecution 🔑64(2).

Evidence, in action for malicious prosecution, *held* not to establish that district attorney's advice to defendant was made on independent investigation, as regards question of probable cause in instituting larceny prosecution.

11. Trial 🔑260(1).

Refusing instructions substantially covered by instructions given *held* not error.

12. Appeal and error 🔑110.

Order denying motion for new trial is not appealable (Code Civ. Proc. § 963).

Appeals from Superior Court, Los Angeles County; John L. Fleming, Judge.

Consolidated actions by H. H. Foster and by Rena E. Foster against Maude Stock Banks. From judgment for plaintiffs, defendant appeals.

Affirmed.

R. D. Knickerbocker and Walter D. Tilleson, both of Los Angeles, for appellant.

Walter S. Coen, of Los Angeles, for respondents.

ARCHBALD, Justice pro tem.

H. H. Foster and Rena E. Foster, husband and wife, the plaintiffs and respondents, each filed separate complaints in the superior court for damages for alleged malicious prosecution against the defendant and appellant, Maude Stock Banks. Afterwards, on stipulation to that effect, an order was made consolidating the cases for the purposes of trial, the jury to return one verdict in both cases, one memorandum of costs to be filed, and it was further stipulated and ordered that "in all further proceedings said actions shall be treated as one case." The actions so consolidated were tried before a jury, which returned a verdict in favor of the plaintiffs for $2,500, of which amount $1,500 was designated as actual and $1,000 as exemplary damages. From the judgment entered upon said verdict, and from an order denying defendant's motion for a new trial, the defendant has appealed.

The plaintiffs were employed by one John M. Seitz at his home near Covina called "The Cloisters," for several years, when the estate was sold to the defendant, the plaintiffs continuing in her employment after such sale. On July 20, 1922, appellant swore to a complaint before the justice of the peace of Covina township, charging respondents with stealing certain household furniture and furnishings of the value of approximately $1,000; thereafter and before the trial thereof in said Covina township appellant swore to another complaint before a justice of the peace of Los Angeles township charging plaintiffs with the crime of grand larceny, on which complaint plaintiffs were held to answer to the superior court. The case pending in the justice's court of Covina township was dismissed on motion of the district attorney two days after filing of the complaint in the justice's court of Los Angeles township. An information was filed in the Superior Court February 16, 1923, to which the plaintiffs here, as defendants, pleaded "not guilty." The cause was partly tried beginning June 6, 1923, ending with the disagreement of the jury, and the case was dismissed on motion of the district attorney on account of insufficiency of the evidence, and respondent's bonds were exonerated.

[1-4] Appellant contends that the warrant was issued only after the district attorney had made an independent investigation and advised her to do so, and after a full and fair disclosure of all the facts to him and to her own attorney, who also advised her she had probable cause, but that he preferred to lay the matter before the district attorney's office before anything was done. The above facts were substantially alleged as a separate defense to the action, as well as the further fact that she filed the complaints in good faith after receiving such advice; and it is argued that appellant's actions after such disclosures and under such circumstances do not make her liable in damages for malicious prosecution. Respondents admit the rule of law contended for by appellant, but urge that, as to the district attorney, the evidence does not show that any independent investigation was made by him, and that, even if it did, as to the ownership of the property, which would seem to be the crucial question in the case, he would necessarily rely on appellant's statement, and, if that was not true, his advice would not be a defense. There is no question but that the goods were found in the possession of the plaintiffs. The evidence is very conflicting as to whether they belonged to the plaintiffs or the defendant. The appellant testified that she bought the property in question from Mr. Seitz, who sold her the real estate. The respondents testified that many of the articles were given them by appellant when she refurnished the house, that others were bought by them in the Middle West and brought to California, while other small articles were given them by Mr. and Mrs. Seitz. There is also evidence in the record which, if believed by the jury would support the conclusion not only that no steps were taken by the plaintiffs to conceal these goods, but that some of them were moved on appellant's trailer and with her knowledge to a residence belonging to the plaintiffs, and then were afterwards moved back to a bungalow on appellant's property, and, as to two rugs involved, one witness testified that appellant said: "Yes, wasn't I a fool for giving her those rugs." It also appears in the record, as we have said, that at the trial the jury in the Superior Court disagreed, and, as we have said, respondents were held to answer to the Superior Court. The fact alone that reasonable men divided on the question of guilt or innocence would of itself seem to be slight, if any, evidence of the existence of probable cause, but there is no question but that the fact that respondents were held to answer is prima facie evidence of probable cause, but it is not conclusive. (Diemer v. Herber, 75 Cal. 287, 17 P. 205), and, while the burden of proof is upon the plaintiff in an action for malicious prosecution to show want of probable cause, there is ample evidence in the record here, if believed by the jury, to overcome such prima facie showing of the existence thereof.

[5-8] Malice in an action for malicious prosecution is always a question of fact for the jury, but the question of whether or not the defendant in such an action had or had not probable cause for instituting the same is always a matter of law for the court. In this case, as we have said, the question was as to the ownership of the property, and the evidence was conflicting. The jury might have found either way, depending entirely upon their view as to the effect and value of the evidence, and in such

a case the jury must pass upon the facts and determine whether or not they warrant or reject an inference of probable cause. Franzen v. Shenk, 192 Cal. 572, 578, 221 P. 932. In that regard the court here instructed the jury as follows: "In order for you to return a verdict in favor of the plaintiffs you must be convinced that the criminal proceedings instituted by the defendant were instituted without probable cause. The burden of proving affirmatively that the defendant acted without probable cause is on the plaintiff and the question of whether the defendant had or had not probable cause for instituting the arrest and prosecution of the plaintiffs is a matter of law for the court. You are therefore instructed that if you find from the evidence that the defendant caused the arrest and prosecution of the plaintiffs on the charge of stealing personal property from her and at the time did not believe that he or she had stolen anything from her, and that she did not have sufficient knowledge as a cautious and prudent person to believe the plaintiffs guilty of stealing property, then as a matter of law there was no probable cause for the arrest and prosecution of the plaintiffs, and if you find that in causing the arrest of plaintiffs, defendant acted maliciously, your verdict should be for the plaintiffs."

"I think I may state that in a little more simple language, ladies and gentlemen of the jury. As already stated to you, before there can be any verdict in favor of the plaintiffs in this case two things must be proved to exist; first, that the prosecution was without probable cause; and secondly, that it was malicious. Now the court will instruct you upon the question of probable cause, that if at the time the defendant in this action caused the arrest of the plaintiffs she did not honestly believe or have a well-founded justifiable suspicion that the plaintiffs had stolen some of her property, then, of course, there was no probable cause. On the other hand, if at that time she had any reasonable grounds for a justifiable suspicion that they had taken any of her property, then it was probable cause."

The above instruction seems to put the disputed question of ownership up to the jury as fairly as the appellant could ask. Under it, if the jury found from the facts that she was the owner, or even honestly thought she was, their verdict would have been in her favor. On the contrary, if they found the claim of respondents was true, they could hardly infer that appellant believed they had stolen the goods from her.

[9] On the question of advice of counsel, the court instructed the jury as follows:

"If you find from the evidence that the defendant, in good faith, communicated to counsel all the material facts known to her, affecting the question of the guilt of the plaintiffs before a warrant was issued, and then acted upon the advice of counsel, probable cause has been established and you should find for the defendant.

"The advice of counsel is no protection for a party who acts maliciously and knows that the party whom she is prosecuting is not guilty, and further knows that all of the acts which the party against whom she complained of are all consistent with the natural innocence of the accused, and if she proceeds under such circumstances, advice of counsel is no protection, and she would be liable for the damage done." Again, the disputed question of ownership, in which is involved the good faith of the disclosure, is left for the jury to determine, for, if they found that appellant owned the goods, there could be no question of her good faith in communicating to counsel, although she might have acted maliciously, but, if she acted maliciously and knowing respondents owned the property she charged them with stealing, then the advice of counsel was no protection. If she knew that respondents were claiming title to the property, or that she did not own it, and failed to disclose either fact to the district attorney, or her own attorney, there could not have been a full and fair recital of facts, and, unless it was shown that they learned such facts from some other source, she could not rely upon their advice to establish probable cause. Burke v. Watts, 188 Cal. 118, 204 P. 578. Or, in other words, if their advice was based entirely on a false statement of fact by appellant as to the ownership of the goods, it would be no defense to the action of malicious prosecution. Franzen v. Shenk, supra.

[10] There is no evidence in the record that the district attorney made an independent investigation upon which his advice was based, even assuming that he did not have to rely upon appellant's statement to him in that regard. Appellant did not testify that he told her he had made an investigation. The entire testimony is as follows: "Q. And did you state the facts to Major McClelland [the deputy district attorney] that you had stated to Mr. Ricketts [her own lawyer]? A. I did.

"Q. And what action did Major McClelland advise you to take? A. As I remember, he said he would like to investigate it, take a couple of days to investigate it.

"Q. Then did you come back to Major McClelland's office again? A. I did.

"Q. And did Major McClelland advise you to sign that complaint charging them with grand larceny? A. He did, after he made his investigation, three days, I think, later." The witness' assumption that an investigation was made is far from legal evidence of such an act.

[11] We see no error in the instructions given by the court, or in refusing to give the two requested instructions by appellant, one of which was for an instructed verdict, and the

other covered the defense of advice of counsel which was substantially covered by instructions given.

[12] With regard to the appeal from the order denying the motion for a new trial, it is sufficient to say there is no appeal from such an order (section 963, Code Civ. Proc.), although any error in that regard would be reached by the appeal from the judgment.

Appeal from order dismissed. Judgment affirmed.

We concur: WORKS, P. J.; CRAIG, J.

113 Cal. App. 43

MARSHALL v. GOLDEN STATE MILK PRODUCTS CO. et al.

Civ. 7552.

District Court of Appeal, First District, Division 1, California.
March 26, 1931.

1. Automobiles ⚿244(36).

Evidence showing truck colliding with parked car could have been stopped by application of brakes showed negligence proximately contributing to accident, notwithstanding breaking of axle on truck.

2. Automobiles ⚿245(49).

Breaking of axle of truck did not as matter of law cause sudden emergency excusing driver from applying brakes.

3. Appeal and error ⚿1054(1).

In action for damage to automobile, admitting evidence of value based on offer plaintiff received for car *held* not prejudicial.

> The trial judge at all times insisted that testimony be confined to market value of car at time of accident, and disregarded and ignored all evidence of offer which plaintiff had received for car.

4. Damages ⚿106.

In automobile accident case, damages for deprivation of use of plaintiff's car *held* properly allowed (Civ. Code, § 3333).

Appeal from Superior Court, Contra Costa County; H. V. Alvarado, Judge.

Action by A. G. Marshall against the Golden State Milk Products Company and another. Judgment for plaintiff, and defendants appeal.

Affirmed.

John H. Corning, of San Francisco, for appellants.

La Shelle & Rankin, of San Francisco (Kirke La Shelle, of San Francisco, of counsel), for respondent.

TYLER, P. J.

Action for damages. The complaint alleges a cause of action for damages sustained by plaintiff to his automobile as a result of the truck of defendant company colliding with the same, while said truck was being operated by an employee of the defendant company. It is charged that the accident resulted solely by reason of the careless and negligent operation and control of the said truck. Briefly stated, the facts are as follows: Plaintiff's automobile was lawfully parked parallel to the curb on Escobar street in the city of Martinez. At this time a five-ton truck owned by defendant company and operated by an employee was proceeding along said street, approaching the automobile from the rear, and it collided with plaintiff's parked car. The trial court awarded plaintiff judgment in the sum of $500 for damage to his automobile and the further sum of $50 for deprivation of its use.

[1-4] Several grounds are relied upon for a reversal of the judgment. It is first claimed that plaintiff failed to prove any negligence on the part of defendants, which directly and proximately contributed to or caused damage to plaintiff's automobile. In this connection it is argued that the accident was caused by the breaking of an axle of the truck due to a latent defect for which defendants were not liable, as the truck had received proper care and was subjected to regular inspection. The contention is without merit. There is ample evidence in the record to show that the car could have been stopped and the accident avoided had the driver of the truck applied his brakes. Nor does the fact, as claimed, that the breaking of the axle caused such a sudden emergency as excused the driver from applying his brakes in any manner alter or change the situation. The question was one for the trial court to determine from all of the surrounding facts. It is next claimed that the judgment awards plaintiff an excessive amount of damage to his automobile. There is ample evidence in the record that the amount awarded plaintiff was reasonable. The further claim is made that the trial court erred in receiving evidence upon the question of value based upon an offer which plaintiff had received for his car. While it is true that certain witnesses during the course of their examination did testify as to the amount of the offer made to plaintiff, the learned trial judge, as the record shows, at all times insisted that the

testimony be confined to the market value of the car at the time of the accident, and that he disregarded and ignored all evidence of the offer. The mere fact, therefore, that there was evidence received of value based upon an offer was not prejudicial and it does not warrant a reversal of the judgment. Equally without merit is the contention that the award in the judgment of $50 for deprivation of use of plaintiff's car is against law. Defendants' negligence deprived plaintiff of the use of his car during the period of its repair. The general rule applicable to the situation is found in section 3333 of the Civil Code, which provides the measure of damage for the breach of an obligation not founded upon a written contract. Meyers v. Bradford, 54 Cal. App. 157, 160, 201 P. 471. It was stipulated by and between the parties that if the court found for loss of use it should be for $5 per day. The appeal is without merit.

The judgment is affirmed.

We concur: KNIGHT, J.; WARD, Justice pro tem.

112 Cal. App. 465

BACHMAN v. INDEPENDENCE INDEMNITY CO.*

Civ. 298.

District Court of Appeal, Fourth District, California.

March 11, 1931.

Rehearing Denied April 8, 1931. Hearing Denied by Supreme Court May 4, 1931.

1. Insurance 🔑616½.

Negligence of automobile driver having been determined, in guest's action against driver, it cannot be litigated in action against insurer, in absence of fraud or collusion.

2. Appeal and error 🔑1010(1).

Finding supported by evidence is conclusive on District Court of Appeal.

3. Insurance 🔑540.

Where, in action for injuries in automobile accident, copies of summons and complaint served on driver were transmitted to insurer by plaintiff's attorney, there was sufficient notice.

> It was admitted that driver failed to give insurer written notice of the accident as required in the policy of insurance, and that he did not send to it copies of the summons and complaint served upon him.

4. Insurance 🔑540.

Where automobile liability insurer disclaimed liability and refused to proceed with driver's defense, sending amended complaint to insurer was useless act not required by law.

5. Insurance 🔑514½.

Where automobile liability insurance contract placed no duty on driver to co-operate in defending suit, failure to co-operate alone cannot furnish defense in action against insurer.

6. Insurance 🔑665(3).

In action against automobile liability insurer, evidence supported finding there was no collusion between insured and plaintiff.

> Insured refused to sign written statement of circumstances of accident prepared by insurer's adjuster, and at first refused to sign answers to complaint filed against him saying that he had been advised by plaintiff's attorney to sign nothing. He also stated that he was friendly with plaintiff and would like to see him recover for his losses if he could do it squarely.

7. Insurance 🔑514½.

Insured under automobile liability policy need not permit sham defense in his name, but cannot arbitrarily decline to assist in making any fair legitimate defense.

8. Damages 🔑131(1).

$2,575 *held* not excessive for broken wrist, sprained wrist, severe bruises, and cuts on face.

9. Insurance 🔑616½.

Judgments against automobile driver tainted by fraud or collusion cannot furnish basis of actions on liability insurance policy.

10. Insurance 🔑616½.

After accident within automobile liability policy, neither insurer nor insured can by voluntary act defeat injured person's statutory right to bring action on policy after judgment against insured (St. 1919, p. 776).

> Insurer, however, may be released if there has been some act or omission on part of injured person which would relieve insurer, such as collusion or fraud between the insured and the injured, to the damage of the insurer.

Appeal from Superior Court, Fresno County; S. L. Strother, Judge.

Action by Leo Bachman, a minor, by Henry Bachman, his guardian ad litem, against In-

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*For opinion denying rehearing, see 298 P. 57.

dependence Indemnity Company. Judgment for plaintiff, and defendant appeals.

Affirmed.

See, also, 297 P. 119; Steele v. Independence Indemnity Co., 297 P. 120.

Willis I. Morrison, of Los Angeles, and Ray W. Hays, of Fresno, for appellant.

B. M. Benson and W. H. Stammer, both of Fresno, for respondent.

MARKS, Acting P. J.

This is an action to recover from an insurance carrier the amount of a judgment rendered against the insured in favor of a guest injured while riding in an automobile. Respondent recovered judgment from the insurance carrier by whom this appeal is prosecuted.

Katie Bachman was the owner of the automobile in question and the insured named in the policy of public liability indemnity insurance written by appellant to indemnify her against loss following accidental injury to others. On June 18, 1927, she desired to go from Fresno to San Francisco, and return, in her automobile. She invited Leo Bachman, the respondent; Joseph V. Steele, her nephew-in-law, and his wife, and Forest Bayliss to accompany her upon this trip. As she did not drive the car, Forest Bayliss was taken along to assist Leo Bachman in driving. Leo Bachman was the minor son of Katie Bachman, and Forest Bayliss was her son-in-law. Upon the return trip from San Francisco to Fresno, on June 19, 1927, Bayliss drove the automobile. Mrs. Bachman rode on the front seat by his side. Respondent and Steele occupied the back seat of the car. In going over the Pacheco Pass highway, Bayliss drove the car off the road and it rolled down a steep embankment. The accident resulted in the death of Katie Bachman and the injury of the other three passengers. The question of the liability of appellant for the death of Katie Bachman is considered in the opinion this day filed in case No. 299, entitled Henry Bachman, as Administrator of the Estate of Katie Bachman, Deceased, v. Independence Indemnity Company (Cal. App.) 297 P. 119. The liability of appellant for the injury suffered by Joseph V. Steele is considered in the opinion this day filed in case No. 297, entitled Joseph V. Steele v. Independence Indemnity Company (Cal. App.) 297 P. 120.

On August 2, 1927, respondent commenced an action in the superior court of Fresno county against Forest Bayliss to recover damages suffered by him by reason of his injuries received in the accident. Upon this date Forest Bayliss was served with a copy of the summons and complaint in the office of B. M. Benson, who was the attorney then acting for respondent and who mailed copies of the summons and complaint to appellant at its San Francisco office and at its home office in Philadelphia, Pa. Both copies were received by appellant. For reasons which will hereinafter be set forth, appellant disclaimed responsibility to respondent under the terms of the policy and finally refused to file an answer in the action for or on behalf of Forest Bayliss. After this refusal, an amended complaint against Forest Bayliss was served upon him in November, 1927. No copy of this amended complaint was sent to appellant. He asked for $5,000 general damages and $75 special damages. On January 12, 1928, the default of Bayliss was entered, and, after a hearing and evidence taken, judgment was rendered in favor of respondent and against Forest Bayliss in the sum of $2,575. After the entry of judgment demand was made upon appellant for its payment, which was refused. Respondent then instituted this action against appellant to recover the amount of his judgment under the terms of the policy of indemnity liability insurance. Judgment was entered in his favor in the sum of $2,850.07, this being the amount of the judgment against Forest Bayliss, together with accrued interest.

The answer of appellant presented six separate defenses. A demurrer was sustained to the fifth, and appellant did not amend. In its second defense it denied that the accident and subsequent injuries was caused by any negligence on the part of Bayliss, together with other matters of defense, which are so interwoven with those we must consider that it will not be necessary to detail them here. The fourth alleged a joint enterprise on the part of all of the occupants of the automobile.

[1] The question of the negligence of Bayliss in the operation of the automobile at the time of the accident was determined by the judgment in the case of Leo Bachman v. Forest Bayliss, and, in the absence of fraud or collusion on the part of, or between, the parties to that action, it cannot be litigated here. Bryson v. International Indemnity Co., 88 Cal. App. 100, 262 P. 790; Kruger v. California Highway Indemnity Exchange, 201 Cal. 672, 258 P. 602, 604; 31 Cor. Jur. 461. In the Kruger Case the Supreme Court announced the following rule: " 'The general rule appears to be that judgments are conclusive and binding upon parties and their privies, but as to all others they are neither prima facie nor conclusively binding, for the reason that it would be unjust to bind a person by any proceeding in which he had no opportunity to make a defense, of offering evidence, of cross-examining witnesses, or of appealing if he were dissatisfied with the judgment. Indemnity contracts against loss or liability are sometimes said to constitute an exception to this rule, while again it is said that they do not in fact constitute an exception at all, but are based upon a fair and reasonable interpretation of the contract. It seems to be

generally conceded, however, that wherever a surety has contracted with reference to one of the parties in some suit or proceeding in the courts, he is concluded by the judgment.' "

[2] On the question of a joint enterprise the trial court found against the contention of appellant. This finding is amply supported by the evidence, which is conclusive upon this court.

Four interesting questions are presented by appellant's answer which we must consider. They are new in California jurisprudence. Appellant maintains there are four reasons why it was released from its obligations under its policy of indemnity insurance: First, because of the failure of Forest Bayliss to notify appellant of the accident and to transmit to it the summons and pleadings served upon him. Under the terms of the policy, Forest Bayliss, who was the driver of the car at the time of the accident, became the insured as he was operating the car with the permission and at the request of Mrs. Bachman, the named insured. Second, because of the failure of Forest Bayliss to co-operate with appellant in the defense of the action against him. Third, because of alleged collusion between Leo Bachman and Henry Bachman, his guardian ad litem, and Forest Bayliss, which resulted in the judgment against the latter. Fourth, because of a fraudulent agreement between the same parties to fasten an unjust liability upon appellant.

[3, 4] It is admitted that Forest Bayliss failed to give appellant written notice of the accident as required in the policy of insurance. He did not send to it copies of the summons and complaint served upon him on August 2, 1927. These were transmitted to appellant by the attorney for respondent. In the case of Royal Indemnity Co. v. Morris (C. C. A.) 37 F.(2d) 90, 92, this was held to be sufficient notice. The amended complaint was served more than two months after appellant had disclaimed its liability under its policy of insurance and had refused to proceed with Bayliss' defense in the action although requested so to do by him. It is evident from the record that the transmission of this amended complaint to appellant would not have changed its attitude upon its obligation to defend the action or to pay the judgment. It then maintained, and still maintains, that it was released from this obligation. The sending of this amended complaint to appellant would have been a useless act which the law does not require of a party to an action. Appellant cannot predicate its defense upon the failure to transmit to it a copy of this amended complaint as this was excused and as it was not injured by this omission. In fact, counsel for appellant do not stress this question upon appeal.

[5] Appellant lays great stress upon the failure of Forest Bayliss to co-operate with it in a defense of the action against him. The policy of indemnity insurance which furnishes the basis of this action contains the following provisions pertinent hereto:

"Policy No. LA 76925 Insured Katie Bachman
"Premium $15.00 Expiry date May 24th 1928.

* * * * * *

"Schedule of Statements

"Statement No. —.

"11. The Company's liability for damage in respect of any one accident or disaster involving bodily injury shall not exceed Ten Thousand Dollars ($10,000), subject to a limit of Five Thousand Dollars ($5,000.) for any one person.

"Automobile Liability Policy (Personal Injuries Only)
"Independence Indemnity Co.
"Home Office: Philadelphia
"Charles H. Holland, President
"Policy No. LA 76925.

"In consideration of the premium specified in, and the Statements contained in, the Schedule endorsed hereon, made part hereof, and warranted by the Insured to be true, the Independence Indemnity Company (hereinafter called 'the Company') hereby agrees with the Insured named in Statement 1, that if, during the term of this Policy, any automobile described in Statement 4, by reason of its ownership, maintenance or use at any location within the United States of America and Canada, shall cause bodily injuries by accident, whether resulting fatally or otherwise, to any person or persons, and for which bodily injuries the Insured and/or others as hereinafter provided are liable for damages, then the Company will insure against loss arising out of such liability, subject to the limits set forth in Statement 11, the named Insured, and/or any person or persons while riding in or legally operating any of the automobiles described in the Schedule of Statements, and/or any person, firm or corporation legally responsible for the operation thereof, provided such riding, use or operation is with the permission of the named Insured; or, if the named Insured is an individual, with the permission of an adult member (other than a chauffeur or domestic servant) of his household.

"And will in addition, in the name and on behalf of the named Insured and/or any person, firm or corporation as above defined,

"1. Defend all claims or suits for damages for such injuries for which damages they are, or are alleged to be, liable.

"2. (a) Pay all costs and expenses incurred with the Company's written consent.

"(b) Pay all taxed costs. (c) Pay all interest accruing upon any judgment.

"3. Repay the expense incurred in providing such immediate surgical relief as is imperative at the time of the accident.

"Provided always that the Insurance hereby made is and shall be subject to the Conditions hereinafter set forth and to the memoranda, if any, endorsed hereon in like manner as if the same were respectively repeated and incorporated herein, and compliance with such Conditions and memoranda, and each of them, shall be a condition precedent to the right of recovery hereunder.

"Conditions

"3. Upon the occurrence of any accident covered by this Policy, the Insured shall give immediate written notice thereof to the Company at its Home Office, and forward to the Company forthwith after receipt thereof every process, pleading and paper of any kind relating to any and all claims, suits and proceedings.

"7. In the event of bankruptcy or insolvency of the named Insured the Company shall not, as respects said Insured, be relieved thereby of the payment of any indemnities provided herein, except that the amount of the damage shall first be fixed by judgment against the said Insured."

This policy is the contract between appellant and Forest Bayliss under the terms of which, together with the provisions of law, the rights, duties, and obligations of the parties must be determined. Its terms place no obligation upon Forest Bayliss to co-operate with appellant in the defense of an action. In this respect it differs from the contracts of insurance which furnish the basis for the many decisions from other jurisdictions cited by appellant and relied upon by it to sustain its contention that a failure of the insured to co-operate with the insurer in the defense of an action releases the insurer from liability under its policy. In practically all of the cases cited by appellant the duty of the insured to co-operate with the insurer was made a condition in the policy and of the right of recovery. This condition being omitted from the policy in the instant case, the cases cited furnish no authority for a similar holding here. We conclude that, as the contract placed no duty upon Forest Bayliss to co-operate with appellant in the defense of the suit against him, this failure to co-operate, of itself and standing alone, cannot furnish a defense in the instant action. It must, however, be considered in connection with the defenses of collusion and fraud, as the failure to co-operate, in connection with other facts, might be considered as evidence of either collusion or fraud or both.

[6] The defenses of collusion and of fraud are so interwoven and so closely connected in the evidence and arguments that we will consider them together.

It appears that none of the parties to the action against appellant, nor the children of Katie Bachman, knew of the existence of the insurance policy until after her death. Henry Bachman was appointed the administrator of her estate. When her safe deposit box was opened the policy was discovered. It does not appear just when this happened, but the evidence would justify the conclusion that it was some time between the 1st and the 29th days of July, 1927. After its discovery the policy was taken to B. M. Benson, Esq., who was acting as the attorney for the administrator in the probate proceedings. He thereupon started to investigate the accident and questioned all of the survivors of the wreck. He advised the administrator, Leo Bachman, and Joseph V. Steele that they had causes of action against the insurance carrier, but that they would first have to sue Forest Bayliss, the driver of the car. They thereupon authorized him to proceed with the litigation and he prepared the complaints which were subsequently filed, served on Forest Bayliss, and mailed to appellant on the 2d day of August, 1927. Appellant thereupon sent an adjuster to Fresno to investigate the accident. Ray W. Hays, Esq., had been the local attorney for appellant for a number of years. He was absent from Fresno, but a copy of the summons and complaint was left in his office for his attention upon his return. Frederick W. Docker, Esq., was caring for Mr. Hays' legal business during his absence. The adjuster prepared a written statement of the circumstances of the accident, but Bayliss refused to sign it, giving as his reasons that Mr. Benson had told him to sign nothing. This statement did not contain a detailed account of the circumstances of the accident. It contained assertions, which were in the form of conclusions and opinions, that Bayliss did not consider himself careless or negligent in his operation of the automobile, nor that he considered that any one had a just ground for any claim against him on account of the accident. Except for these legal conclusions and opinions, the circumstances of the accident there set forth did not necessarily differ from those contained in other statements made by Bayliss in which his negligence clearly appears. The evidence concerning the conversation leading up to Bayliss' refusal to sign this first statement is not entirely clear. Mr. Docker testified that he asked Bayliss if the statement correctly set forth the facts of the accident, to which Bayliss replied that it did. The facts contained in the statement do not necessarily refer to nor include statements of legal conclusions or opinions. Further, the trial court found that Bayliss was negligent in the operation of the automobile, which finding is supported by the great weight of the evidence.

Mr. Hays returned to Fresno about the middle of August and interviewed Bayliss at his office. A few days later, after being sworn by a notary public, Bayliss gave a statement of the circumstances of the accident to Mr.

Hays, which was taken down in shorthand. He refused to sign this statement, giving the same reason as before. On August 27, 1927, he was again called to the office of Mr. Hays and there presented with answers to the three complaints filed against him. He read over the answers and refused to sign them, telling Mr. Hays that Mr. Benson had advised him to sign nothing. In an extended conversation with Mr. Hays, Bayliss stated that he was friendly with the plaintiffs in the three actions and thought they should recover for their losses, and that he would like to have them do so if he could do it squarely. He asserted that his negligent operation of the automobile was the sole cause of the accident. Upon his final refusal to verify the answers, Mr. Hays informed Bayliss that appellant disclaimed liability under its insurance policy because of his refusal to verify the answers presented, or any other answers, and his refusal to co-operate in the defense of the actions, and his apparent desire to co-operate with the plaintiffs in their securing judgments against him. Mr. Hays gave him a letter, which was probably a further disclaimer of liability, but which does not appear in the record, and also called Mr. Benson over the telephone, informing him that Bayliss had refused to verify the answers. Under date of August 31, 1927, appellant wrote Bayliss a letter disclaiming responsibility and liability under the insurance policy for the reasons hereinbefore set forth. Shortly thereafter Mr. Benson got into communication with Bayliss and explained to him that he had not told him not to sign any anwers, but merely not to sign any statements prepared by the agents or representatives of appellant, and that it was necessary for Bayliss to sign answers to the complaints filed against him. This conference resulted in Mr. Benson preparing a letter addressed to Mr. Hays which Bayliss signed and mailed. This letter was dated September 8, 1927, and informed Mr. Hays in part as follows:

"I have your letter of August 31, 1927, in regard to the three suits brought against me by Leo Bachman, Joseph V. Steele & Henry Bachman, and note what you say with reference to your denying any liability. You are mistaken in regard to my attitude in this matter. I have not refused to verify any answer which denies negligence on my part, for the simple reason that the accident was caused solely by my negligence and carelessness. I have always been willing and still am willing, and I hereby offer to verify any answer which truthfully sets forth the facts in these cases, and I demand that you prepare such answers for signature and verification.

"No default has been entered in any of these cases and unless you undertake my defense immediately, I shall employ other attorneys and later I expect reimbursement for any sum I am compelled to expend for attorney fees.

"Your attitude throughout the matter has been that you should tell me the facts in these cases instead of accepting the facts from me."

This letter did not change the attitude of appellant. It stood upon its former disclaimer of liability and refusal to represent Bayliss in the litigation. Judgments in the three actions were rendered on January 12, 1928. On that day Mr. Benson informed Mr. Hays that the judgments had been rendered, but that, if Mr. Hays thought appellant had any defenses to the actions, he would set aside the judgments to permit such defenses to be made. Mr. Hays replied that Mr. Benson "had closed the gates behind him" or "had burned his bridges behind him." Under date of June 7, 1928, Mr. Benson wrote Mr. Hays in part as follows: "In view of the apparent misunderstanding of Mr. Bayliss' refusal to verify the answer in the original cases we are considering the advisability of having all of the judgments set aside and the cases dismissed and then filing same over again, and in case this course is pursued, Mr. Bayliss would then verify any answer which you might prepare. Please take this up with the company at once and request an early answer, and when you have received same, please advise me."

As this letter produced no results, demand was made upon appellant to pay the judgments, and, upon its refusal so to do, the three suits were instituted to collect them.

Had the court found that there was fraud and collusion between Bayliss and the plaintiffs which resulted in the judgments against Bayliss, we have concluded that there is ample evidence in the record to have supported such a finding. However, the court found that there was no such collusion or fraud. Appellant seriously questions these findings as contrary to and not supported by the evidence. In addition to the testimony produced by appellant which we have detailed, it introduced evidence showing that Henry Bachman and Steele regarded the bringing of the actions against Bayliss as a joke. They explained that they really did consider it a joke for the reason that Bayliss was without property or assets and earning $17 per week, out of which he was trying to support himself, his wife and child; that his wages were insufficient for this purpose, and that he had to borrow from his relatives in order to pay his living expenses. They also testified that they did not expect to collect judgments from Bayliss. They explained this statement by saying that this belief was founded upon Bayliss' impecunious condition. We believe that the foregoing fairly summarizes the evidence presented by appellant upon which it relies to establish collusion between, and fraud on the part of, Bayliss and the plaintiffs in the actions against him.

In view of the findings of the court against the existence of fraud and collusion, we must determine whether or not there is any evidence in the record, or reasonable inferences to be drawn from such evidence, supporting these findings. This evidence is found principally in the testimony of Mr. Benson. He admits conferring with Bayliss several times and telling him not to sign the statements prepared by the representatives of appellant. He explains this action on his part by saying that it is a well-known fact that adjusters for indemnity companies in obtaining these statements often color them in favor of the company and secure the signature of an unwary witness to a writing that does not exactly present the true facts. He was positive in his testimony that he did not tell Bayliss not to sign any answers to the complaints and did not know that Bayliss had refused to sign or verify the answers until informed of this fact by Mr. Hays over the telephone. He immediately got into communication with Mr. Bayliss and corrected his mistaken idea about the answers and had him sign and mail the letter of September 8, 1927. He further testified that at no time did he advise Bayliss in the litigation or instruct him to do anything in connection therewith except to tell the representatives and attorneys for appellant the truth about all of the circumstances of the accident and not to sign any written statements prepared by them. Of course the impropriety of the attorneys for the plaintiff giving any advice or instructions to the defendant in an action is immediately apparent and needs no further comment. Anderson v. Eaton (Cal. Sup.) 293 P. 788; Elberta Oil Co. v. Superior Court (Cal. App.) 291 P. 668.

[7] The answers to the actions filed against Bayliss which were prepared and presented to him for verification are not in the record. It appears from the undisputed evidence, however, that these answers denied negligence on the part of Bayliss, and that when Bayliss refused to sign them he maintained that he was guilty of the accident, or, in other words, that his negligence caused it. While this did not excuse him from signing any answer which might truly set forth a legitimate defense, it did excuse him from signing the answers presented to him. As was said in the case of Royal Indemnity Co. v. Morris, supra: "It may be added that the duty of the insured in respect of permitting a defense in his name is not susceptible to precise general definition. He is not to be a mere puppet in the hands of the insurer; he is under no obligation to permit a sham defense to be set up in his name, nor can he be expected to verify an answer which he does not believe to be true; he cannot evade personal responsibility, and hence is not bound to yield to any demand which would entail violation of any law or ethical principle; but he cannot arbitrarily or unreasonably decline to assist in making any fair and legitimate defense."

As soon as Bayliss was informed of his duty to sign any answers prepared for him which set forth the true facts of the case, he informed appellant of his willingness to verify such pleadings. This information was conveyed to appellant more than four months before Bayliss' default was entered and judgment taken against him. This gave appellant ample time to interpose any legitimate defense that might be urged in the pending actions. While Bayliss was not justified in the position which he first assumed, we think it is equally apparent from the evidence that appellant was extremely prompt in attempting to avail itself of a technical defense and thereby to escape liability for an injury which the record clearly indicates was caused by the negligence of its insured.

[8] We have examined the record and the undisputed evidence shows that Leo Bachman was quite seriously injured in the accident, one of his wrists was broken and the other quite badly sprained. He was severely bruised, and his face and forehead were badly cut. He was confined to a hospital for about two weeks. We are of the opinion that the judgment rendered in his favor was not excessive. He was asleep on the rear seat of the automobile at the time of the accident, and, if there was any legitimate defense to be urged in his suit against Bayliss except as to the amount of his recovery, it does not appear from the record. If there was any such defense to be urged, appellant had ample time in the four months which elapsed between September 8, 1927, and January 12, 1928, in which to prepare an answer setting it forth and to serve and file the same.

Analyzing the evidence, and the arguments of appellant, we find that its grounds for maintaining that the policy was voided because of collusion between Bayliss and the three plaintiffs in the damage actions, and of a fraudulent agreement between them to fasten an unjust liability upon appellant, are as follows: (1) The family relationship between them, which is admitted. (2) The fact that the plaintiffs regarded their actions against Bayliss as jokes, which was explained upon the grounds we have indicated. The trial court accepted this explanation as true. There is a reasonable inference from the evidence supporting this theory. (3) That there was an agreement between the parties not to enforce the judgments against Bayliss. The plaintiffs testified that they did not expect to collect the judgments because his impecunious condition made him judgment and execution proof. Bayliss testified he did not expect to pay the judgments because he could not do so. They all denied that there was any agreement to release Bayliss from paying the judgments. The court's findings against the existence of any such agreement is supported by the evidence. (4) The refusal of Bayliss, at the request of the attorney for the plaintiffs, to sign written statements of the circumstances of the accident prepared by the representatives of appellant. It is admitted by respondent that this was done. This attorney told Bayliss to tell the true facts of the accident, but not to sign statements. Bayliss apparently made several frank and truthful statements of the circumstances of the accident to the attorney for appellant. We know no rule of law, and there is nothing in the policy, requiring him to sign or swear to such statements. The court's finding in favor of respondent on this issue that this action on the part of Bayliss and the attorney was taken in good faith and without any collusive or fraudulent intent is supported by a reasonable inference from the evidence. (5) That Bayliss refused to co-operate with appellant in the defense of the actions against him. The contract of insurance placed no obligation upon him so to do, and this lack of co-operation can only be considered as a circumstance tending to indicate collusion or fraud or both. (6) That Bayliss refused to sign and verify the answers presented to him. These answers presented defenses not in accordance with the circumstances of the accident as claimed by him to be the true facts, and excused him from signing and verifying the answers presented to him. (7) That Bayliss refused to sign or verify any answers in the actions against him under the advice of the counsel for the plaintiffs. According to Bayliss' testimony, and his statements to the attorneys for appellant, they undoubtedly believed this to be true. The attorney for the plaintiffs testified that he had given no such advice to Bayliss and did not know that any answers had been prepared or presented to him, nor that he had refused to sign them until after such refusal when he was told of this fact by one of the attorneys for appellant. He thereupon communicated with Bayliss and informed him that no such advice had been given, and that he would have to sign and verify any answers, the allegations of which conformed to the truth. Bayliss wrote appellant's attorney and informed him that he was ready and willing to sign and verify such answers. Two or more people must collude together. Collusion cannot be on the part of one alone. Nor can a fraudulent agreement to fasten an unjust liability on another be made by one person. The testimony of Mr. Benson and his clients denied collusion on their part. The court found against this contention of appellant, and there is evidence in the record to support this finding. (8) That on account of his relationship to and friendship for the plaintiffs, Bayliss desired them to recover judgments against him. Bayliss admitted this but qualified it with the statement that he wanted them to recover if he could "do it squarely." This desire on his part might have been a natural one prompted by the honest belief that he was negligent and solely responsible for the accident. The evidence points strongly to his negligence. In fact, after reading the record, no other conclusion should be reached. The court accepted and believed this explanation and under the evidence it could do so. (9) From the foregoing facts and combination of circumstances, appellant concludes that there is satisfactory evidence demonstrating collusion between the plaintiffs and their attorney on the one side and Bayliss on the other, and a fraudulent agreement between these persons to fasten an unjust liability on appellant. The court found against this contention and that the parties to the action and the attorney had acted in good faith and without collusion or fraud. This finding is supported by evidence and by reasonable inferences from the evidence.

[9] Appellant and its attorneys undoubtedly believed that collusion and fraud actually existed between Bayliss and the parties suing him at the time of the disclaimer of liability under the policy and the refusal to proceed with the defense of the actions. If such collusion or fraud had existed, they would have been justified in the action they took. Judgments tainted by fraud or collusion should not be permitted to furnish the basis of the actions on the insurance policy. This defense, if established, should prevail, but like any other defense, if not established in the trial court, must fail. The trial court found against appellant on this issue, and the finding finds sufficient support in the evidence to become final in this court.

[10] Appellant confidently urges that, under the decisions in the cases of Metropolitan Casualty Ins. Co. v. Colthurst (C. C. A.) 36 F.(2d) 559; Royal Indemnity Co. v. Morris, supra; Coleman v. New Amsterdam Casualty Co., 247 N. Y. 271, 160 N. E. 367; and Rushing v. Commercial Casualty Ins. Co., 251 N. Y. 302, 167 N. E. 450, the judgment must be reversed.

The two federal cases were decided by the United States Circuit Court of Appeals, Ninth Circuit, upon causes of action arising in California. In both the court construed a statute of this state relating to actions against insurance carriers, approved May 21, 1919 (St. 1919, p. 776), which we will hereafter quote at length. United States courts have always conceded to state courts the right to construe and interpret the statutes of their state where federal constitutional or statutory provisions were not involved. We have concluded that the construction placed on this statute by the Circuit Court of Appeals does not conform to that of the courts of

California. The cases are also distinguishable in point of fact from the instant case. In the Colthurst Case the policy required the insured to forward to the company the summons and other process as soon as it was served on him. The company had no notice of the service of process in the action in which the judgment was rendered against the insured until three days after its rendition, which fact furnishes the basis of the decision. In the Morris Case the insurance policy contained the provision that the "insured shall in no manner aid or abet the claimant but shall co-operate fully with the company, the Royal Indemnity Company, in defense of such claim or suit," which proviso is wholly lacking from the policy in the case at bar. A violation of this co-operation clause is relied upon by the Circuit Court for the conclusion it reached.

The cases cited from New York are also easily distinguishable from the case we are considering, for two reasons: First, because the duty to co-operate clause appeared in both of the policies; and, second, because of the material difference between the New York and California statutes permitting actions to be filed against the insurance carrier by an injured person.

The California statute (St. 1919, p. 776) is as follows: "Section 1. No policy of insurance against loss or damage resulting from accident to, or injury suffered by another person and for which the person insured is liable other than a policy of insurance under the workmen's compensation, insurance and safety act of 1917 or any subsequent act on the same subject, or, against loss or damage to property caused by horses or other draught animals or any vehicle, and for which loss or damage the person insured is liable, shall be issued or delivered to any person in this state by any domestic or foreign insurance company, authorized to do business in this state, unless there shall be contained within such policy a provision that the insolvency or bankruptcy of the person insured shall not release the insurance carrier from the payment of damages for injury sustained or loss occasioned during the life of such policy *and stating that in case judgment shall be secured against the insured in an action brought by the injured person or his heirs or personal representatives, in case death resulted from the accident, then an action may be brought against the company, on the policy and subject to its terms and limitations, by such injured person, his heirs or personal representatives as the case may be, to recover on said judgment. Upon any proceeding supplementary to execution, the judgment debtor may be required to exhibit any policy carried by him insuring against the loss or damage for which judgment shall have been obtained.*"

The portion which we have italicized does not appear in the New York statute (N. Y. Laws of 1917, c. 524), but otherwise the two are substantially the same. The Supreme Court calls attention to another important difference in the statutory law of the two states in the case of Malmgren v. Southwestern Automobile Ins. Co., 201 Cal. 29, 255 P. 512, 513.

In the jurisdictions which do not recognize the right of an injured person to bring an action on the insurance policy to collect the amount of a judgment rendered against the insured for damages suffered at his hands, the policy is regarded and treated as a private contract of indemnity between the insurer and insured in which no other person may become interested. In the jurisdictions recognizing such a right of action the policy is regarded as a contract between the insurer and the insured for their benefit and for the benefit of an unknown third person who becomes known and identified upon being injured by the insured. The language of our statute authorizing the injured person to file suit against the insurance carrier, after recovery of a judgment against the insured, would indicate that the Legislature intended to adopt the latter rule in California. It would seem a strange and useless proceeding on the part of the Legislature to give to the injured the right to sue the insurer if a recovery in such an action could be defeated by the insurance company and the insured without the knowledge or consent of or any act on the part of the injured person. That the Supreme Court took this view is indicated by the language used in the case of Malmgren v. Southwestern Automobile Ins. Co., supra, as follows:

"It is appellant's contention that no contractual relation is alleged or shown to exist between the injured party and the appellant. The provisions of the statutes, as above quoted, are, as a proposition of law, a part of every policy of indemnity issued by a company or corporation engaged in transacting the kind of indemnity insurance business which appellant was authorized by the law of the state to transact. It was a contractual relation created by statute which inured to the benefit of any and every person who might be negligently injured by the assured as completely as if such injured person had been specifically named in the policy. * * *

"It is contended by appellant that its liability could not accrue under the provisions of the policy until an execution issued upon the judgment obtained against the assured, or judgment debtor, was returned unsatisfied by reason of the insolvency or bankruptcy of said assured. The statute of this state, which is the final word on this issue, does not make the return of the execution unsatisfied a prerequisite to the commencement of an action upon the policy. The statute of the state of

New York has such a provision, and appellant had caused to be incorporated in its policy the language of the New York statute verbatim. The substantive law of this state cannot be enlarged, circumvented, defeated, or modified by any provision which the insurer may have elected to place in its contract in derogation of or in conflict therewith. The statute is founded upon principles of public policy, and an anomalous situation would be created if the rights of third parties, for whose protection the law was adopted, could be hindered, delayed, or defeated by the private agreements of two of the parties to a triparty contract. If appellant's contention be sound, then it could, with equal justification, require the question of the assured's bankruptcy to be adjudicated by a competent tribunal before it would be obliged to recognize his insolvency or bankruptcy, or impose other conditions precedent to the injured person's right of action in derogation of express provisions of the law's mandate. We see no merit in the contention. Schoenfeld v. New Jersey Fidelity & Plate Glass Ins. Co., 203 App. Div. 796, 197 N. Y. S. 606, relied upon as an authority in the instant case, is merely declaratory of the New York statute * * * which provides that a cause of action does not accrue to the injured person *until an execution issued upon the judgment against the assured has been returned unsatisfied by reason of insolvency or bankruptcy.* No such language or language equivalent thereto is found in the statute of this state and neither appellant nor this court is given authority to interpolate the provision of the New York law into a California statute. The clause in the statute which provides that an 'action may be brought against the company, on the policy and subject to its terms and limitations, by such injured person,' was not intended to defeat its purpose upon the theory that an action brought 'on the policy' binds the injured person to a repudiation or waiver of the benefits of the statute expressly adopted for his protection, but it clearly has reference to those matters concerning which the insurer and assured could legally contract."

The following cases support the conclusions which we have reached concerning the construction to be placed on this statute: Marple v. American Automobile Ins. Co., 82 Cal. App. 137, 255 P. 260; Pigg v. International Indemnity Co., 86 Cal. App. 671, 261 P. 486; Bryson v. International Indemnity Co., 88 Cal. App. 100, 262 P. 790, and Langley v. Zurich Gen. Acc. & L. Ins. Co., 97 Cal. App. 434, 275 P. 963.

We are of the opinion that after the happening of an accident coming within the coverage provisions of a policy of insurance, such as we are considering, neither the insurer nor the insured can, by any voluntary act, defeat the statutory right given to the injured person to bring an action on the policy after judgment recovered against the insured without some act or omission on the part of the insured which will relieve the insurer from liability. Of course, collusion or fraud between the insured and the injured to the damage of the insurer, when proven in a proper action, would furnish grounds for the release of the insurer. To adopt any other rule would permit the insurer and insured to revoke or cancel the policy or release the insurer's liability at will after the accident and thus defeat the purpose of the statute, giving the one injured a cause of action against the insurer to enforce his judgment. This was attempted in the case of Finkelberg v. Continental Casualty Co., 126 Wash. 543, 219 P. 12. An examination of this case discloses that the Continental Casualty Company issued its policy of indemnity insurance to Tanaka. On November 2, 1920, and while the policy was in full force and effect, Finkelberg was injured through the operation of an automobile by Tanaka. On July 7, 1921, Finkelberg recovered judgment against Tanaka for his injuries. Upon his failure to collect this judgment he brought suit against the insurer, which defended the action by alleging a release of liability under the policy for a consideration and by agreement with the insured. It appears that on April 11, 1921, before the judgment against Tanaka, and before the service of summons upon him, the insurer paid him $850 for this release. The Supreme Court of Washington refused to recognize this release and held that the right, which finally ripened into a cause of action by Finkelberg against the insurer, accrued at the time of the accident and injury on November 2, 1920. See, also, Metropolitan Casualty Ins. Co. v. Albritton, 214 Ky. 16, 282 S. W. 187.

Judgment affirmed.

We concur: JENNINGS, J.; LAMBERSON, Justice pro tem.

BACHMAN v. INDEPENDENCE INDEMNITY CO.*

Civ. 299.

District Court of Appeal, Fourth District, California.

March 11, 1931.

Rehearing Denied April 8, 1931. Hearing Granted by Supreme Court May 4, 1931.

1. Death 🔑15.

Personal representative or heirs at law cannot recover for death, where deceased would have had no cause of action for injury.

2. Negligence 🔑93(1).

Negligence of automobile driver must be considered as negligence of owner riding with driver and in charge of expedition.

3. Insurance 🔑435.

Recovery cannot be had on automobile liability policy for death of owner of automobile killed by negligence of one driving car at her request.

> The policy insured owner against claims for damages from bodily injuries caused by accident to any person for which she or others named in policy might become liable. The policy showed that owner, had she lived, would have had no right of action against insurer, and therefore her children and heirs at law could have no greater right of recovery.

Appeal from Superior Court, Fresno County; S. L. Strother, Judge.

Action by Henry Bachman, as administrator of the estate of Katie Bachman, deceased, against Independence Indemnity Company. Judgment for plaintiff, and defendant appeals.

Reversed.

Willis I. Morrison, of Los Angeles, and Ray W. Hays, of Fresno, for appellant.

B. M. Benson and W. H. Stammer, both of Fresno, for respondent.

MARKS, Acting P. J.

Henry Bachman was at all times herein mentioned the duly qualified and acting administrator of the estate of Katie Bachman, deceased.

On and before June 19, 1927, Katie Bachman was the owner of a Buick sedan. It appears from the allegations of the complaint, and the evidence, that on this date she requested Forest Bayliss to drive the automobile for her, and that while he was driving it over the Pacheco Pass highway, with the deceased sitting beside him on the front seat of the car, he drove it off the highway and over an embankment, killing Katie Bachman and injuring others riding with them.

Prior to the accident, appellant had written and delivered to deceased a policy of public liability indemnity insurance, a copy of which is attached to the complaint and which contains the following:

"The Independence Indemnity Company, (hereinafter called 'the Company') hereby agrees with the Insured named in Statement 1, (Katie Bachman), that if, during the term of this policy, any automobile described in Statement 4, (the Buick Sedan involved in the accident) by reason of its ownership, maintenance or use at any location within the United States of America and Canada, shall cause bodily injuries by accident, whether resulting fatally or otherwise, to any person or persons, and for which bodily injuries the Insured and/or others as hereinafter provided are liable for damages.

"Then the Company Will Insure Against Loss Arising Out of Such Liability, Subject to the Limits Set Forth in Statement 11."

Respondent, as administrator, filed suit against Forest Bayliss on behalf of the children of Katie Bachman for the damage suffered by them from the death of their mother. A default judgment was entered in favor of the plaintiff in the sum of $7,507, which judgment became final, but was not paid. Respondent then demanded payment of the judgment from appellant, and, upon its refusal to pay, brought this action. The court below rendered judgment in favor of respondent in the sum of $5,007.

The court found all of the allegations of the plaintiff's complaint true, or, in other words, that at the time of the accident Forest Bayliss was driving the Buick sedan at the request, and with the permission of Katie Bachman and for her. While many questions are argued by appellant on this appeal, the only one we need to consider is whether or not the children of Katie Bachman can recover under the language of the public liability policy which we have quoted.

[1] It is well settled in this state that the personal representatives or heirs at law of a deceased cannot recover for a death where the deceased would have had no cause of action for the injury. 8 Cal. Jur. 960; Watts v. Murphy, 9 Cal. App. 564, 99 P. 1104; Good v. City of San Bernardino, 49 Cal. App. 559, 193 P. 790; Burnham v. Stone, 101 Cal. 164, 35 P. 627; Young v. Southern Pacific Co., 182 Cal. 369, 190 P. 36. It therefore remains for us to determine whether or not Katie Bachman could have recovered from appellant for her injuries had she survived.

[2, 3] It is admitted by respondent that Bayliss was driving the automobile as the agent and servant of Katie Bachman. He also admits that the negligence of Bayliss in the operation of the automobile caused the accident. Mrs. Bachman was sitting on the front seat

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

* Hearing granted 6 P.2d 943.

by the side of the driver at the time of the accident. She had arranged the trip and had invited the other passengers to accompany her and must be held to have been "in charge of the expedition." Gates v. Pendleton, 184 Cal. 797, 195 P. 664, 666. We must conclude that "the liability of an owner, under the circumstances above described, is doubtless a primary one" (Bosse v. Marye, 80 Cal. App. 109, 250 P. 693, 697), and that the negligence of Bayliss must be considered as the negligence of Mrs. Bachman.

The public liability policy was not a policy of accident insurance indemnifying Katie Bachman against injuries suffered by herself in an accident. By its definite terms it insured her against claims for damages arising from bodily injuries caused by accident to any person or persons, for which she or others named in the policy might become liable. The mere reading of the policy makes it self-evident that Katie Bachman, had she lived, would have had no right of action against appellant for any injuries suffered by her in the accident. She having no cause of action against appellant, it follows that her children and heirs at law can have no greater right of recovery than that given her by the terms of the policy. The complaint failed to state a cause of action against appellant, and the judgment is not supported by either the pleadings or the findings.

Appellant urges many other grounds for a reversal of the judgment, but it is not necessary that we consider them here. The case of Leo Bachman v. Independence Indemnity Co. (Cal. App.) 297 P. 110, the opinion in which is this day filed, considers some of them and may be referred to for a further statement of the facts and questions involved.

Judgment reversed.

We concur: JENNINGS, J.; LAMBERSON, Justice pro tem.

112 Cal. App. 464

STEELE v. INDEPENDENCE INDEMNITY CO.

Civ. 297.

District Court of Appeal, Fourth District, California.

March 11, 1931.

Rehearing Denied April 8, 1931. Hearing Denied by Supreme Court May 4, 1931.

Damages ⚿131(1).

$750 *held* not excessive for broken collar bone and bruises on head, back, and legs.

Appeal from Superior Court, Fresno County; S. L. Strother, Judge.

Action by Joseph V. Steele against the Independence Indemnity Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Willis I. Morrison, of Los Angeles, and Ray W. Hays, of Fresno, for appellant.

B. M. Benson and W. H. Stammer, both of Fresno, for respondent.

MARKS, Acting P. J.

This is an action to recover from an insurance carrier the amount of a judgment rendered against the insured in favor of a guest injured while riding in an automobile. Respondent recovered judgment from the insurance carrier who prosecutes this appeal.

This is a companion action to the cases of Leo Bachman, a minor, by Henry Bachman, his guardian ad litem, v. Independence Indemnity Company, a corporation (Civil No. 298) 297 P. 110, and Henry Bachman, as administrator of the estate of Katie Bachman, deceased, v. Independence Indemnity Company, a corporation (Civil No. 299) 297 P. 119, the opinions in which are this day filed. The facts and issues here are similar to those detailed in the Leo Bachman Case, except as to the injuries suffered by respondent and the amount of damages recovered by him.

The evidence shows that respondent was sitting by the side of Leo Bachman on the rear seat of the automobile driven by Forest Bayliss. Steele suffered a broken collar bone, bruises on his head, back, and legs, and was unable to work for about three weeks. He was dozing at the time of the accident and was not able to testify to any of the circumstances leading up to it. In his action against Forest Bayliss judgment was rendered in his favor in the sum of $750. In our opinion this judgment was not excessive. Judgment was rendered in his favor in the instant case in the sum of $835.61, this being the amount of his judgment against Forest Bayliss, plus accrued interest.

For the reasons given and upon the authorities cited in the opinion this day filed in the case of Leo Bachman, a minor, by Henry Bachman, his guardian ad litem, v. Independence Indemnity Company, a corporation, Civil No. 298, supra, the judgment herein is affirmed.

We concur: JENNINGS, J.; LAMBERSON, Justice pro tem.

⚿For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

112 Cal. App. 679

V. C. SOLOMON, Plaintiff and Respondent, v. Joe FRANCO et al., Defendants and Appellants.

Civ. 7502.

District Court of Appeal, First District, Division 2, California.

March 19, 1931.

Appeal from Superior Court, Santa Clara County; F. B. Brown, Judge.

Richard V. Bressani and John M. Burnett, both of San Jose, for appellants.

Wayne R. Millington, of San Francisco, for respondent.

PER CURIAM.

The respondent having in open court consented to remit all the judgment above the sum of $249, and it appearing to the court that there is nothing involved in the appeal except the question of the sufficiency of the evidence, and it further appearing that the evidence is fully sufficient to support a judgment in that amount, the judgment is modified to read $249, and, as so modified, is affirmed, respondent to recover costs.

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112 Cal. App. 732

WILSHIRE-COMMONWEALTH CORPORATION et al. v. STATE CORPORATION DEPARTMENT et al.

Civ. 7818.

District Court of Appeal, Second District, Division 1, California.

March 21, 1931.

Rehearing Denied March 21, 1931.

1. Courts 🔑207(2).

Where application for certiorari may lawfully be made to lower court in first instance, higher court will not assume jurisdiction, unless circumstances set forth in petition render it proper that writ should originally issue from appellate court to which application is made (Rules of Supreme Court and District Court of Appeal, rule 26).

2. Courts 🔑207(2).

Certiorari to review order suspending permit to sell securities was denied, where application for writ should have been made to Superior Court in first instance, and writ raised questions not directly affecting public welfare (Rules of the Supreme Court and District Courts of Appeal, Rule 26).

Application for certiorari by the Wilshire-Commonwealth Corporation against the State Corporation Department and another to review an order of the Department suspending a permit to sell and issue convertible notes and shares of stock.

Writ denied.

CONREY, P. J.

On petition for rehearing, after the entry of an order denying petition for writ of certiorari.

[1] One of the reasons for denying the petition for the writ was that the application should have been made to the Superior Court rather than to this court. While the jurisdiction is concurrent, the rule of practice is that, where the application might have been lawfully made to a lower court in the first instance, the higher court will not assume jurisdiction of the cause, unless the circumstances set forth in the petition are such as to "render it proper that the writ should issue originally from the appellate court to which such application is made and not from such lower court." Rule 26 of the Rules of the Supreme Court and District Courts of Appeal.

In denying the application for the writ, the justices of this court were of the opinion that petitioner will not be exposed to the dire consequences described by it as results likely to ensue from the determination of this court that the petition should have been filed in the Superior Court.

[2] Notwithstanding the alleged magnitude of the interests involved, the questions raised concerning the order sought to be reviewed are not such that they directly affect the public welfare. Furthermore, the order made by the commissioner of corporations (suspending the permit theretofore granted to petitioner to sell and issue its convertible notes, and shares of stock) is an order suspending the permit only "in so far as the same authorized or permitted the sale and issuance of securities of said applicant." Conceding for the moment that the commissioner would be without jurisdiction to make any order which would prevent the exercise of rights vested in respect to convertible notes which were sold before the date of the order of suspension, it does not appear that by said order of suspension the commissioner has attempted to accomplish any such interference with rights thus vested.

The petition for rehearing is denied.

We concur: HOUSER, J.; YORK, J.

112 Cal. App. 565

FRANCIS et al. v. IOWA NAT. FIRE INS. CO. OF DES MOINES.

Civ. 3790.

District Court of Appeal, Third District, California.

March 16, 1931.

1. **Insurance** 🔑**665(2).**

Evidence *held* to sustain finding that fire policy was duly executed by authority of insurer.

2. **Insurance** 🔑**665(8).**

Evidence sustained finding that clause in fire policy exempting insurer from liability when insured property was incumbered by mortgage, was waived (Civ. Code, § 2636).

3. **Insurance** 🔑**665(8).**

Court, in absence of fraud on part of insured, should carefully examine evidence regarding failure to furnish proof of loss, so as to avoid forfeiture.

4. **Insurance** 🔑**560(1).**

Insurer, having determined to repudiate obligations of fire policy, had duty of notifying insured so that he could protect himself by furnishing proof of loss (Civ. Code, § 2636).

5. **Insurance** 🔑**556(1).**

General agent of fire insurance company, with power to bind company in conduct of its business, has authority to waive clause of policy requiring sworn proof of loss (Civ. Code, § 2636).

6. **Insurance** 🔑**558(2).**

Declarations of insurer and agents *held* to waive furnishing of sworn proof of loss required by fire policy (Civ. Code, § 2636).

> Local agents of insurer, who had apparent authority to represent company as general agents, with exception of adjusting losses, specifically assured the insured that they would do everything necessary to collect the insurance, and told him that there was nothing further required of him to do or to sign, in addition to which the general agent had returned check given for premium with the statement that payment of premium could not be accepted at that time, in view of fact that company was not in a position to either admit or deny liability on the particular policy.

7. **Insurance** 🔑**559(1).**

Insurer, by denying liability on fire policy, waived provision requiring sworn proof of loss (Civ. Code, § 2636).

8. **Insurance** 🔑**665(8).**

Evidence established that insurer at all times intended to repudiate liability under fire policy, so as to waive requirement for proof of loss (Civ. Code, § 2636).

9. **Insurance** 🔑**665(8).**

Insurer's conduct in sending adjuster to insured immediately after fire was evidence of waiver of clause of contract requiring proof of loss (Civ. Code, § 2636).

Appeal from Superior Court, Stanislaus County; L. W. Fulkerth, Judge.

Action by L. S. Francis and another against Iowa National Fire Insurance Company of Des Moines. Judgment for plaintiffs, and defendant appeals.

Affirmed.

Robert M. Pease and Roy P. Dolley, both of Los Angeles, for appellant.

Griffin & Boone, of Modesto, for respondents.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

This is an appeal from a judgment for compensation of loss by fire, which judgment was rendered pursuant to the terms of an insurance policy. It is claimed liability under this policy was waived by the insured by failure on his part to supply the company with sworn proof of loss as required by the contract.

The plaintiff Western owned a store building, together with fixtures and a stock of merchandise at Ceres. The merchandise was subject to a chattel mortgage to secure the loan of $2,000 which was held by the plaintiff Francis. Except for this mortgage, Francis had no interest in the property. Russell & Robbins are insurance brokers who maintain their office at Modesto. They were agents in Stanislaus county for the defendant, Iowa National Fire Insurance Company of Des Moines. The defendant admits this agency, but denies they had authority to adjust claims of loss in behalf of the company, or to waive the furnishing of proof of loss by the insured as required by the terms of the policy.

December 29, 1926, the agent Russell visited the store of plaintiff Western and took his application for $1,500 insurance on the fixtures and stock of merchandise. The agent then had full knowledge of the existence of the chattel mortgage. The following morning the policy was duly issued insuring the stock and fixtures of plaintiff Western for $1,500 in the Iowa National Fire Insurance Company. At noon on December

30th, the agent Russell delivered the policy to Western and collected the balance of the premium amounting to $32.63. In the meantime, following the acceptance of the insurance, a fire occurred during the night which entirely destroyed the building, fixtures, and stock of merchandise. Notice of the loss by fire was promptly given to the agents Russell & Robbins. Russell sent a telegram to R. H. Jenkins, general agent of the defendant insurance company, at his office in Los Angeles. The message read:

"Modesto, Calif., Dec. 30, 26

"R. H. Jenkins, A. G. Bartlett Bldg., Los Angeles, Calif.

"Wrote Pol. No. 616522 yesterday and store burned at four A. M. today. Two parties not interested in [it] in jail for setting fire. Suggest you sending adjuster Wm. Brown, Stockton, Clark Hotel for adjustment. Would appreciate quick settlement.

"[Signed] R."

To this wire, Jenkins replied: "Adjuster Fargo of this city leaving for Modesto tonight." On the morning of December 30th, Russell & Robbins forwarded to Jenkins a complete report of the issuing of the insurance policy to Western. A few days later they sent Jenkins their check for $32.63 in payment of the premium on the policy. On January 4th this check was returned to Russell & Robbins with a letter containing the following paragraph: "This morning in checking over the slips that came in with the numerous checks from various agencies, she [the clerk] finds a memorandum that this check paid for policy No. 616522 in which P. G. Western is named as the assured. As we are not at the present time in a position to either admit or deny liability under this particular policy, we cannot at this time accept payment of the premium and you are instructed to return same forthwith to the assured."

Mr. Russell informed the insured that his check in payment of the premium had been returned by the general agent. The check, however, was not delivered to the insured. To the question which was propounded to Mr. Western, "Did you ever know that Mr. Russell had received a return check from Mr. Jenkins' office?" he replied, "Yes, he told me that he had received it." Russell constantly encouraged the claimant to believe that the insurance company would adjust and pay the loss which resulted from the fire. Mr. Russell promptly wrote to the general agent, Jenkins, saying he did not intend to return the premium to the insured; that the contract of insurance was legitimate and binding; and, "if we have to expect the Iowa National to renege on us on this loss, we wish to know at once, so we will know how to proceed with this agency in the future, but in this loss, we must stand back of Mr. Western and Mr. Francis as they are innocent parties in this loss. * * * We will not return the check to Mr. Western as this claim must be settled." To this letter the general agent replied as follows:

"February 7, 1927.

"Messrs. Russell & Robbins, 1103 I Street, Modesto, California.

"Gentlemen: Re policy # 616522—Western. As the above numbered policy was issued after the loss and there was no agreement between you and Mr. Western as to which company this policy should be issued in, we are, at the present time having the matter further investigated.

"Also as I have informed you before, you have violated the companies' instructions in issuing a policy on a stock encumbered by a chattel mortgage, and we feel certain that if the company should have been called upon to pay this claim they would have looked to you for reimbursement."

The adjuster, Fargo, visited the premises on December 31, 1926. He interviewed the plaintiff Western, who then furnished him with a complete list of the property which was destroyed by the fire, together with his valuation of the various items thereof. After this written statement had been completed, the adjuster left. Mr. Western testified that the adjuster then said "that was all that he wanted with me, and that I would hear from him in a few days." The insured heard nothing further directly from Fargo, the adjuster, or from the general agent of the defendant company. No sworn proof of loss was furnished to the company by the insured. Western claims to have been induced to believe, from the conduct and declarations of the agents of the insurance company that the filing of this sworn proof of loss was waived. He testified, in addition to the foregoing conduct and statement of the adjuster, that Russell frequently said "he would take care of it [the collection of the insurance] for me, whatever was necessary, and I left it up to him to take care of." He further testified that he visited the office of Russell & Robbins thirty days after the fire, and stated that "I asked them if there was anything else to file, or to sign, and he [Russell] said there was not, that he had taken care of everything. * * * Q. At that time Mr. Russell said he had taken care of everything necessary? A. Yes sir. Q. To collect the money from the insurance company? A. Yes sir." These statements were also corroborated by Mr. Francis. At the trial, Mr. Russell frankly admitted the foregoing facts, and said, with respect to his failure to file the proof of loss, or to notify the insured that the company denied its liability under the policy: "I told them [the insured] at different times, especially Mr. Francis, * * * I didn't think it was necessary for us to make a sworn affidavit and file a proof of loss at that time. * * * Q. Now, you knew that a second notice, or a notice of proof of loss was due then in 60 days, did you not, after the fire? A. Well, not under these circumstances, no sir."

No part of the insurance was paid by the company. In April, 1927, this suit upon the policy was commenced. The defendant answered the complaint controverting all the material allegations thereof. The answer denies that the insurance policy was ever issued or authorized by the company, or that it was obligated to pay any sum of money thereunder. As separate defenses, the answer also alleges the policy is void because it was issued in violation of the provision therein contained that "this company shall not be liable for loss or damage to any property insured hereunder while encumbered by a chattel mortgage." It further asserts that all claim for compensation for loss by fire is forfeited by the insured because of his failure to file a sworn proof of loss within 60 days after the fire occurred, as required by the terms of the contract.

Findings favorable to the plaintiffs were adopted by the court upon all material issues. A judgment for $1,500 and accrued interest, aggregating the sum of $1,635.63, was accordingly rendered in favor of the plaintiffs. From this judgment an appeal was perfected.

For reversal, the appellant relies solely on its contention that the insured forfeited all claims for reimbursement under the insurance policy by failure to furnish the company with sworn proof of loss within 60 days of the time when the fire occurred. It is asserted the conduct of Jenkins, the adjuster, acting in behalf of the company, did not amount to a waiver of the clause of the policy requiring the proof of loss to be furnished. It is further claimed the insurance brokers, Russell & Robbins, were merely local or special agents without authority to waive the filing of this proof of loss.

[1, 2] There is ample evidence in the record to support the finding that the insurance policy was duly executed by authority of the defendant, and that the clause in the policy which exempts the company from liability when the insured property is found to be incumbered by mortgage, was waived, since the agent had full prior knowledge of the chattel mortgage and full power to accept risks and issue policies for fire insurance. It is unnecessary to cite authorities or further elaborate on these issues, since the appellant is urging neither of them as a ground of reversal.

The provision of the policy requiring sworn proof of loss to be furnished within 60 days after the fire occurred was waived by the insurer for three reasons: (1) The course of conduct and declarations of the agents of the defendant led the insured to believe this requirement was waived; (2) the company denied all liability under the policy before the expiration of the 60-day period for filing proof of loss; (3) the company promptly sent its adjuster to interview the insured and procured from him complete information concerning all property which was destroyed by fire together, with detailed valuation thereof.

[3] The obvious purpose of adopting the clause of a fire insurance policy requiring the furnishing of sworn proof of loss within a limited time after the fire occurs is to protect the insurer against fraudulent claims. There is no statutory provision requiring such notice to be furnished. In the absence of fraud on the part of an insured, a court should carefully examine the evidence regarding the failure to furnish proof of loss by fire so as to avoid a forfeiture of legitimate claims merely because of technical omissions. Ramirez v. United Firemen's Ins. Co. of Phila., 46 Cal. App. 451, 455, 189 P. 309.

[4] The insured is charged with no fraud in the present case. The company was informed of the fire the very day it occurred. An adjuster was promptly sent to investigate the origin and result of the fire. He interviewed the insured and secured from him a detailed statement of the property which was burned and its valuation. The adjuster left, saying to the insured, "that is all I want of you; you will hear from me in a few days." Having given to the adjuster a detailed statement of his claim of loss, it is not unreasonable to assume the insured believed no further proof of loss would be required. Neither the adjuster nor the company directly communicated with the insured after taking this data. No complaint was made regarding the property which the insured claimed to have lost, nor its reported valuation. Moreover the defendant's local agents, Russell & Robbins, who had the apparent authority to represent the company as general agents, with the exception of adjusting losses, specifically assured the plaintiff Western they would do everything necessary to collect his insurance. Russell told him there was nothing further required of him to do or sign. Clearly this deceived the insured into believing the furnishing of the sworn proof of loss was waived. Silence on the part of the defendant regarding its intentions undoubtedly helped to deceive the insured. Under the circumstances of this case, having determined to repudiate its obligations under the policy on all grounds, the defendant should have notified the insured so that he could protect himself by conforming literally to the terms of the contract regarding this proof of loss. This omission

may reasonably be attributed to the negligence and fault of the defendant and its agents. Section 2636 of the Civil Code provides that: "Delay in the presentation to an insurer of notice or proof of loss is waived, if caused by any act of his, or if he omits to make objection promptly and specifically upon that ground."

The appellant, however, contends the conduct and declarations of the adjuster were insufficient to constitute a waiver of this provision of the policy, and that the insured admitted he did not rely on the adjuster's acts or declarations. Very likely the insured did rely chiefly on the assurance of the agent Russell that he would look after the collection of the claim, but certainly his belief that no further proof of loss or notice was required was greatly strengthened by the conduct of the adjuster.

[5] The appellant seeks to escape from the responsibility of the declarations made by Russell on the ground that he was a mere special agent with no power to adjust claims and consequently with no authority to waive the provisions of the policy respecting the proof of loss. There is no evidence that the insured knew the agent Russell had no authority to waive this provision of the policy. Apparently Russell had all the authority of a general agent to bind the company which he represented, except the power to adjust claims. A general agent of a fire insurance company, who has power to contract for and bind the company in the conduct of its business, has the authority to waive the clause of a policy requiring sworn proof of loss. The authorities are fairly uniform to the effect that an agent who has the power to adjust losses sustained by fire may also waive the furnishing of written proof of loss. 26 C. J. 393, § 507; 33 C. J. 23, § 680; 7 Cooley's Briefs on Ins. (2d Ed.) p. 5955, § 12a. A number of reputable authorities are cited by the appellant from other jurisdictions which hold that an agent who has no authority to adjust losses has no power to waive the terms of the contract. Hottner v. Fire Ins. Co., 31 Pa. Super. Ct. 461; Bush v. Westchester Fire Ins. Co., 63 N. Y. 531; Ermentrout v. Girard Fire & Marine Ins. Co. of Phila., 63 Minn. 305, 65 N. W. 635, 30 L. R. A. 346, 56 Am. St. Rep. 481. By the great weight of authority, however, the right to adjust claims is not necessarily the test as to the power to waive the furnishing of proof of loss. 7 Cooley's Briefs on Ins. (2d Ed.) p. 5966, § 12e; 26 C. J. 393, § 507. And it is said in the authority last cited: "If an agent has apparent authority to waive notice or proofs, the insurer is bound by his act in doing so, regardless of his actual authority."

[6] In the present case it appears the agents Russell & Robbins had all the powers of a general agent to bind the company except the authority to adjust claims. We are satisfied the combined acts and declarations of the defendant and its agents Jenkins and Russell had the effect of waiving the furnishing of sworn proof of loss.

[7] The insurance company waived the provision of the policy requiring sworn proof of loss to be furnished by denying its liability. In Lee v. U. S. Fire Ins. Co., 55 Cal. App. 391, 396, 203 P. 774, 776, it is said: "The denial of such liability prior to the expiration of the time to make proof of loss is a waiver of the condition of the policy requiring such proof. Farnum v. Phoenix Ins. Co., 83 Cal. 263, 17 Am. St. Rep. 233, 23 P. 869; Royal Ins. Co. v. Martin, 192 U. S. 149, 48 L. Ed. 385, 24 S. Ct. 247. [See, also, Rose's U. S. Notes.]"

To the same effect are the following authorities: 7 Cooley's Briefs on Ins. (2d Ed.) p. 6019, § 14a; 26 C. J. 406, § 522; 33 C. J. 32, § 694; 5 Joyce on Ins. (2d Ed.) p. 5592, § 3373. In the last cited authority at page 5564, section 3354, it is said: "The question concerning whether or not there has been a waiver of this provision must in all cases depend upon the circumstances of each particular case. The courts will construe this provision, as a rule, against the insurer, and will not scan very closely evidence introduced by the insured tending to rebut a technical forfeiture."

[8] From the evidence in the present case, it must be assumed the company at all times intended to repudiate its liability under the policy. This is the effect of its correspondence with the local agents. This purpose must be inferred from its general conduct. The defendant promptly returned to its agents the plaintiff's check for the payment of his premium on the policy saying: "You are instructed to return same forthwith to the insured." It is true that the defendant also said in this letter: "We are not at the present time in a position to either admit or deny liability under this particular policy." Good faith on the part of the company in making this statement was a matter for the court to determine. We do not impute bad faith on the part of the defendant. But if the company had determined to repudiate the obligations of the policy, and anticipated the insured might neglect to file his proof of loss, in view of the foregoing well-established principle of law, a possible defense to an action on the policy might be saved by failure on the part of the insurer to definitely deny its liability. The defendant's subsequent conduct indicates that it had definitely determined to deny its liability. On February 7th, the company wrote its local agents saying that, prior to the fire, "there was no agreement between you and Mr. Western as to which company this policy should be issued in." The defendant further said, "You have violated the companies' instructions in issuing a policy on a stock encumbered by a chattel mortgage, and we feel certain that if the company should have been called upon to pay this claim, they would have looked to you for reimbursement." This letter certainly infers that the company did not assume it would be called upon to pay the claim. The company so notified its agents. The reasonable inference from these communications is that the company intended to repudiate its liability. But the appellant argues that the contents of this letter were not communicated to the insured, and that it therefore furnishes no grounds upon which to base a waiver. We do not understand the authorities require the knowledge of the general denial of liability on the part of the insurer to be communicated to the insured in order to create a waiver of the requirement to file proof of loss. Indeed some reputable authorities hold that a general denial of liability made by the insurer for the first time in its answer, constitutes a waiver of this clause. 7 Cooley's Briefs on Ins. (2d Ed.) p. 6039, § 14e. It is, however, unnecessary to accept this extreme view in the present case. Knowledge of the return of the premium check was conveyed to the insured. Moreover the defendant's local agents knew that the insured relied upon them to do everything that was legally necessary to collect the insurance. Russell told the plaintiffs he did not think it was necessary to file proof of loss under the circumstances. Even Jenkins, the general agent, told Western after he had listed the various items lost in the fire and their valuation that that was all he wanted of him. It was the duty of the agent Russell to have told the insured that the defendant was evidently repudiating its obligations under the policy, so that the plaintiffs might be warned to protect themselves by filing the proof. The insured was deceived by the entire course of conduct on the part of the defendant and its agents. In the answer, and throughout the trial of the case, the defendant did deny its liability on the ground that the contract was void. We are satisfied the conduct and declarations of the defendant amount to a denial of its liability and that this constitutes a waiver on that ground of the provision requiring the furnishing of proof of loss.

[9] Sending an adjuster to the insured immediately after the fire, who obtained a full report of the property which was destroyed and its value, and who then told the insured that was all they wanted of him, and he would hear from them in a few days, constitutes conduct which would tend to deceive the insured regarding the requirement to supply further proof of loss, and furnishes evidence of a waiver of this clause of the contract. Ramirez v. United Firemen's Ins. Co., 46 Cal. App. 451, 454, 189 P. 309; 26 C. J. 403, § 517; 33 C. J. 30, § 690; 7 Cooley's Briefs on Ins. (2d Ed.) p. 6010, § 13g; 5 Joyce on Ins. (2d Ed.) p. 5564, § 3354 and p. 5606, § 3385. In the authority last cited it is said: "The general rule seems to be, * * * that any act or series of acts upon the part of the insurer which tend to create a belief in the mind of the claimant under the policy that notice need not be given, or that proofs of loss will be unnecessary, will operate as a waiver, and release such claimant from a compliance with the provision."

On page 5607 of the last-cited authority, the author says: "If the insurer by its acts and conduct leads the claimant to believe that the company is preparing to adjust the loss, the insurer will be estopped from claiming the proofs were not furnished as provided in the policy."

Under the facts and circumstances of this case, we are unable to say there is no substantial evidence to support the findings of the court to the effect that the furnishing of sworn proof of loss was waived by the appellant.

The judgment is affirmed.

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113 Cal. App. 46

LEVINSON v. SANTA CLARA VALLEY LAND CO. et al.

Civ. 6654.

District Court of Appeal, Second District, Division 2, California.

March 26, 1931.

1. Account stated 🔑19(3).

Evidence sustained finding of account stated, justifying recovery of real estate salesman's commissions by salesman's assignee.

> It appeared that parties entered into contract whereby all commissions due from third person to real estate salesman's employer or debtor were assigned to salesman as security for commissions due him, and third person was authorized to pay to salesman specified amount, after which any surplus should be payable to salesman's debtor. It appeared further that third person was not indebted to salesman, but was indebted, if at all, only to salesman's debtor.

2. Pleading 🔑243.

Real estate salesman's assignee suing for commissions *held* properly allowed to amend complaint and introduce evidence to show that salesman was duly licensed real estate agent.

> It was contended that complaint in question was not susceptible of amendment, since it was in effect no pleading whatever, for the reason that it lacked an essential allegation, and that bringing of action should date only from filing of complaint as amended.

3. Pleading ⚷236(1).

Amendments of pleadings are to be allowed in sound discretion of court and in furtherance of justice.

Appeal from Superior Court, Los Angeles County; Harry W. Falk, Judge.

Action by William Levinson against the Santa Clara Valley Land Company, A. B. Widney, and others. Judgment for plaintiff, and defendant last named appeals.

Affirmed.

Frank L. Muhleman, C. Sherman Anderson, and Muhleman, Anderson & Palmer, all of Los Angeles, for appellant.

H. E. Gleason and Louis Feinstein, both of Los Angeles, for respondent.

IRA F. THOMPSON, J.

[1] The appeal in this case by the defendant A. B. Widney from a judgment against him in the sum of $4,356.90, including costs, involves the second cause of action in a complaint, which count is founded upon an account stated. It appears that for some time prior to December 19, 1923, the plaintiff's assignor, A. L. Martin, had been employed as a real estate salesman by appellant, who was then doing business as the Suburban Estates Company; that his compensation was 2½ per cent. commission on all sales made, plus an additional commission on sales made by him personally; that at the time mentioned appellant was indebted to Martin somewhere in the neighborhood of $15,000 for commission earned. On this date the parties, together with one J. B. Meikle, entered into an agreement whereby the business was to be conducted as theretofore, under the name of the "Suburban Estates Company"; that each of the three parties were to receive "a weekly salary or compensation" as follows: "A. B. Widney, $250.00 A. L. Martin, $150.00 (out of his 2½% overhead commission) J. B. Meikle, $100.00, payable from said proceeds Saturday of each week. Neither of said parties is obligated personally for any of said payments." Between the date of the agreement from which we have just quoted and April 19, 1924, Martin "earned approximately $5,000," and drew $4,722.71. On the last-mentioned date the parties entered into the following agreement: "Final Settlement Agreement. In consideration of the transfer of two hundred (200) shares of stock in the Santa Clara Valley Land Company and the release of the contract of employment between said Santa Clara Valley Land Company and other claims of every nature against the Santa Clara Valley Land Company and the Suburban Estates Company and A. B. Widney the undersigned do hereby assign to A. L. Martin, all of the commissions due and to become due from Maurita Grove Company to the undersigned under the selling agency contract entered into on the fifteenth day of September, 1923, between said Maurita Grove Company and Suburban Estates Company, *as security for the payment of the commissions and compensations now due or to become due, to said A. L. Martin* under his contract with the Suburban Estates Company and with the Santa Clara Valley Land Company and A. B. Widney, as salesman and sales manager for the sale of properties in the Pacoima District and elsewhere, and authorize said Maurita Grove Company to pay same to said A. L. Martin up to the amount due, or to become due to him, in the amount of fifteen thousand, one hundred, thirty seven dollars and sixty-one cents ($15,137.61). Any and all surplus remaining unpaid after the payment of said commissions due to said A. L. Martin are to be accounted for and paid to Suburban Estates Company or its assigns." (Italics ours.) The signatures of all the parties appear. Payments were made regularly by the Maurita Grove Company for the difference between the $15,137.61 and the unpaid balance which the court found was $4,306.

The principal contention of appellant is that, inasmuch as none of the parties were obligated to pay the weekly compensation mentioned in the agreement of December 19, 1923, the memorandum of April 19, 1924, cannot be taken to mean an acknowledgment of or a settlement of their accounts as of its date. It is also said that under the "facts and circumstances of the case" the agreement should be read to mean that it creates no new liability. It must be borne in mind that the trial court had all the facts and circumstances before it and was from that standpoint better able to determine the intent of the parties than are we. But, even to us, when we take into consideration testimony to the effect that the Santa Clara Valley Land Company was not indebted to plaintiffs' assignor, but only, if at all, to the Suburban Estates Company, it seems inescapable that the parties had agreed upon the sum of $15,137.61 as being due to Martin as his commissions in acting as salesman. Whether it is determinative of the question or not, there is the fact that the agreement of December 19, 1923, only provided that Martin was to receive a drawing account of $150 per week

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

chargeable against his commission of 2½ per cent. It is also to be observed that he had earned approximately the amount mentioned in the "Final Settlement Agreement" before the so-called co-operative agreement. There is nothing made to appear in appellant's brief which would justify us in saying that the finding of the court to the effect that an account was stated between A. L. Martin and the defendant is not supported by the evidence.

[2, 3] Appellant also asserts that the court erred in permitting plaintiff to amend his complaint by alleging that his assignor was a duly licensed real estate agent and permitting him to make proof of that fact. The statement of the argument or position of the appellant in this particular carries its own refutation. He says: "The amended complaint on which plaintiff went to trial was not susceptible of amendment, being in effect no pleading whatever, and the bringing of the action should date from date of filing of the second amended complaint." This simply means that, when a complaint lacks an essential allegation, it is no complaint and cannot be amended, but such is not and never was the law. Amendments are to be allowed in the sound discretion of the court and in the furtherance of justice. The rule of law is too well known to necessitate the citation of authority. No other arguments are advanced.

Judgment affirmed.

We concur: CRAIG, Acting P. J.; ARCHBALD, Justice pro tem.

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112 Cal. App. 636

BENCE v. TEDDY'S TAXI et al.

Civ. 4198.

District Court of Appeal, Third District, California.

March 17, 1931.

Rehearing Denied April 16, 1931. Hearing Denied by Supreme Court May 14, 1931.

1. Automobiles 🔑227(3).

Facts justified recovery for pedestrian struck by taxicab under last clear chance doctrine.

Facts showed that plaintiff alighted from street car at a corner when the car stopped at the safety station at that point. He started to walk at once toward the sidewalk; the curb being some 18 feet distant. Without looking in the direction from which the defendant's taxicab was approaching, he walked some 8 feet, when he saw it bearing down on him. He attempted to jump to the sidewalk, but was struck before he reached it. All of these movements were seen and known to the driver of the taxicab, who was driving at a speed found to be in excess of 25 miles an hour.

2. Negligence 🔑83.

"Last clear chance" rule necessitates plaintiff's negligence, putting him in danger from which he cannot escape by ordinary care, of which danger defendant is aware under such circumstances that he realizes, or ought to realize, plaintiff's inability to escape therefrom, and defendant has clear chance to avoid injuring plaintiff by ordinary care and fails to do so.

[Ed. Note.—For other definitions of "Last Clear Chance," see Words and Phrases.]

3. Automobiles 🔑164(1).

Where pedestrian, alighting from street car, immediately started to walk toward sidewalk, on-coming taxicab driver owed duty to stop, under facts.

Facts showed that the taxicab driver saw the pedestrian's situation. He was aware of the pedestrian's dangerous position, and realized, or ought to have realized, pedestrian's inability to escape therefrom. The instant that pedestrian started to walk from the safety station to the sidewalk, he was in a position of danger.

4. Evidence 🔑539.

Taxicab operator could testify as expert as to distance in which he could stop taxicab while driving at given speed.

The witness was one of the partners who owned and operated the taxicab involved in the collision. He had driven taxicabs of the same type, and had driven automobiles for some fourteen years.

5. Pleading 🔑121(3).

Whether taxicab driver striking pedestrian was in defendant's employ at time of collision was presumptively within defendant's knowledge, precluding denial of such fact on information and belief.

6. Pleading 🔑121(3).

Denial of facts presumptively within defendant's knowledge, on information and belief, will be treated as evasion.

7. Appeal and error 🔑169.

Objection raised for first time on appeal could not prevail.

8. Damages 🔑132(1).

$6,800 *held* not excessive for injuries to pedestrian struck by taxicab.

Pedestrian testified that his foot and ankle were broken, and a hole was made in his arm below the elbow, which took two months to heal. A front tooth was knocked out and three fingers were smashed. His head was injured, which necessitated the removal of a part of the bone of the skull. Two ribs were cracked. At the time of the trial, and more than a year from the time the injury was received, his back caused continual pain, and he was unable to lift anything with his right hand. He was unable to secure employment because he could not use his right arm.

9. Appeal and error ⚿1004(1).

Verdict cannot be set aside for excessive damages, unless it raises strong presumption that it was result of passion, prejudice, or corruption.

Appeal from Superior Court, Sacramento County; John F. Pullen, Judge.

Action by R. L. Bence against Teddy's Taxi and others. Judgment for plaintiff, and defendants appeal.

Affirmed.

See, also, 101 Cal. App. 748, 283 P. 86.

Irving D. Gibson, of Sacramento, for appellants.

Fred J. Harris and Downey & Chester, all of Sacramento, for respondent.

Mr. Justice Pro Tem. TUTTLE delivered the opinion of the court.

This is an action brought to recover damages on account of personal injuries received by plaintiff when he was struck by an automobile. The trial was had by the court, and, upon the findings made, judgment was entered for plaintiff in the sum of $6,800.

At a former trial of this action, an appeal was taken to this court, and judgment in favor of plaintiff was reversed upon the sole ground that he was guilty of contributory negligence. Bence v. Teddy's Taxi, 101 Cal. App. 748, 282 P. 392, 283 P. 86.

The court, upon the second trial, found that plaintiff was entitled to recover under the doctrine of "last clear chance," and it is first urged by appellant that the facts of this case do not justify the application of that doctrine. The finding thus assailed reads as follows:

"That on June 16, 1928, at about the hour of 5:35 o'clock in the forenoon of said day, plaintiff was a passenger on a street car traveling in a westerly direction over and upon said 'K' Street, between Eighth and Seventh Streets in said City of Sacramento, and when said street car arrived at or near the intersection of Seventh Street with said 'K' Street, plaintiff alighted from said street car and negligently and carelessly proceeded in a northerly direction towards the sidewalk on the northerly side of said 'K' Street, at or near its intersection with said Seventh Street, and at said time plaintiff negligently and carelessly failed and neglected to use ordinary care for his own safety and carelessly and negligently failed to observe the approach of a certain taxicab which was then and there being driven and operated by the defendant Phil Khoury in a westerly direction along said 'K' Street, between said Eighth and Seventh Streets, and at said time plaintiff negligently and carelessly failed to look in the direction from which said taxicab was approaching. At said time plaintiff was in the path of said oncoming taxicab and was in a position of danger from which he could not escape by the exercise of ordinary care.

"That as plaintiff was alighting from said street car, and so walking towards said sidewalk, defendant Phil Khoury was negligently and carelessly operating and driving said taxicab in a westerly direction along said 'K' Street, towards Seventh Street and was at said time operating said taxicab at a speed in excess of twenty-five miles per hour and defendant Phil Khoury observed and saw plaintiff as he alighted from said street car and at all times thereafter until he was hit by said taxicab and defendant Khoury knew that plaintiff did not see or know of the approach of said taxicab as plaintiff was so proceeding northerly along 'K' Street and defendant Khoury knew during all of such time that plaintiff was in a position of danger from which plaintiff could not escape by the exercise of ordinary care and during all of such time defendant Khoury had a clear chance and opportunity to avoid injuring plaintiff by the exercise of ordinary care, and during all of such time defendant Khoury could have avoided injuring plaintiff by the exercise of ordinary care; that defendant Khoury failed to avoid injuring plaintiff by the use of ordinary care and did not use ordinary care to avoid injuring plaintiff, but did so negligently and carelessly operate and drive said taxicab so as to strike plaintiff and did injure plaintiff to the extent hereinafter set forth. That plaintiff did notice the approach of said taxicab before he was struck by it and thereafter exercised ordinary care and diligence in an endeavor to escape from it but was not by the exercise of ordinary care able to escape from said taxicab or extricate himself from said position of danger. That the negligence of plaintiff hereinbefore referred to did not proximately cause or contribute to the accident or injuries to plaintiff."

⚿For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

[1] We are of the opinion that there is ample evidence in the record to support this finding. Respondent alighted from a street car at the corner of Seventh and K streets in the city of Sacramento, when the car stopped at the safety station at that point. He started to walk at once toward the sidewalk, the curb being some eighteen feet distant. Without looking in the direction from which the taxicab was approaching, he walked some eight feet, when he saw it bearing down upon him. He attempted to jump to the sidewalk, but was struck before he reached it. All of these movements were seen and known to the driver of the taxicab, who was driving at a speed which the court found to be in excess of twenty-five miles an hour. There was testimony to the effect that at a speed of twenty-five miles an hour the taxicab could be stopped within a distance of eighteen feet. The taxicab approached the car from the rear, and it had followed behind the car until the latter stopped at the safety zone, which was some forty-five feet in length. There is sufficient evidence in the record which would justify the trial court in finding that the driver could have stopped the taxicab in time to have avoided striking plaintiff. At the time of the accident, the lawful rate of speed for the taxicab, while passing a standing car, was not in excess of ten miles an hour.

The driver testified that he was driving at a speed of ten miles per hour when passing the street car. If we accept his version as to speed, there is not the slightest doubt, from the evidence adduced, that the injury could have been easily avoided. It is a case where the driver, who was very inexperienced, took a chance and failed in the attempt.

Plaintiff testified that June 16, 1928, the day of the accident, was a "beautiful day," and that the sun was up; that, as he stepped off the street car, he stepped into the pedestrian lane. He further testified: "A. I had my left hand holding on the right-hand side of the front door of the car, facing towards the Bon Marché Store, a little north and west, and I stepped out about the center of the street—I stepped about two steps and looked around, turned by back around, and there was this automobile coming at a terrible rate of speed, about sixteen or eighteen feet from me, and I started to proceed across the street—he was coming right into the lane, and I couldn't get out of the way very well, he was coming so fast, and he turned his car and run it towards the curb, and about a foot and a half from the curb, he hit me about on that manhole there in the street, and hit my right leg on the knee here; he knocked me down with his car. * * * A. I got off right here and stepped into the pedestrian lane. I got off, just off the pedestrian lane. I didn't go in the safety zone, I stepped off the car in the pedestrian lane, right in here, and started across, between six and eight feet, before I seen the car, see, then I turned around and see the car coming, coming too fast. Mr. Gibson, interposing: He said he went six or eight feet before he seen the car?

"Witness: A. Yes. I should judge two steps across, and I turned around and there was the car onto me, about eighteen feet from me when I seen it, sixteen or eighteen feet. I didn't measure it, about that distance, coming at an awful rapid speed; I didn't know what to do, I jumped for my life, to keep from being hit, and he run in the curb, he turned his car to the right and he ran to the curb, ran into the curb line."

[2] The elements of the last clear chance rule have been announced in California on innumerable occasions, and are settled beyond dispute. As said in Palmer v. Tschudy, 191 Cal. 696, 700, 218 P. 36, the last clear chance rule presupposes: (1) That plaintiff has been negligent; (2) that, as a result of his negligence, he is in a position of danger, from which he cannot escape by the exercise of ordinary care; (3) that defendant is aware of plaintiff's dangerous situation under such circumstances that he realizes, or ought to realize, plaintiff's inability to escape therefrom; (4) that defendant then has a clear chance to avoid injuring plaintiff by exercise of ordinary care and fails to do so.

If all of these elements are present, the rule applies and enables plaintiff to recover, notwithstanding his own negligence, but, if any of them be absent, the rule does not apply, and the case is governed by the ordinary rules of negligence and contributory negligence.

[3] It is contended by defendant that the third element mentioned in the Palmer Case is not present here. His entire argument is predicated upon the theory that plaintiff, when he alighted from the street car, stood still upon the safety zone. There is testimony in the record to the effect that plaintiff did not stop, but started to walk toward the sidewalk as soon as he stepped from the street car. All of this was seen by the driver of the taxicab. He was aware of plaintiff's dangerous position, and realized, or ought to have realized, plaintiff's inability to escape therefrom. The instant that plaintiff started to walk from the safety station to the sidewalk, he was in a position of danger. Under such circumstances, it was clearly the duty of the driver to stop his taxicab, instead of attempting to dodge around plaintiff, at an unlawful rate of speed.

The case of Green v. L. A. Ry. Co., 143 Cal. 41, 76 P. 719, 101 Am. St. Rep. 68, relied upon by appellant, was one where the plaintiff was standing still upon the safety zone. There was nothing to indicate that he was attempting to cross the street in front of the taxicab. The Supreme Court simply held that the driver had the right to assume that plaintiff would continue to so stand until he (the driver) had passed the zone. In the instant case, plaintiff, as we have pointed out, did not stand still upon alighting, but proceeded forthwith to cross to the sidewalk. The driver knew that plaintiff was walking directly across his path. To say that under such circumstances plaintiff was not in danger would rob the doctrine of last clear chance of every vestige of its humanitarian aspect, and would relegate its obvious import to a mere quibble.

This case comes squarely within the rule laid down by this court in the case of Smith v. Los Angeles Ry., 288 P. 690, where it is stated: "For this ground of liability to exist it need not appear that it was physically impossible for plaintiff to have escaped danger, but it is sufficient in this connection if it appears that plaintiff was unaware of the danger and for that reason was unable to escape."

Other attacks of a like nature are made by appellant upon the findings, but they are similarly devoid of merit.

[4] Witness Demas was permitted to testify as to the distance within which he could stop a taxicab similar to that driven in this case, while driving at a given speed. This witness was one of the partners who owned and operated the taxicab involved in the collision. He had driven taxicabs of the same type, and had driven automobiles for some fourteen years. We are of the opinion that there was sufficient proof to justify his testimony as an expert.

[5-7] The next ground for reversal urged by appellant is that there is no evidence in the record to support the finding that the driver of the taxicab was in the employ of defendant at the time of the accident. It would appear that such facts are admitted by the answer. The complaint states that the driver was in the employ of defendant at the time of the injury, and the answer denies those allegations upon information and belief only. Such facts are presumptively within the knowledge of defendant, and he must answer positively, and a denial of the same upon information and belief will be treated as an evasion. Curtis v. Richards, 9 Cal. 38. The entire question was given careful and exhaustive consideration by this court in the case of Zany v. Rawhide Gold Mining Co., 15 Cal. App. 373, 114 P. 1026. Furthermore, this question is raised for the first time upon appeal. The record would seem to indicate that the case was tried upon the theory that these were admitted facts. Under such circumstances, the objection cannot prevail.

[8, 9] It is next contended that the damages are excessive. The plaintiff testified that his foot and ankle were broken. A hole was made in his arm below the elbow, which took two months to heal. A front tooth was knocked out, and three fingers were smashed. His head was injured, which necessitated the removal of a part of the bone of the skull. Two ribs were cracked. At the time of the trial, and more than a year from the time the injury was received, his back caused continual pain, and he was unable to lift anything with his right hand. He was unable to secure employment because he could not use his right arm. We cannot say that under such circumstances the verdict is excessive, nor are we able to say that the award was so grossly disproportionate to any compensation reasonably warranted by the facts as presented to us on appeal as to shock the sense of justice, and raise at once a strong presumption that it was the result of passion, prejudice, or corruption, rather than honest or sober judgment. Under such circumstances, we are powerless to revise the award thus made. Kelley v. Hodge Trans. System, 197 Cal. 598, 242 P. 76.

Other objections are made by appellant with reference to the admission of testimony respecting the pain and suffering endured by respondent, but we can find no substantial merit in any of them.

The judgment is affirmed.

FOLEY v. EULESS et al. *

Civ. 317.

District Court of Appeal, Fourth District, California.

March 23, 1931.

1. Contracts 🔑168.

Courts will not rewrite contracts by implying provisions, unless necessary to carry out parties' intention.

2. Contracts 🔑168.

Condition of contract cannot be implied where contrary to express terms or where contract is intentionally silent.

3. Principal and agent 🔑136(1).

Under contract with growers' representatives requiring packer to prepare and market all raisins delivered by growers, representatives *held* not impliedly obligated to cause growers to deliver their entire crop.

Contract in question provided that packer would weigh, grade, process, pack, store, and market such raisins as representatives would cause growers to deliver

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Hearing granted 6 P.(2d) 956.

to him by specified time; that packer would issue negotiable warehouse receipt and weight tag to each grower; that except for raisins delivered by growers, who dealt in three particular varieties, packer would handle no other raisins of those varieties during term of contract; and that contract should continue until all raisins delivered by growers had been processed and sold.

4. Principal and agent 🔑136(1).

Agent who within scope of his authority contracts or is dealt with as such incurs no personal liability.

5. Principal and agent 🔑146(2).

Agent acting for undisclosed principal must disclose principal's name when executing contract, or agent will be bound as a principal.

6. Principal and agent 🔑146(3).

Packer required by contract with agents of undisclosed principals to issue warehouse receipts for raisins to be delivered by principals could not fasten personal liability on agents, since principals would necessarily be disclosed (St. 1909, p. 437; Civ. Code, §§ 1858b, 1858c).

Appeal from Superior Court, Fresno County; S. L. Strother, Judge.

Action by E. Y. Foley against J. M. Euless and another. Judgment for defendants, and plaintiff appeals.

Affirmed.

Frank Kauke, of Fresno, for appellant.

Julius Hansen and Gallaher & Jertberg, all of Fresno, for respondents.

MARKS, J.

Appellant filed suit in the court below seeking the recovery of $100,000 damages for an alleged breach of contract. Respondents filed a general and special demurrer to an amended complaint, which demurrer was sustained without leave to amend. From the judgment entered in favor of respondents, appellant prosecuted this appeal.

A written contract bearing the date of October 9, 1929, forms the basis of appellant's cause of action. E. Y. Foley, the first party named therein, was a packer and shipper of dried fruits, with a packing house in Fresno, Cal. Respondents are described in the contract as "J. M. Euless and Henry Dermer, associated together as the Euless-Dermer Pool of the same county and State, parties of the second part." The contract is signed by the respective parties individually without any indication, as far as the signatures are concerned that they were acting in a representative capacity. The body of the agreement discloses that the second parties were acting as the representatives of a number of growers of raisin grapes who were associated together and acting for their joint benefit and protection under the name of the Euless-Dermer Pool. As the decision of this case will turn on the construction to be placed upon this contract, it will be necessary for us to detail its provisions.

The members of the pool were engaged in raising Thompson Seedless, Sultana, and Muscat grapes and curing them into raisins. They desired to secure packing and marketing facilities for their crops. To effect this purpose appellant agreed to receive at his packing house such of the raisins of the pool members "which the said second parties (respondents) will have the members of the said above-mentioned pool deliver to the first party's (appellant's) packing house not later than January 1st, 1930." Upon such delivery appellant agreed to weigh the raisins and grade them as either extra standard, standard, or sub-standard. In case of any disagreement as to the grades, a regrading by the representatives of the two parties to the contract and a third grader selected by the pool's representative was provided for. Appellant obligated himself to issue to each pool member so delivering raisins a negotiable warehouse receipt and a standard weight tag, showing the amount, kind, and grade of raisins so delivered. Appellant further agreed that he would put the raisins through the standard processes to prepare them for market, and that he would pack them either in cartons or twenty-five pound boxes as and when directed by respondents. Appellant agreed to store, warehouse, and protect them from the elements, and that he would be responsible for the safety of the raisins and guard them against theft and insure them against loss by fire at his own cost and expense. Appellant further agreed to secure purchasers for the raisins. All bids were to be submitted to an executive committee of the pool consisting of respondents and one other, and no bid could be accepted without the consent of the committee. When sold the purchase price was to be paid to the pool. He further agreed that upon the sale of the raisins by the executive committee he would load the raisins on cars for shipment. All expenses of handling, processing, packing, preparing for market, and marketing the raisins were to be paid by appellant, except that the "pool shall pay the regular buyer's two per cent. (2%) cash discount and a broker's commission incurred in the sale of the raisins." It was further agreed that all drafts drawn for the payment of the raisins should be drawn in favor of the pool. The contract also contained the following provisions:

"It is further understood and agreed by and between the parties hereto that in consideration of the said second parties obtaining the delivery of the pool members' raisins to the said first party's packing house, that the said first party will not handle any other natural dried raisins of Thompson Seedless, Sultanas and Muscat varieties, during the term of this contract at his above mentioned packing plant.

"The said second parties will pay to the said first party therefor the sum of 1¼c per pound on all raisins packed in twenty-five pound boxes and 1½c per pound on all raisins packed in cartons and that the said consideration shall be paid to the said first party by the said second parties, as the said raisins are sold and paid for.

"It is understood and agreed that this agreement shall continue in full force and effect until all of the raisins delivered to first party by the Pool members shall have been processed and sold and delivered to the buyers of the same."

A copy of the contract is attached to the amended complaint as an exhibit.

It is alleged in the amended complaint that the pool members raised and cured, and respondents had under their control, ten thousand tons of the varieties of raisins mentioned in the contract; that appellant could and would have received all of these raisins at his packing plant prior to January 1, 1930, and "could and would have weighed and graded all said raisins, and could and would have performed all the necessary work of putting the said raisins through the standard process, and could and would have prepared said raisins for marketing, and could and would have packed all said raisins in cartons and boxes, and could and would in all respects and particulars have handled said raisins in the manner mentioned and called for in and by said contract," if he had not been prevented in so doing by the respondents. It is further alleged that respondents caused the growers to deliver four hundred tons of the raisins to appellant's warehouse, "but said defendants failed and refused to deliver or cause to be delivered, and did not deliver, nor cause to be delivered, nor suffer or permit to be delivered, at plaintiff's packing plant or to plaintiff, any other or further amount of the raisins of said pool members or any raisins, and said defendants did advise, direct, and cause the said pool members to refrain from delivering other or further raisins to plaintiff, or at said packing plant, and that no raisins, except said 400 tons, or thereabouts, were ever delivered or caused to be delivered or permitted by defendants to be delivered at said packing plant." It is further alleged that respondents "refused to permit or allow plaintiff to process, pack or otherwise prepare for marketing any of said raisins, either of said 400 tons which were so delivered, or of any part of the remaining 9,600 tons of said pool members' raisins, or other raisins; and said defendants prevented plaintiff from doing anything relative to the processing, packing or preparing for marketing of raisins." It is further alleged that on January 1, 1930, respondents notified appellant that they would not proceed under nor comply with the terms of the contract, and that they repudiated the same and would not permit appellant to proceed thereunder and prior to January 20, 1930, caused the four hundred tons already delivered to be removed. It is not alleged that appellant graded or insured the four hundred tons of raisins which were delivered.

This appeal presents two questions for our consideration: First, the liability of respondents to appellant, if any, as to the nine thousand six hundred tons of raisins which were not delivered to appellant's warehouse, and, second, as to the four hundred tons which were delivered but were subsequently removed.

Appellant concedes that the contract, by its express terms, did not obligate respondents to have delivered to the warehouse all, or any definite quantity, of the growers' raisins. He contends that, as the agreement prohibited him receiving at the described packing house any other raisins of the varieties named, and that as the agreement was to remain in force and effect until all the raisins delivered had been processed, sold, and delivered to buyers, there was an implied covenant on the part of the respondents to cause all of the growers' raisins to be delivered to him.

[1, 2] Courts have been careful not to rewrite contracts for parties by inserting an implied provision, unless, from the language employed, such implied provision is necessary to carry out the intention of the parties. No implied condition can be inserted as against the express terms of the contract or to supply a covenant upon which it was intentionally silent. The rule is thus stated by the Court of Appeals of New York in Genet v. Delaware & Hudson Canal Co., 136 N. Y. 593, 32 N. E. 1078, 1081, 19 L. R. A. 127: "I know very well that implied promises are to be cautiously and not hastily raised. What they are was very well stated in Scrantom v. Booth, 29 Barb. [N. Y.] 174; in Allamon v. Albany, 43 Barb. [N. Y.] 36; and in Booth v. Cleveland Roll. Mills Co., 6 Hun. [N. Y.] 597. They always exist where equity and justice require the party to do or to refrain from doing the thing in question; where the covenant on one side involves some corresponding obligation on the other; where by the relations of the parties and the subject-matter of the contract a duty is owing by one not expressly bound by the contract to the other party in reference to the subject of it. In this court we have thrown some safeguards about the doctrine to secure its prudent application, and have said that a promise can be implied only where we may rightfully assume that it would have been made if attention had been drawn to it (Der-

mott v. State, 99 N. Y. 101, 1 N. E. 242), and that it is to be raised only to enforce a manifest equity, or to reach a result which the unequivocal acts of the parties indicate that they intended to effect (King v. Leighton, 100 N. Y. 386, 3 N. E. 594)."

This rule was recognized in the case of Loyalton, etc., Co. v. California, etc., Co., 22 Cal. App. 75, 133 P. 323, 324, where it was said: "Where parties have entered into written engagements which industriously express the obligations which each is to assume, the courts should be reluctant to enlarge them by implication as to important matters. The presumption is that, having expressed some, they have expressed all, of the conditions by which they intended to be bound."

[3] With these rules of law in mind we cannot conclude that there was an implied obligation on the part of respondents to cause the pool members to deliver all of their raisins to appellant. The omission of such a covenant might have been intentional on the part of respondents, as the quantity of raisins to be delivered might be determined by them and be governed entirely by the good faith of appellant in performing his obligations and his success in marketing those delivered. The executed contract was clear in its terms and left to the judgment of respondents the quantity of raisins to be delivered. Had appellant desired a covenant requiring a given number of tons of raisins or all of the growers' raisins delivered to him, he should have had such a provision inserted in the contract. We cannot rewrite the agreement for him.

The liability of respondents to appellant for his prospective profits on the four hundred tons of raisins delivered presents questions entirely different from the one raised by the failure to deliver the nine thousand six hundred tons. Both parties assume that the respondents acted as agents for the growers in executing the contract in question.

[4, 5] An agent who contracts as such for his principal within the scope of his authority does not incur a personal liability by reason of the agreement. Jewell v. Colonial Theater Co., 12 Cal. App. 681, 108 P. 527. The same is true of one who is dealt with and treated as an agent by the other party to the agreement. Tevis v. Savage, 130 Cal. 411, 62 P. 611.

Where, however, an agent acts for an undisclosed principal, it becomes his duty to disclose the name of his principal at the time of the execution of the contract or he will be bound by the obligations of the contract as a principal. Murphy v. Helmrich, 66 Cal. 69, 4 P. 958; Kerry v. Pacific Marine Co., 121 Cal. 564, 54 P. 89, 66 Am. St. Rep. 65; Coover v. Cox, 95 Cal. App. 1, 272 P. 343; Heringer v. Schumacher, 88 Cal. App. 349, 263 P. 550. It is under this last rule that appellant seeks to hold respondent for the damage suffered by the alleged breach of contract.

[6] It affirmatively appears from the contract that respondents were acting in a representative capacity for the members of the pool in executing the agreement. The names of the members of the pool were not disclosed to appellant at the time of the execution of the contract as far as appears from the allegations of the complaint. However, the contract provided that appellant issue to each pool member a standard weight tag and a negotiable warehouse receipt upon the delivery of raisins. The form of a negotiable warehouse receipt is fixed by law and the law fixes certain of the rights of the issues and holder of such a receipt. 25 Cal. Jur. pp. 947–952; Stats. 1909, p. 437; sections 1858b, 1858c, Civ. Code. As the issuance of these negotiable warehouse receipts to the growers was provided for and required by the terms of the contract, and as the issuance of these receipts changed the rights, obligations, and duties of the appellant, respondents, and growers to each other as expressed in the contract, we cannot consider the contract as complete or expressing the full intention of the parties until the issuance of these receipts, nor can we construe the contract separate from the receipts and the effect given them by law. We must therefore consider the expressed terms of the contract enlarged and extended by the receipts which it required appellant to issue to the pool members. The same may be said of the standard weight tags. Upon the issuance of the warehouse receipt and the weight tag, the name of the pool member, one of the principals of respondents in the transaction, became disclosed to appellant. The contract required him to record these names and the kinds and amounts of raisins delivered to him by each pool member and deliver a copy of such to respondents. Thus the names of respondents' principals were disclosed to him under the very terms of the contract in which he seeks to fasten liability upon the agents. The law does not permit him to hold the agents acting as such for disclosed and named principals. The complaint, therefore, failed to state a cause of action against respondents.

The liability to appellant of the pool members who first delivered their raisins to him and then removed them from his warehouse has not been considered by us.

Judgment affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

112 Cal. App. 383

McALVAY v. CONSUMERS' SALT CO. et al.

Civ. 7651.

District Court of Appeal, First District, Division 1, California.

March 9, 1931.

Rehearing Denied April 8, 1931. Hearing Denied by Supreme Court May 4, 1931.

1. Execution 🔑283.

Evidence supported finding that judgment debtor was owner of corporate stock at time execution was levied.

2. Husband and wife 🔑262(1).

Corporate stock obtained during coverture was presumptively community property notwithstanding it stood in name of judgment debtor's wife (Civ. Code, § 164).

3. Husband and wife 🔑262(1).

Presumption that corporate stock standing in name of judgment debtor's wife was community property was disputable (Civ. Code, § 164).

4. Husband and wife 🔑262(1).

Presumption that corporate stock standing in name of judgment debtor's wife is community property may outweigh contrary evidence (Civ. Code, § 164).

5. Husband and wife 🔑270(9).

When presumption that corporate stock standing in name of judgment debtor's wife is community property is controverted by evidence, issue of fact is raised.

6. Appeal and error 🔑931(1).

Appellate court must give liberal construction to finding in support of judgment.

7. Execution 🔑283.

In execution purchaser's suit to quiet title to corporate stock, express finding should have been made on question whether original transfer of title to third party was made for benefit of judgment debtor.

8. Execution 🔑283.

Evidence *held* to establish that corporate stock sold at execution sale was previously purchased in name of third party and held for benefit of judgment debtor (Code Civ. Proc. § 956a; Const. art. 6, § 4¾).

9. Execution 🔑250.

Equity will not enforce execution sale where disproportion between value of property and sum paid for it is so great as to shock conscience.

10. Appeal and error 🔑1012(1).

Weight of testimony is for trial court (Code Civ. Proc. § 1847).

11. Execution 🔑250.

Mere inadequacy in price paid on execution sale does not furnish ground for setting aside sale.

12. Execution 🔑283.

Finding that execution sale of judgment debtor's interest in 225,000 shares of corporate stock for $50 was not so inadequate as to render transaction unconscionable *held* supported.

13. Execution 🔑283.

In execution purchaser's action against judgment debtor's wife to quiet title to corporate stock, evidence as to conversations, between debtor who was officer of corporation and another officer, which were parts of equivocal transaction leading up to purchase of stock, *held* admissible.

The evidence was admissible, since it tended to establish that the judgment debtor, and not his mother-in-law in whose name the stock was originally purchased, but who subsequently transferred stock to debtor's wife, was the owner of the stock.

14. Appeal and error 🔑1051(3).

In execution purchaser's action to quiet title to corporate stock, where entry of judgment against debtor and issuance of execution thereon were admitted, admission of judgment roll, if erroneous, *held* harmless.

15. Execution 🔑283.

In execution purchaser's action against judgment debtor's wife to quiet title to corporate stock, testimony of officer of corporation that wife was questioned by purchaser respecting interest of her mother, who transferred stock to wife *held* relevant.

16. Quieting title 🔑44(2).

Evidence of circumstances under which deed to property conveyed in part payment of corporate stock transferred to name of judgment debtor's mother-in-law *held* competent in execution purchaser's action to quiet title to corporate stock against judgment debtor's wife subsequently holding stock.

17. Appeal and error 🔑1056(1).

Exclusion of judgment debtor's testimony that he intended transfer of corporate stock from mother-in-law to vest stock in his wife as her separate property, if error, *held* harmless, in view of other testimony.

The judgment debtor had previously testified that from the time of the purchase of the corporate stock to the date of the trial he neither had nor claimed any interest in the stock.

18. Trial 🔑59(2).

Order of proof is discretionary with trial court (Code Civ. Proc. § 2042).

19. Execution 🔑264.

Execution purchaser acquired only right of judgment debtor (Code Civ. Proc. § 699).

20. Quieting title 🔑10(1).

Plaintiff in action to quiet title must recover on strength of his own title.

21. Quieting title 🔑10(1).

Plaintiff in action to quiet title cannot recover on weakness of adversary's title.

22. Execution 🔑283.

Execution purchaser must show, as against stranger to judgment, that judgment debtor had title or possession on date of lien or execution sale.

23. Fraudulent conveyances 🔑208.

Generally, only creditors at time of alleged fraudulent transfer or subsequent creditors intended to be defrauded can complain thereof.

24. Fraudulent conveyances 🔑69(1).

To make voluntary conveyance void as to subsequent creditors, it must be made with intent of fraudulently preventing them from enforcing claims.

25. Fraudulent conveyances 🔑109.

Judgment debtor's property is liable to debts of subsequent as well as existing creditors, where only nominal title is conveyed to another.

26. Execution 🔑41.

Where trust was merely passive, interest of cestui que trust in corporate stock was subject to sale under execution (Code Civ. Proc. § 688).

27. Execution 🔑53.

As regards judgment creditor's right to subject corporate stock to execution sale, transferee, not being bona fide purchaser, stood in no better position than transferor.

28. Quieting title 🔑10(2).

Generally, owner of equitable title cannot maintain action to quiet title against owner of legal title.

29. Husband and wife 🔑249.

Where corporate stock was purchased at time when under laws husband was sole owner of community property, title vested in husband, notwithstanding transfer to wife.

30. Husband and wife 🔑269.

Community property, although standing in name of wife, could be taken in satisfaction of execution against husband.

Appeal from Superior Court, Los Angeles County; J. Walter Hanby, Judge.

Action by B. D. McAlvay against the Consumers' Salt Company and another. Judgment for plaintiff, and defendants appeal. Affirmed.

Newby & Newby and Dee Holder, all of Los Angeles, for appellant B. C. Stockwell.

John C. Packard, of Los Angeles, for appellant Consumers' Salt Co.

Harry M. Irwin and Andrew H. Rose, both of Los Angeles, for respondent.

PER CURIAM.

The plaintiff brought the above action to quiet title to 225,000 shares of the capital stock of defendant corporation and to compel the issuance to him of a certificate therefor. The complaint alleged the ownership of the stock to be in plaintiff, and that defendant B. C. Stockwell, to whom a certificate therefor had been issued by defendant corporation, claimed an interest therein, which was without right. The defendants by their answer denied the material allegations of the complaint, and admitted that defendant B. C. Stockwell claimed an interest in the stock, which they alleged to be the full ownership thereof. The action was tried on these issues.

The court found plaintiff to be the owner of the stock, and that B. C. Stockwell (who will be hereinafter referred to as the defendant) had no interest therein and wrongfully withheld the certificate mentioned. Judgment was entered quieting plaintiff's title as against the defendants, and requiring the corporation (hereinafter referred to as the company) to issue a new certificate to the plaintiff.

The defendant since 1901 has been the wife of V. E. Stockwell, and R. P. Greenleaf, hereinafter mentioned, is defendant's mother. On June 18, 1925, plaintiff recovered a judgment in the superior court of Los Angeles county against V. E. Stockwell for $16,000 and costs. The judgment was docketed on June 19, 1925. On September 25, 1925, an execution issued thereon, pursuant to which the sheriff of that county, according to his return, levied upon all of the interest of V. E. Stockwell in and to the 225,000 shares of the capital stock of the Consumers' Salt Company, evidenced by certificate number 40, issued to and standing in the name of V. E. Stockwell, and on November 17, 1925, sold the same to the plaintiff herein. The stock in question was formerly held by a corporation called the Crystal Salt Company, which owned a total of 300,000 shares of the company represented by certificate number 14. Some time before September 27, 1918, C. B. T. Jones recovered a judgment in the superior court of Los Angeles county against the Crystal Salt Company for $5,250 and costs, and on November 7, 1918, the sheriff of that county, under an execution issued in the action, caused the above 300,000 shares to be sold. The court in the present action found "* * * that at said sale said 300,000 shares were purchased in the name of R. P. Greenleaf; * * * that thereafter, to wit, on June 30, 1919, said certificate number 14 for 300,000 shares of the capital stock of defendant Consumers' Salt Company was canceled, and certificate number 36 for said 300,000 shares of the capital stock of defendant Consumers' Salt Company was issued to R. P. Greenleaf; * * * that thereafter, to wit, on August 13, 1923, said certificate number 36 was canceled, and certificate number 38 for 75,000 shares of said stock was issued to C. L. Mulholland, and certificate number 39 for 225,000 shares of said stock issued to said R. P. Greenleaf; * * * that on July 9, 1925, said certificate number 39 for said 225,000 shares was canceled, and certificate number 40 for said 225,000 shares was issued on said date to defendant B. C. Stockwell; * * * that at all times while said certificate number 39 was outstanding said 225,000 shares, which are evidenced by said certificate number 39, were owned by V. E. Stockwell. * * *" The court also found that these shares were not owned by R. P. Greenleaf or B. C. Stockwell at any time, and that on the date of the execution sale thereof to plaintiff the same were owned by V. E. Stockwell.

Plaintiff claims that, notwithstanding the stock was purchased in the name of Mrs. Greenleaf and subsequently transferred by her to defendant, it was at all times the community property of the latter and B. C. Stockwell; while defendant claims the same as her separate property acquired by gift from her mother.

As grounds for the appeal it is contended that the findings and judgment in favor of plaintiff are unsupported; that upon the findings made and as the legal effect of the execution sale of the stock to Mrs. Greenleaf judgment should have been entered for the defendants; that in equity and good conscience plaintiff is not entitled to any relief; and that the court erred in the admission and rejection of evidence, and abused its discretion in permitting plaintiff to introduce evidence out of order.

The evidence shows that in 1918 V. E. Stockwell and C. L. Mulholland were respectively the president and general manager and director of both the Consumers' Salt Company and the Crystal Salt Company. In October of that year while such officers they purchased the judgment held by C. T. B. Jones against the Crystal Salt Company, the consideration being $2,500 in cash, furnished by Mulholland, and a house and lot which B. C. Stockwell caused to be transferred to Lillian P. Jones. By agreement between the purchasers the judgment was assigned to Mrs. Greenleaf. Mulholland testified that the transfer to her was due to a suggestion by Stockwell, who said: "It would not look good for us as officers of the company to take that judgment in our names. Let us take it in Mrs. Greenleaf's name." The payment by Mulholland was represented by a check made payable to Mrs. Greenleaf, which check was delivered to Stockwell; both the payee and Stockwell indorsed the check, and the latter cashed the same. With the proceeds Stockwell purchased a cashier's check for the same amount payable to Mrs. Greenleaf, which he indorsed as her attorney in fact. This check with the deed to the real property mentioned was placed by him in escrow, and was ultimately exchanged for the assignment of the judgment. Subsequently an attorney, acting under Stockwell's instructions, caused the execution to issue on the judgment, and on November 13, 1918, bid in the stock at the execution sale in the name of Mrs. Greenleaf. The latter, who was about seventy years of age and a widow, had since her husband's death in 1901 made her home with the Stockwells. She paid nothing for her board or room, and, so far as defendant could recall, had not owned or possessed any property other than the stock in question during that period. In 1905 she executed to V. E. Stockwell her general power of attorney, and took no part in the purchase of the Jones judgment or the execution sale thereunder, nor was the certificate number 36 for the stock issued in her name or received or seen by her, the same being receipted for and retained by Stockwell. It further appears that on August 13, 1923, Stockwell and Mulholland, in the absence of Mrs. Greenleaf and without consulting with her, divided the 300,000 shares represented by certificate No. 36, whereupon 75,000 shares thereof were issued to Mulholland, and certificate No. 39 for the 225,000 shares issued in the name of Mrs. Greenleaf. At this time certificate No. 36 was indorsed for cancellation by Stockwell, and thereupon the latter, acting as secretary, and Mulholland, acting as president of the company, issued said certificate No. 39, which was received and receipted for by Stockwell. The latter voted the stock at a subsequent stockholders' meeting, at which Mrs. Greenleaf was elected a director of the company, but during the time the stock stood in her name she attended none of the meetings of the company, being represented thereafter by Stockwell. It appears, however, that, when certificate No. 40 was issued to defendant, certificate No. 39 was personally indorsed by Mrs. Greenleaf. The house and lot referred to was purchased by Stockwell from Mrs. Julia Norton on November 6, 1917, the consideration therefor being an unsecured note for $1,000 executed by Stockwell and the defendant, which note Stockwell subsequently paid. According to Mrs. Norton the deed was prepared by Stockwell, who read the same to her before its execution, stating that the name of the grantee therein was V. E. Stockwell. The record of the notary public before whom the deed was acknowledged shows, however, that the grantee originally named therein was B. C. Stockwell, but that this name was subsequently changed on the notarial record to Nellie B. Jones. It further appears from the deed that the name of the original grantee was erased therefrom and Mrs. Greenleaf's name substituted. According to Stockwell he made the change in the deed with Mrs. Norton's consent; but the latter testified that she knew nothing of Mrs. Greenleaf until several months after the execution, and that no change was made in the name of the grantee in her presence or with her knowledge. As stated, a deed to the same property was executed to Lillian P. Jones by Mrs. Greenleaf in October, 1918. It is also claimed by defendant that the amount furnished by Mulholland was loaned to Mrs. Greenleaf; but it is clear that no note or security therefor was asked or given, and Mulholland denied that such loan was made. It is clear from Mrs. Greenleaf's testimony that her knowledge of any of these transactions was of the vaguest description. She never saw the property acquired from Mrs. Norton, or the assignment of the Jones judgment, or knew its amount. The stock was received and held by Stockwell, and with one exception indorsed by him. It was also voted by him at all the meetings of the company. Furthermore, Mrs. Greenleaf proved to be almost wholly unfamiliar with the facts of the acquisition of the Jones judgment, and her lack of knowledge of the other transactions described tends strongly to support the conclusion that she was not the real party in interest.

[1] The reason advanced for her lack of knowledge is the fact that she had given her power of attorney to Stockwell, in whom, according to her testimony, she had full confidence. The power was given in 1905; but it sufficiently appears that she had no property or business; and the inference that its purpose was to enable Stockwell to transact business under her name when convenient is not unreasonable, and the conclusion that such was the fact, and that, although the stock was purchased in her name, it was Stockwell's property and held for his benefit, is fairly supported by the evidence.

[2–5] The judgment recovered by plaintiff against Stockwell was docketed on June 19, 1925, and on July 9, 1925, the stock was transferred to defendant. As stated, she claimed that the same was a gift from her mother. There was, however, no documentary evidence supporting this claim; and being a transfer of personal property there was no presumption that the title vested in her as her separate property, as the provision of section 164 of the Civil Code (Stats. 1897, p. 63; Stats. 1917, p. 827; Stats. 1923, p. 746) that "whenever any property is conveyed to a married woman by an instrument in writing, the presumption is that the title is thereby vested in her as her separate property," had reference to transfers of real property only. Booker v. Castillo, 154 Cal. 672, 98 P. 1067; Stafford v. Martinoni, 192 Cal. 724, 221 P. 919. The stock therefore was presumptively community property (Estate of Pepper, 158 Cal. 619, 112 P. 62, 31 L. R. A. (N. S.) 1092), notwithstanding it stood in defendant's name (Fennell v. Drinkhouse, 131 Cal. 447, 63 P. 734, 82 Am. St. Rep. 361; Rowe v. Hibernia, etc., Soc., 134 Cal. 403, 66 P. 569; Bashore v. Parker, 146 Cal. 525, 80 P. 707; Hammond v. McCollough, 159 Cal. 639, 115 P. 216; Stafford v. Martinoni, supra). While such presumptions are disputable (Thompson v. Davis, 172 Cal. 491, 157 P. 595), they may nevertheless outweigh the evidence adduced against them (Pabst v. Shearer, 172 Cal. 239, 156 P. 466); and when controverted by evidence, direct or indirect, an issue of fact is raised which it is the duty of the trial court to determine as in other cases (Fanning v. Green, 156 Cal. 279, 104 P. 308); and notwithstanding such evidence a presumption will support a finding made in accordance therewith (Moore v. Gould, 151 Cal. 723, 91 P. 616; Estate of Wiechers, 199 Cal. 523, 250 P. 397; Grantham v. Ordway, 40 Cal. App. 758, 182 P. 73; Hibernia Savings & Loan Society v. De Ryana [Cal. Sup.] 292 P. 632).

Defendants contends that no facts were found which contravene the finding that the stock was purchased in the name of Mrs. Greenleaf, and that the legal effect of the purchase was to vest ownership in her. This transaction took place on November 13, 1918, and there was no express finding that Stockwell owned the stock previous to August 13, 1923, the date when certificate No. 39 was issued, the finding being that at all times while this certificate was outstanding he was the owner of the stock evidenced thereby. The court also found that it was not true that the stock was owned by Mrs. Greenleaf until July 19, 1925, as alleged by defendant, or at all.

[6–8] While an appellate court must give a liberal construction to findings in support of the judgment (Haight v. Haight, 151 Cal. 90, 90 P. 197; Adler v. Sawyer, 40 Cal. App. 778, 181 P. 817), and, as urged by respondent, these findings might be so construed, nevertheless we agree with appellant that an express finding on the question of ownership at the time of the purchase should have been made. However, under section 4¾ of article 6 of the Constitution, and section 956a of the Code of Civil Procedure, we have the power in disposing of appeals to make findings. As stated, the evidence amply supports the conclusion that, although the stock in question was purchased in the name of Mrs. Greenleaf, it was the property of Stockwell, and was held by her for his benefit and we so find.

The record shows that $500 was bid for the 302,000 shares sold under the execution issued on the Jones judgment, and that Stockwell's interest in the 225,000 shares was purchased by plaintiff for $50 under the execution issued on the latter's judgment. Defendant claims that the price paid by plaintiff was so inadequate as to render the transaction unconscionable, and that he should for that reason be denied equitable relief.

[9-12] It has been held that a court of equity will not lend its aid to enforce a sale of property under execution where the disproportion between the value of the property sold and the sum paid for it is so great as to shock the conscience. Mississippi, etc., R. Co. v. Cromwell, 91 U. S. 643, 23 L. Ed. 367; Randolph's Executor v. Quidnick Co., 135 U. S. 457, 10 S. Ct. 655, 34 L. Ed. 200. The total number of shares issued by the company does not appear, and the only direct evidence of the value of the stock in litigation was Stockwell's testimony that it was worth $150,000. As against this, however, was evidence that the business showed a deficit for the year ending June 30, 1925, and that the net profits for the following year approximated but $2,200. In addition, Stockwell's testimony was evasive and in many respects contradictory, and the weight to be given thereto was a question for the trial court. Code Civ. Proc. § 1847. There was no suggestion of any irregularity in the conduct of the sale, and no motion was made to vacate it. While inadequacy of price is a circumstance to be considered (Odell v. Cox, 151 Cal. 70, 90 P. 194), mere inadequacy, however great, does not of itself furnish a ground for setting aside such a sale (Rauer v. Hertweck, 175 Cal. 278, 165 P. 946; Bock v. Losekamp, 179 Cal. 674, 179 P. 516; Baldwin v. Brown, 193 Cal. 345, 224 P. 462). No fraud and no unfairness except as to the amount paid is urged against the plaintiff, and the testimony was not such as to compel the finding that the price paid rendered the transaction unconscionable. Such was not the view of the trial court, and no reason appears for disturbing its conclusion.

[13] Complaint is also made that Mulholland was permitted over objection to relate conversations with Stockwell at times when neither the defendant nor Mrs. Greenleaf was present. Several of the conversations related to the financial and other arrangements which led to the purchase of the Jones judgment and the sale thereunder. In a subsequent conversation a division of the stock was discussed, following which the 75,000 shares above mentioned were transferred to Mulholland. The conversations were parts of equivocal transactions relevant and material to the issues and explanatory thereof. Taken in connection with the conduct of the parties to the transactions they tended to show that Stockwell rather than Mrs. Greenleaf was the owner of the stock, and this testimony was properly admitted. 22 Corp. Jur., Evidence, §§ 544, 548, pp. 453, 458; Wigmore Evidence, § 1772.

[14, 15] The judgment roll in plaintiff's action against Stockwell was admitted in evidence. The witness Mulholland was permitted to testify that he and Stockwell were officers of the salt companies in 1918, and the defendant was questioned by plaintiff respecting her mother's property. This evidence was also objected to by appellants. Although the entry of this judgment and the issuance of execution thereon were admitted by appellants the admission of the judgment roll in evidence, if erroneous, was not prejudicial, and the testimony of Mulholland was relevant to the issues.

[16] Nor is there any merit in the contention that evidence of the circumstances under which the Norton deed was executed was incompetent, or that either Stockwell or the defendant were subjected to improper cross-examination.

[17] Testimony offered by Stockwell that he intended and understood the transfer from Mrs. Greenleaf to vest the stock in the defendant as her separate property, and that he made no claim thereto as community property, was rejected. This ruling is also assigned as error. While testimony as to a party's intention has been held to be competent (Horton v. Winbigler, 175 Cal. 149, 165 P. 423; Gilmour v. North Pasadena, etc., Co., 178 Cal. 6, 171 P. 1066; Parsons v. Robinson, 206 Cal. 378, 274 P. 528), here the witness had previously testified that from the time of the purchase of the stock to the date of the trial he neither had nor claimed any interest in the stock. In view of this testimony the ruling, if erroneous, was not prejudicial.

[18] The order of proof was a matter within the sound discretion of the trial court (Code Civ. Proc. § 2042), and no abuse of discretion in this respect is disclosed by the record.

[19-22] As urged by appellant, plaintiff at the execution sale of the stock acquired the right, title, and interest of Stockwell therein and no more (Code Civ. Proc. § 699; Widenmann v. Weniger, 164 Cal. 667, 672, 130 P. 421); and in an action to quiet title must recover on the strength of his own title and not upon the weakness of the title of his adversaries (Di Nola v. Allison, 143 Cal. 106, 76 P. 976, 65 L. R. A. 419, 101 Am. St. Rep. 84; Sears v. Willard, 165 Cal. 12, 130 P. 869). Also where a plaintiff claims under an execution sale he must show as against a stranger to the judgment that the judgment debtor had title or possession at the date of the lien or execution sale. (Robinson v. Thornton, 102 Cal. 675, 681, 34 P. 120; Reilly v. Wright, 117 Cal. 77, 48 P. 970).

[23-25] Appellants further claim that plaintiff, being at most a subsequent creditor of Stockwell, is not under the facts one of the class who could attack the transfer to Mrs. Greenleaf. It is the general rule that the only creditors who can complain are those who were creditors at the time of the alleged fraudulent transfer, or those subsequent thereto who were intended to be defrauded; but to make a voluntary conveyance void as to subsequent creditors it must be made with the intent of fraudulently preventing them from enforcing their claims. Bush & Mallett Co. v. Helbing, 134 Cal. 676, 66 P. 967; Franck v. Moran, 36 Cal. App. 32, 171 P. 841. Otherwise subsequent creditors cannot complain. Kane v. Desmond, 63 Cal. 464; Scales v. Holje, 41 Cal. App. 733, 183 P. 308. But it is also the rule that, though the nominal title to property be conveyed to another, it is nevertheless liable for the debts of its owner (Scott v. Keane, 87 Md. 709, 40 A. 1070, 42 L. R. A. 359; Wetherill v. Canney, 62 Minn. 341, 64 N. W. 818; McKey v. Cochran, 262 Ill. 376, 104 N. E. 693; Spencer v. Davis [Tex. Civ. App.] 298 S. W. 443; Jamison v. Mississippi, etc., Trust Co. [Mo. Sup.] 207 S. W. 788; Ward v. Marie, 73 N. J. Eq. 510, 68 A. 1084; Benedict v. Benedict, 261 Pa. 117, 104 A. 581; Menken Co. v. Brinkley, 94 Tenn. 721, 31 S. W. 92), upon the principle that one cannot be the equitable owner of property and still have it exempt from his debts (27 Cor. Jur., Fraudulent Conveyances, § 344, p. 600; McColgan v. Magee, Inc., 172 Cal. 182, 155 P. 995, Ann. Cas. 1917D, 1050). And the rule applies to subsequent as well as to existing creditors (McKey v. Cochran, supra; Williams v. Kemper, 99 Minn. 301, 109 N. W. 242; Petty v. Moores, etc., Sanitarium, 110 Va. 815, 67 S. E. 355, 27 L. R. A. (N. S.) 800, 19 Ann. Cas. 271; 27 Cor. Jur., Fraudulent, Conveyances, supra), and to both real and personal property (Wetherill v. Canney, supra). As the court said in Rives v. Stephens (Tex. Civ. App.) 28 S. W. 707, 708: "If a conveyance be made with no intention that the title shall pass, but with the understanding that the grantee will hold in trust for the grantor, subsequent as well as prior creditors can subject the property to the payment of their debts, the same as other property of such a cestui que trust." And the doctrine does not depend upon the fraudulent intent of any party connected with the transaction. McColgan v. Magee, Inc., supra.

[26, 27] In the present case it is clear that, notwithstanding the stock was purchased in Mrs. Greenleaf's name, it was Stockwell's property and held for his use and benefit. While the legal title was vested in Mrs. Greenleaf, she was under no duty except to convey it to the person ultimately entitled. Being merely a passive trust, the interest of the cestui que trust was subject to seizure and sale under execution (23 Cor. Jur., Executions, § 84, p. 343), as, under the rule in California, all interests in property, whether legal or equitable, which are not exempt by law are liable to be so taken and sold (Code Civ. Proc. § 688; 15 Cal. Jur., Levy and Seizure, §§ 24, 27, pp. 1015, 1018; Kennedy v. Nunan, 52 Cal. 326; Le Roy v. Dunkerly, 54 Cal. 452; King v. Gotz, 70 Cal. 236, 241, 11 P. 656); and the defendant, not being a bona fide purchaser, stands in no better position than her transferor (Eversdon v. Mayhew, 65 Cal. 163, 3 P. 641; Cal., etc., Fruit Ass'n v. Stelling, 141 Cal. 713, 75 P. 320.

[28-30] In this connection defendant contends that the legal title to the stock was vested in her and not in the plaintiff, and that consequently an action to quiet title will not lie, citing Aalwyn's Law Institute v. Martin, 173 Cal. 21, 159 P. 158, and other cases. It is the general doctrine in California that the owner of an equitable title cannot maintain an action to quiet title against the owner of the legal title, the cases cited holding that a complaint containing only the usual averments in such an action is insufficient as against the owner of the legal title. Among the reasons for the rule the cases state that an allegation or finding of ownership in the plaintiff is not sustained by proof that the defendant owns the legal title subject to an equity in the plaintiff (Robinson v. Muir, 151 Cal. 118, 90 P. 521; Gray v. Walker, 157 Cal. 381, 108 P. 278); also that it would be unfair to permit the owner of equities to procure a judgment based upon his adversary's fraud without setting up the facts constituting the fraud (Aalwyn's Law Institute v. Martin, supra). In the present case, however, the evidence shows that the stock was purchased on November 13, 1918, at which time under the laws of this state the husband was the sole owner of all community property, the wife having no present vested interest therein (Stewart v. Stewart, 204 Cal. 546, 269 P. 439); and the cases hold that, notwithstanding its transfer to the wife, no title, legal or equitable, vested in her, but the same at once vested in the husband (Peiser v. Griffin, 125 Cal.

9, 57 P. 690; Osborn v. Mills, 20 Cal. App. 346, 128 P. 1009; Mitchell v. Moses, 16 Cal. App. 595, 117 P. 685, 687). Accordingly such property, though it stands in the name of the wife, could be taken in satisfaction of an execution against the husband (Schuyler v. Broughton, 70 Cal. 282, 11 P. 719), and the purchaser at the execution sale acquired all the right, title, and interest of the husband therein (Code Civ. Proc. §§ 698, 699). Furthermore, the right of a husband to maintain an action to quiet his title to community property against the wife has been frequently upheld (Osborn v. Mills, supra; Fanning v. Green, 156 Cal. 279, 104 P. 308; Bollinger v. Wright, 143 Cal. 292, 76 P. 1108; Hammond v. McCollough, 159 Cal. 639, 115 P. 216), as the court said in Mitchell v. Moses, supra, the two cases last cited "* * * established the rule that the husband, or one claiming under him, may maintain an action to quiet title against the wife, or one claiming under her, where title to community property has been taken in her name."

The above authorities, we think, fully sustain plaintiff's right to maintain the present action.

The evidence sufficiently supports the findings, and no error is shown which would justify a reversal of the judgment.

The judgment is affirmed.

211 Cal. 646

SOUTHLANDS CO. et al. v. CITY OF SAN DIEGO et al.

L. A. 11808.

Supreme Court of California.
Feb. 25, 1931.

1. Appeal and error 🔑900.

All presumptions are in favor of trial court's judgment.

2. Navigable waters 🔑20(2).

Consent of United States authorities must be secured for construction of bridge over navigable intrastate water (33 USCA §§ 401, 406).

3. Navigable waters 🔑20(2).

Source of authority to build bridge over intrastate navigable waters is state and not United States (33 USCA §§ 401, 406).

4. Navigable waters 🔑20(2).

State Legislature, by general statute, may delegate to any agency, such as municipality, power to consent and order construction of bridge over intrastate navigable water.

5. Municipal corporations 🔑488, 489(5).

Objections to proceedings for public improvements are waived if not seasonably and properly urged before local legislative body (St. 1925, p. 864, § 10; p. 866, § 16; p. 905, § 52).

6. Constitutional law 🔑43(1).

Objections to public improvements based on noncompliance with "due process" clauses of state and federal Constitutions are not waived by failure to urge such objections before local legislative body (St. 1925, p. 864, § 10; p. 866, § 16; p. 905, § 52).

7. Municipal corporations 🔑488, 489(5).

Test of whether defects in improvement proceedings are waived by failure to object before local legislative body is whether legislative body has power, in proceeding before it, to correct alleged defects (St. 1925, p. 864, § 10; p. 866, § 16; p. 905, § 52).

8. Municipal corporations 🔑488, 489(5).

Test of whether defects in improvement proceedings are waived by failure to object before local legislative body is whether or not alleged defective step could have been omitted altogether by state Legislature (St. 1925, p. 864, § 10; p. 866, § 16; p. 905, § 52).

9. Navigable waters 🔑20(2).

Failure of state to consent to municipality constructing bridge over intrastate navigable water is jurisdictional defect not waived by failure to object before local legislative body (St. 1925, p. 864, § 10; p. 866, § 16; p. 905, § 52).

10. Navigable waters 🔑20(2).

Erection of bridge over intrastate navigable water by municipality without state's consent would violate federal statute (33 USCA §§ 401, 406).

11. Navigable waters 🔑20(2).

Contract entered into by municipality in violation of federal penal statute requiring state's consent to building bridge over intrastate navigable water would be void (33 USCA §§ 401, 406).

12. Bridges 🔑1.

General power to improve and construct highways gives municipalities power to construct bridges and causeways whenever local legislative body, in absence of fraud, deems such bridge or causeway reasonably necessary to construction and improvement of highway, regardless of whether bridge crosses navigable or nonnavigable waters (St. 1925, p. 902, § 50).

13. Appeal and error 🔑907(2).

Where evidence on which trial court's finding was based was not before reviewing court, finding must be presumed amply supported by record.

14. Municipal corporations 🔑63(1).

Finding of city council that bridge is necessary to construction or improvement of highway, in absence of fraud, is conclusive (St. 1925, p. 849).

15. Bridges 🔑4.

That five-sevenths of cost of highway improvement is to be expended on bridge does not necessarily determine that bridge is not "incidental to or reasonably connected with, construction and improvement of highway," within statute authorizing improvement of "highway" by municipality (St. 1925, p. 902, § 50).

[Ed. Note.—For other definitions of "Highway" and "Incidental," see Words and Phrases.]

16. Navigable waters 🔑20(1).

Where municipality is to build bridge across navigable waters, suitable protection must be given to rights of those engaged in navigation and commerce.

17. Navigable waters 🔑20(2).

Where approval of appropriate federal officers to bridge improvement had been secured and appropriate state officers had approved width of spans necessary to permit free flow of water, rights of those engaged in navigation and commerce were protected.

18. Navigable waters 🔑20(2).

General municipal statutory power to construct highways impliedly includes power to construct necessary bridges over navigable waters (St. 1925, p. 902, § 50; p. 905, § 52).

19. Navigable waters 🔑20(2).

Statute authorizes municipalities to build bridges over navigable waters when reasonably necessary to construction and improvement of highway (St. 1883, p. 295).

20. Navigable waters 🔑20(2).

"Navigable streams," as used in statute authorizing municipalities to build bridges, included all bodies of water (St. 1883, p. 295; Pol. Code, § 2875).

> St. 1883, p. 295, provides that it shall be lawful for municipal corporations to erect and maintain draw-bridges across "navigable streams" that flow through or penetrate the boundaries of such city, when the necessities require it. This statute refers to Pol. Code, § 2875, which contains the headnote, "How constructed over navigable waters," and which statute requires that bridges over navigable streams must have draws or swings of sufficient space to permit passage of various craft which may navigate "the stream or water bridged."
>
> [Ed. Note.—For other definitions of "Navigable Stream," see Words and Phrases.]

21. Statutes 🔑211.

Headnote of Code section may be considered part of Code for purposes of interpretation.

22. Navigable waters 🔑36(1, 3).

Lands underlying navigable waters and tidelands belong to state.

23. Navigable waters 🔑20(2).

Before bridge can be constructed over lands underlying navigable waters and tidelands, an easement must be secured from state.

24. Navigable waters 🔑20(2).

Statute *held* to grant municipality easement to construct bridge over lands underlying navigable waters and tidelands (St. 1865–66, p. 855).

> St. 1865–66, p. 855, is entitled "An act granting to roads and highways a right of way over the public lands of the state."

25. Navigable waters 🔑20(2).

Municipal corporations have express and implied authority to construct bridges and causeways over navigable intrastate waters whenever reasonably necessary in construction of highway improvement, provided approval of proper state and federal authorities be first secured (St. 1925, p. 902, § 50; p. 905, § 52; St. 1883, p. 295).

26. Statutes 🔑123(4).

Title of Acquisition and Improvement Act *held* not misleading for failure to contain term "bridges" or "causeways" (St. 1925, p. 849; Const. art. 4, § 24).

> While title of Acquisition and Improvement Act of St. 1925, p. 849, did not contain the term "bridges" or "causeways," title did contain a comprehensive description of the nature of the act in reference to the improvement of public highways and the word "highways" being broad enough to include the word "bridges."

27. Statutes 🔑109.

Title of act need not embrace entire catalogue or abstract of its contents (Const. art. 4, § 24).

28. Statutes 🔑109.

Title of act need merely indicate, or be logically germane to, subject and include subject within its scope (Const. art. 4, § 24).

29. Municipal corporations 🔑277.

Municipality has jurisdiction of highway public improvements whose termini are within municipality, although improvement crosses unincorporated territory (St. 1925, p. 852, § 2; p. 905, § 52).

30. Municipal corporations 🔑450(2).

Nonassessable land may be included within assessment district, without affecting validity of district.

31. Appeal and error 🔑671(3).

Where evidence attacking trial court's finding was not included in bill of exceptions, reviewing court could not consider validity of finding.

32. Municipal corporations 🔑488, 489(5).

Failure to object before common council that improvement district was neither contiguous nor continuous waived the point, it not being jurisdictional (St. 1925, p. 864, § 10; p. 866, § 16; p. 905, § 52).

33. Municipal corporations 🔑488, 489(5).

Failure to object before municipal council that county, which at no time objected to improvement, had not consented to permit bridge over nonassessable unincorporated territory of county waived defect (St. 1925, p. 852, § 2; p. 864, § 10; p. 866, § 16; p. 905, § 52).

34. Municipal corporations 🔑426.

Municipality is not liable for assessment on municipal lands not used in performance of public function, but lands themselves are primary debtor.

35. Municipal corporations 🔑426.

Municipal lands not being used in performance of public function may be sold to satisfy assessment.

36. Municipal corporations 🔑864(3).

Indebtedness of municipality in violation of constitutional and charter debt limitations cannot be created by assessment on municipal lands not used in performance of public function.

37. Municipal corporations 🔑231(2).

Superintendent of work for city for single public improvement, receiving no compensation therefor, *held* not "officer" or "employee" of city within charter prohibiting "officer" or "employee" of city from being interested in contract with city.

> Charter provision of city concerned prohibited any "officer" or "employee" of the city from being directly or indirectly interested in the performance of any work, contract or business with or for the city. Terms "officer" or "employee" as so used in the charter provision imply that person renders regular and continuous services, that the services are not limited to a particular transaction, that the person has a fixed tenure and is liable to account for misfeasance or nonfeasance, and that he receive compensation, though not all of such elements need concur.
>
> [Ed. Note.—For other definitions of "Employé" and "Officer," see Words and Phrases.]

38. Municipal corporations 🔑488, 489(5).

Failure to object before common council that same person was employed as engineer and superintendent of public improvement waived objection (St. 1925, p. 864, § 10; p. 866, § 16; p. 905, § 52).

In Bank.

Appeal from Superior Court, San Diego County; Lloyd E. Griffin, Judge.

Action by the Southlands Company and others against the City of San Diego and others. From a judgment for defendants, plaintiffs appeal.

Affirmed.

Harvey H. Atherton and H. C. Gardiner, both of San Diego, for appellants.

Earl H. Miller, Crouch & Sanders, and C. C. Pease, all of San Diego, for interveners and respondents.

M. W. Conkling, Crouch & Sanders, Charles C. Crouch, Hugh A. Sanders, and Ray M. Harris, all of San Diego, for respondents.

Gibson, Dunn & Crutcher, and S. M. Haskins, all of Los Angeles (Edward E. Bacon, of Los Angeles, of counsel), amici curiæ for Municipal Bond Co.

PER CURIAM.

This is a proceeding brought by certain property owners within an assessment district to enjoin certain work authorized by the common council of the city of San Diego, purporting to act under the terms and provisions of the Acquisition and Improvement Act of 1925 (Cal. St. 1925, p. 849). It appears that the proposed improvement consists in part in the erection and building of a bridge and causeway across Mission Bay, a navigable body of water lying within the county of San Diego, belonging to the state of California, and over which the United States has retained sufficient jurisdiction to enable it to control navigation and commerce thereon. It further appears that the city of San Diego proceeded under the provisions of said act to create the necessary improvement and assessment district, heard protests of certain property owners whose properties were included therein, including the protest of appellants; and, after a hearing, overruled all such protests, and awarded the contract of construction to one of the defendants, Noble & Rhodes, Inc., who started and practically completed the work thereon.

Appellants sought in the trial court to have all of the proceedings taken by the common council declared null and void; to have all of the defendants enjoined from carrying on the work; to enjoin the city of San Diego from ordering or directing the issuance of any bonds; and to enjoin the further trial of certain condemnation actions brought by the city in an attempt to carry out the improvement.

After the filing of the complaint, defendants, respondents herein, generally and specially demurred. The trial court sustained a demurrer without leave to amend to part of the complaint and permitted amendments to other parts of the complaint. Plaintiffs thereupon filed certain amendments to the complaint, defendants answered, and the case was tried on its merits. After hearing the evidence and various arguments of counsel, the trial court dismissed plaintiffs' complaint and entered judgment for defendants. From the judgment so secured plaintiffs prosecute this appeal on a bill of exceptions.

So far as pertinent here, the trial court found that Mission Bay is a navigable body of water several square miles in area, located in San Diego county, belonging to the state of California, and over which the United States has jurisdiction to control navigation and commerce; that the common council of the city of San Diego had duly and regularly proceeded under the provisions of said Acquisition and Improvement Act to create the assessment district and had properly proceeded to take all necessary steps to carry out the improvement; that it is not true that the bridges and causeway to be erected as part of the improvement are not part of any street; that it is not true that the same are not the extension of a public highway; that it is true that no means of travel other than by water has ever existed along the line of the bridges and causeway; that it is true that according to the estimate of the engineer of work, at least five-sevenths of the total cost of the entire improvement will be expended in the erection and construction of the bridges and causeway; that the total cost of said improvement will be approximately $725,000; that defendants have the "right, power, and authority to build said causeway and bridges over said Mission Bay, and that the said bridges and causeway will, when constructed, constitute a part of an extension of a public street and highway"; that Mission Bay is not within the boundaries of the city of San Diego; that the consent of the county of San Diego has not been secured to the erection and construction of the improvement over county property; that only property within the city of San Diego is to be assessed for the improvement; that the said causeway and bridges "are necessary and proper to complete, connect with, and render of greater use to the public existing improvements in and on public ways * * * and that the consent, easement, and rights of way of the state of California, and of the United States government have been obtained for the construction of said improvements"; that the plans and specifications require that as part of said improvement a causeway 950 feet long on one side of the bay and 2,300 feet on the other, and two bridges 950 feet and 750 feet long, respectively, be erected; that the assessment district is divided into twelve zones; that zones 9 and 10 are on the south side of Mission Bay; that the waters of Mission Bay lie between these two zones and the ten zones on the north side of the bay; that the waters of the bay are included within the exterior boundaries of the district; that no part of the waters of the bay, or the lands underlying the same, have been or could be assessed for the improvement; and that the entire improvement is to be constructed within the boundaries of the assessment district.

On this appeal appellants contend that the entire proceedings are null and void, and that if the work be continued and the assessment levied, appellants will be deprived of their property without due process of law. Appellants' objections in this regard can be conveniently grouped under four main heads:

1. That neither said act nor any other statute confers on cities the power to construct bridges and causeways over navigable waters of the state; that under the federal law the consent of the state must be secured to the construction of such bridges and causeways; that such consent has not been granted; that if said act does authorize the construction of bridges over navigable waters, it is unconstitutional for the reason that it then embraces more than one subject not expressed in its title.

2. That the major portion of the improvement is outside the assessment district; that the district is not continuous nor contiguous; that even if said act does authorize the construction of bridges, it does not authorize the construction of an improvement partially in the municipality and partially in unincorporated territory; that the county of San Diego has never consented to the improvement crossing unincorporated territory.

3. That within the assessment district are included municipally owned lands not devoted to a public purpose; that the liability of the city for such assessments constitutes an indebtedness in excess of the constitutional and charter provisions of the city of San Diego.

4. That one Paul R. Watson has been appointed "Engineer of Work," and "Superintendent of Work"; that the position of "Superintendent of Work" is a public office; that the employment of the same person in both positions constitutes a violation of certain provisions of the city charter.

[1] The trial court specifically found that the first three objections set forth above were not made before the city council in the formal protest filed by appellants. As to whether the fourth objection was or was not made does not directly appear; that point having been determined on demurrer; and the bill of exceptions containing no reference thereto. It must be assumed, therefore, that the objection was not made, all presumptions being in favor of the trial court's judgment. These objections will be considered in order.

[2] The most important question presented on this appeal is whether the Acquisition and Improvement Act of 1925, or any other statute, confers authority upon municipalities to build bridges over navigable intrastate water, when such a bridge becomes reasonably necessary in the construction and improvement of a highway. Inasmuch as the United States possesses jurisdiction over such waters

for the purpose of controlling navigation and commerce, it is obvious that the consent of the United States authorities must be secured for the construction of such a bridge. In this regard, an act of Congress of March 3, 1899, provides in part (U. S. C. A. title 33, § 401, p. 377):

"It shall not be lawful to construct or commence the construction of any bridge, dam, dyke, or causeway over or in any port, roadstead, haven, harbor, canal, navigable river, or other navigable water of the United States until the consent of Congress to the building of such structures shall have been obtained and until the plans for the same shall have been submitted to and approved by the Chief of Engineers and by the Secretary of War: Provided, That such structures may be built under authority of the legislature of a State across rivers and other waterways the navigable portions of which lie wholly within the limits of a single State, provided the location and plans thereof are submitted to and approved by the Chief of Engineers and by the Secretary of War before construction is commenced. * * *"

It is likewise provided that any person or corporation violating the above section shall be deemed guilty of a misdemeanor. U. S. C. A., title 33, § 406, p. 425.

[3] Under the above statutory provision, it is clear that the source of the authority to build a bridge over intrastate navigable waters is the state, and not the United States. In other words, no approval other than that of the Secretary of War and Chief of Engineers to the location and plans of the bridge need be secured from the United States. Such approval was admittedly secured in the present case. However, it is obvious under the terms of the above statute that such approval of the United States authorities confers no right on the applicant in the absence of the consent of the state. The approval of the Secretary of War and the Chief of Engineers is necessarily predicated on the assumption that the consent of the state has or will be given. This is just another way of stating that the source of authority to build such a bridge lies in the state and not in the United States. See International Bridge Co. v. New York, 254 U. S. 126, 132, 41 S. Ct. 56, 65 L. Ed. 176.

Therefore, since the consent of the properly authorized United States authorities has been secured to build the bridges and causeway involved herein, the only question to be determined on this appeal in this regard is whether the state Legislature has authorized and consented to the construction of such bridges and causeway.

[4] There can be no question but that the state Legislature by a general statute may delegate to any agency such as a municipality the power to consent and order the construction of such a bridge. Wright v. Nagle, 101 U. S. 791, 25 L. Ed. 921. Respondents contend that our statute has conferred upon municipalities the right and power to construct bridges over navigable intrastate waters when such bridges are an integral part of a highway improvement. Appellants contend that neither that statute nor any other statute has conferred such a power on municipalities.

At the outset of this discussion, respondents point out that the proceedings involved herein were taken under the provisions of the Acquisition and Improvement Act, and also point out that the objection that the state has not consented to the construction of such a bridge, was not made before the common council of the city of San Diego as one of the grounds of protest of such improvement. Respondents contend that under the curative provisions of that act, appellants are precluded from now objecting to the proceedings on this or any other ground not specified as a ground of objection before the common council. The curative provision most strongly relied on is found in section 16 of the act which provides in part:

"All objections to any acts or proceedings relating to the improvement prior to the time within which such objections are permitted by this section to be filed, not made in writing and in the manner and at the time aforesaid, shall be waived. It is the intent of this section that any person failing to file such notice within the time specified shall be deemed to have intentionally waived every objection to the regularity or validity of such acts or proceedings and he shall be estopped from thereafter raising the same."

In addition, section 10 of the act provides in part:

"The findings and determination of said legislative body upon the matters of the extent and boundaries of the assessment district, the zones, if any, into which said district is divided, the percentage of the expenses to be raised from each of said zones, the grades to which the improvement is to be constructed, and the necessity for the acquisition, or improvement, or both, comprehended by the proceeding, shall be final and conclusive."

And section 52 provides in part:

"No error, defect, irregularity, informality and no neglect or omission of any officer of any county or municipality, in any procedure taken hereunder, which does not affect the jurisdiction of the legislative body to order the doing of the thing or things proposed to be done, shall avoid or invalidate such proceeding or any bonds issued thereunder.

The exclusive remedy of any person affected or aggrieved thereby shall be by appeal to the legislative body as hereinbefore provided."

[5, 6] Curative and conclusive evidence provisions similar to those quoted above, found in other street improvement and bond acts, have been the fertile source of litigation. It is now well settled, if such provisions are found in the statute, that, if a property owner fails to file a protest with the municipal legislative body, or protests on certain designated grounds and such protest has been denied, he cannot later, in a proceeding in court or elsewhere, complain of the denial of his protest on grounds other than those stated in his protest, nor can he on any grounds not stated in any protest maintain an action to restrain any improvement authorized by the municipal legislative body. In other words, objections to proceedings for public improvements are waived if not seasonably and properly urged before the local legislative body. See, for several recent cases discussing the rule, Blake v. City of Eureka, 201 Cal. 643, 258 P. 945; Noyes v. DeGolyer, 202 Cal. 542, 261 P. 1006. It is equally well settled, however, that objections addressed to the proceeding, constituting, or necessary to constitute, a compliance with the "due process" clause of the state and federal Constitutions are not waived by failure to urge the same before the legislative branch of the municipality wherein the improvement proceedings were had. Chase v. Trout, 146 Cal. 350, 80 P. 81; Watkinson v. Vaughn, 182 Cal. 55, 186 P. 753; Noyes v. DeGolyer, supra. The difficulty comes in such cases in determining just what constitutes a defect going to "due process," or what has been termed in some cases as a "jurisdictional defect." The leading case discussing what defects are and what defects are not waived by failure to object is Chase v. Trout, 146 Cal. 350, 80 P. 81, in interpreting similar provisions found in the Vrooman Act (St. 1885, p. 147). In that case, the court, after discussing what defects are waived, stated at page 360 of 146 Cal., 80 P. 81, 85:

"What, then, are the essentials, the nonobservance of which cannot be cured? The property must be within the jurisdiction of the local board; there must be the actual performance of some work which is to be paid for (that is, a subject-matter of which the council can acquire jurisdiction); an assessment or apportionment of the amount to be raised must be made; and, as above stated, there must be sufficient notice and opportunity for the hearing and determination of grievances and objections to constitute due process of law."

Section 52 of the Mattoon Act, itself, quoted supra, recognizes the distinction, wherein it is provided that "no error * * * in any procedure taken hereunder, which does not affect the jurisdiction of the legislative body * * * shall avoid * * * such proceeding. * * *" See, also, Chapman v. Jocelyn, 182 Cal. 294, 300, 187 P. 962; Ramish v. Hartwell, 126 Cal. 443, 58 P. 920; People v. Van Nuys Lighting District, 173 Cal. 792, 797, 162 P. 97, Ann. Cas. 1918D, 255.

[7, 8] It seems clear, under the above decisions, that the main purpose of requiring all objections to be specified before the municipal legislative body is not, primarily, to lay the foundation of a future suit, but to give opportunity to the local legislative body to correct any errors, defects, or irregularities in the proceedings. Obviously, if the defect is of such a nature that the legislative body before whom the objections have been filed has no power to correct it, the making of an objection would not fulfill the above purpose. One test of whether the defect is waived by failure to object, suggested by the above decisions, is whether the legislative body has power in the proceeding before it to correct the defect alleged to exist. Another test is whether or not the particular step alleged to be faulty, irregular, or defective, could have been omitted altogether by the Legislature of the state in prescribing the procedure to be followed in creating the district and levying the assessment.

[9] We have no hesitancy in holding that if the defect now urged by appellants does exist—that is, if the state has not consented to the construction of bridges by municipalities over intrastate navigable waters, when such a bridge is reasonably necessary in the construction of a highway—then that defect is jurisdictional in the sense that it is not waived by failure to object on that ground before the local legislative body. Under either of the tests suggested above, the defect is not waived by failure to object.

[10, 11] Moreover, erection of the bridge without state consent would constitute a direct evasion of the federal statute above quoted, violation of which is made a crime. Under elementary principles, any contract entered into by the city in violation of such a penal statute renders the contract void. See Berka v. Woodward, 125 Cal. 119, 126, 57 P. 777, 45 L. R. A. 420, 73 Am. St. Rep. 31; Stockton Plumbing & Supply Co. v. Wheeler, 68 Cal. App. 592, 601, 229 P. 1020.

[12] We now turn to a discussion of whether or not the state has conferred upon municipalities the authority to build bridges over navigable intrastate waters. Appellants contend that the act in question limits the authority of a municipality to the construction and improvement of highways in the sense of roadways, and strenuously contend that the construction and erection of a bridge over navigable waters does not constitute the improvement of a highway within the meaning of the act.

The act specifically authorizes the construction of bridges, at least under certain circumstances. Section 50 provides in part:

"The word 'improve,' and any of its variants, as used in this act, shall be deemed to mean and shall include the construction or doing of the things and work following, either singly or in any combination thereof, as well as the reconstruction and repairing thereof; * * * the construction or reconstruction of sidewalks, crosswalks, steps, parks and parkways, culverts, bridges, curbs, gutters, tunnels, subways, or viaducts; * * * all other work which may be deemed necessary to improve the whole or any portion of any public ways or property or rights of way of the public; all other work or improvements auxiliary, incidental, necessary or convenient to any of the above, which may be required to carry out, facilitate or complete the same."

Appellants admit that there can be no question but that the above section authorizes a municipality to construct a bridge merely incidental to the construction or improvement of a highway, but contend that the bridge herein involved is not merely incidental to the construction or improvement of a highway, emphasizing in this regard that the trial court found that five-sevenths of the total cost of the improvement is to be expended on the bridges and causeway, and also emphasizing the fact that the bridges and causeway are to cross navigable waters. It was specifically held by this court in the case of Bailey v. City of Hermosa Beach, 183 Cal. 757, 761, 192 P. 712, 713, under the provisions of the Vrooman Act similar to the above, that "the act * * * authorizes the construction of bridges in the street of a city without any limitation other than the general implied one that the bridges be for street purposes." Appellants contend, however, that the word "bridges" as above used is to be strictly limited to "incidental bridges" in the nature of viaducts, etc., and is not to be extended to include bridges over navigable waters. From a reading of the entire act, we are of the opinion that, even if the word "bridges" was not contained in section 50 of the act, the general power to improve and construct highways, would include the power to construct bridges and causeways whenever in the opinion of the local legislative body, and in the absence of fraud, a bridge and causeway becomes reasonably necessary in the construction and improvement of a highway, and this without regard whether the bridge crosses navigable or nonnavigable waters. In this connection, the trial court found that:

"* * * The said bridges and causeway will, when constructed, constitute a part of, and an extension of, a public street and highway, to-wit: Ingraham street from Crown Point across the waters of Mission Bay to connect with a proposed street, as established in these proceedings, denominated Ingraham street, ending with Point Loma Boulevard, and leading to said water from the main portion of the city of San Diego."

And the court further found:

"* * * That the said causeway and bridges are necessary and proper to complete, connect with, and render of greater use to the public existing improvements in and on public ways within said municipality."

[13] The evidence upon which this finding is based is not before us on this appeal, and must, therefore, be presumed to be amply supported by the record.

[14, 15] The resolution of intention of the common council of the city of San Diego provided in part, "That the public interest, convenience, and necessity require * * * that a public right of way for street purposes be acquired * * * and it is hereby determined that said right of way, through, over and upon the said lands is necessary to be taken and acquired for the said purpose. * * *"

It appears to us clear that under the general power to construct and improve highways conferred upon municipalities by the provisions of the statute a municipality has the power to construct a bridge over navigable or nonnavigable waters, whenever in the opinion of the local legislative body it becomes reasonably necessary in such construction or improvement to construct such a bridge, and, in the absence of fraud, the finding of that body that such a bridge is necessary, is conclusive and not subject to review. We do not see how the mere fact that five-sevenths of the cost of the improvement is to be expended on the construction of the bridge, determines that, as a matter of fact, such bridge is not incidental to, or reasonably connected with, the construction and improvement of a highway.

[16, 17] Where the bridge is to cross navigable waters suitable protection must be given to the right of those engaged in navigation and commerce. In the case at bar, not only has the approval of the Secretary of War and Chief of Engineers been secured, but also the Director of Public Works and State Engineer of California have approved the "width of the spans necessary to permit the free flow of water." Thus the rights of those engaged in navigation and commerce have been protected.

We have been unable to discover any prior decision of this court, holding that the power to construct highways includes the power where reasonably necessary, to construct bridges over navigable waters, the question apparently never having been presented. Other states, however, have held that such power exists. One of the early and leading cases on the subject, where the problem is fully discussed, is Brown v. Town of Preston, 38 Conn. 219. In that case, at page 223, the court stated:

"The statute in general terms confers on the Superior Court the power to lay out highways in certain cases, and prescribes the manner in which it shall be done. Stat., p. 498, sec. 29. The statute however is silent in respect to bridges. That the power to lay out a highway carries with it the power to require the construction of bridges in the line of the highway, over all streams and rivers not navigable, cannot be denied. It must also be conceded that inlets and rivers navigable to some extent are within the limits of this power. That such has been the practical construction of the statute the records of our courts and reported cases will abundantly show. Wethersfield and Glastonbury v. Humphrey, 20 Conn. 218; Clark v. Saybrook, 21 Conn. 313; Groton and Ledyard v. Hurlburt, 22 Conn. 178.

"But we are urged to limit this power to those cases in which the navigation is so inconsiderable as not to require the construction of a draw-bridge. We have not discovered any good reason for such a limitation. It would prove detrimental to the interests of the public along our navigable rivers and seacoast, by checking improvements in the matter of highways, while, on the other hand, the advantages sought to be secured thereby are unimportant and inconsiderable. * * *

"It is apparent that if the bridge is constructed with a suitable draw, the injury to navigation will be very slight. Whatever the inconvenience may be, it was doubtless fully considered by the committee in determining the common convenience and necessity of the proposed highway. It was proper that it should be so considered. Upon such consideration it is found that the public wants require the construction of the highway, including the bridge. The slight inconvenience to which those interested in the navigation of this cove will be subjected, should be endured for the sake of the greater good accruing to the public at large.

"The most serious objection to construing this statute as conferring the powers contended for, is found in the fact that the statute makes no provision for the construction of a draw-bridge. Although the statute contains no express authority, yet we think it may be clearly implied in cases where public convenience and necessity demand a highway across a navigable stream of water. Towns in the construction of highways exercise the right of eminent domain, which right is delegated by them by the legislature. The obstruction of navigation by means of a drawbridge is an exercise of this same right. The power implied therefore is of the same general nature, and is necessary in order to secure fully the main object contemplated by the statute."

The above case was affirmed in the case of Bryan v. Town of Branford, 50 Conn. 246, 250. See, also, Aransas County v. Coleman-Fulton Pasture Co., 108 Tex. 216, 191 S. W. 553, where many of the decisions on the subject are reviewed.

[18] We are therefore of the opinion that the general power to construct highways conferred on municipalities by the statute includes by necessary implication the power and authority to construct a bridge over navigable waters whenever the construction of such a bridge becomes reasonably necessary in the construction of a highway, and is an integral part thereof. We think this interpretation of the act is in accord with the intent of the legislature as indicated by section 52 of the act, which provides in part: "This act and all of its provisions shall be liberally construed to the end that the purposes hereof may be effected."

[19] We are not presented with the question and, therefore, we do not determine whether an assessment district could be created solely for the purpose of constructing a bridge not connected with a highway improvement. That is not the situation presented herein, as shown by the findings above quoted. Even if the statute did not impliedly authorize municipalities to build bridges over navigable waters, when reasonably necessary in the construction and improvement of a highway, direct statutory authority exists for the construction of such a bridge. By a statute of 1883 (Cal. St. 1883, p. 295) it is provided in part:

"It shall be lawful for municipal corporations, and they are hereby authorized by their respective legislative body or bodies, to erect and maintain drawbridges across navigable streams that flow through or penetrate the boundaries of such cities, when the necessities require it. Such bridges shall in all respects be constructed in accordance with the provisions of section two thousand eight hundred seventy-five of the Political Code."

[20] It is, of course, true that the above statute uses the expression "navigable streams," but we have no hesitancy in holding that "streams," as therein used, comprehend such a body of water as Mission Bay. There is nothing to indicate that "streams," as therein used, was not used in its most comprehensive sense, including all bodies of water. This interpretation is indicated by the fact that the above statute directly refers to section 2875 of the Political Code. That section provides:

"All bridges constructed under this chapter crossing navigable streams must be so constructed as not to obstruct navigation, and must have a draw or swing of sufficient space or span to permit the safe, convenient, and expeditious passage at all times of any steamer, vessel, or raft which may navigate the stream or water bridged."

[21] It is to be noted that in the last part of the Political Code section above quoted the expression used is "stream or water," which expression was obviously and clearly intended as the equivalent of the expression "navigable streams," as used in the first part of the section. Moreover, the headnote of section 2875 of the Political Code, as it appears in the code commissioner's edition, reads: "How constructed over navigable waters." Such headnote may be considered part of the Code itself, for purposes of interpretation. 23 Cal. Jur. 772, § 147.

Appellant has cited three cases from other states. (Murdock v. Stickney, 8 Cush. (Mass.) 113; Jones v. State, 114 Ga. 538, 40 S. E. 807; School Trustees v. Schroll, 120 Ill. 509, 12 N. E. 243, 60 Am. Rep. 575), all of which hold that the expression "streams," as used in certain statutes involved therein, must be limited to bodies of water having a definite and continuous current. Respondents and amicus curiæ have referred us to two cases (Munson v. Hungerford, 6 Barb. [N. Y.] 265, and Long v. Boone County, 36 Iowa, 60), holding that the word "streams," as used in certain statutes there under consideration, was used in its most comprehensive sense to include all bodies of water. Either interpretation of the word as used in the statute of 1883 is therefore permissible, and from the analysis already given, we are of the opinion that the term was therein used in its most comprehensive sense, including within its scope waters such as those herein involved.

[22-24] In this state lands underlying navigable waters and tidelands belong to the state, and before a bridge can be constructed over such lands an easement must be secured from the state. Having already held that a bridge is included within the power to construct highways, there can be no doubt that such an easement has been granted in the present case. By an act of April 2, 1866 (Cal. St. 1865–66, p. 855), an easement for such highways has been granted in the most comprehensive terms. The title to that act reads: "An act granting to roads and highways a right of way over the public lands of the state."

[25] We conclude this part of the discussion with the observation that the city of San Diego and other municipal corporations have both express and implied power and authority to construct bridges and causeways over the navigable intrastate waters of the state, whenever such bridge or causeway becomes reasonably necessary in the construction of a highway improvement, provided the approval of the proper state and federal authorities be first secured to insure that the proposed structure will not unduly interfere with navigation and commerce.

[26-28] Appellants next contend that if the Acquisition and Improvement Act does authorize the construction of bridges over navigable waters, then it is unconstitutional, being in violation of article 4, section 24, of the California Constitution, providing that every act shall embrace but one subject, which shall be expressed in its title. It is true that the title of the act does not contain the terms "bridges" or "causeways," but the title does contain a comprehensive description of the nature of the act in reference to the "acquisition of, including the laying out, opening, extending, widening, straightening, and acquiring in any manner, in whole or in part, and for the improvement of and work upon public highways, roads, streets, avenues, boulevards, lanes, alleys, courts, places, parks, pleasure grounds, commons, and all public ways and other property and rights of way of the public." It is clear, inasmuch as we have already held that the word "highways" impliedly includes "bridges," that in no sense can the title of the act be said to be misleading. It must be noted that the title of an act need not embrace an entire catalogue or abstract of its contents. All that is required is that the subject must be indicated by the title of the act, or be logically germane to it, and included within its scope. See Park v. Pacific Fire Extinguisher Co., 37 Cal. App. 112, 173 P. 615; Buelke v. Levenstadt, 190 Cal. 684, 214 P. 42; McClure v. Riley, 198 Cal. 23, 243 P. 429; 23 Cal. Jur., pp. 646 et seq. The point is without merit.

[29] The next contentions of appellants are built around the findings of the trial court that Mission Bay, over which the bridges and causeway are to be constructed, is not within the boundaries of the city of San Diego, but is within the unincorporated territory of the county of San Diego. Other than the bridges and causeway, however, the rest of the improvement is within the city of San Diego, the termini of the improvement being so located, and being bisected by the bridges and causeways. Appellants contend that even if the statute confers power and authority upon municipalities to build the bridges and causeways here provided for, the act specifically limits the jurisdiction of municipal corporations so as to exclude power and authority to construct the improvement over unincorporated territory under the circumstances here existing. This contention is based on a literal reading of section 2 of the act, which provides in part: "Likewise, the jurisdiction of the legislative body of a municipality shall be extended over and it shall have said power and authority to acquire and improve public ways within the boundaries of such municipality, and also those forming its exterior boundaries where it joins unincorporated territory of the county or the territory of another municipality, and also public ways and public property lying within unincorporated territory of a county and of one or more other municipalities * * * provided, that the consent of the legislative body or bodies of the county

and of such other municipality or municipalities within the boundaries of which such public ways and property lie, expressed by resolution, shall first be obtained thereto and to the assessment of the property therein. * * * "

It will be noted that the above section provides expressly for three classes of improvements over which a municipality has jurisdiction, viz: (1) Improvements entirely within the boundaries of the municipality. (2) Improvements forming the exterior boundaries of the municipality, where it joins unincorporated territory of the county or of another municipality. (It should be here noted that the trial court expressly found that the proposed improvement did not fall within either of these two classes.) (3) Improvements lying partly within the municipality and partly "lying within unincorporated territory of a county and of one or more other municipalities."

Appellants construe the last-quoted provision of the statute to mean that when a municipality desires to construct an improvement partially within its boundaries and partially across unincorporated territory, the municipality has jurisdiction over the entire improvement only when the proposed improvement has one terminus in the municipality instituting the proceeding and the other terminus in another municipality, but so to join the two municipalities, the improvement must cross unincorporated territory. Such a situation is undoubtedly provided for by the section, the act providing that the municipality first instituting proceedings shall have jurisdiction over the entire improvement, providing the consent of the county and the other municipality be first secured to the improvement and to the assessment. Appellants point out that the improvement here involved does not run between two different municipalities, but between parts of the same municipality; that, to do so, it must cross unincorporated territory; and that admittedly the consent of the county of San Diego was not secured so to do. If the act does not confer jurisdiction on a municipality to construct such an improvement, we are of the opinion that clearly this point was not waived by failure to protest on that ground before the common council, under the authorities above cited, the alleged defect being jurisdictional in the sense that it goes to due process.

The question as to whether a municipality has jurisdiction over an improvement partially within its boundaries and partially lying within and across unincorporated territory seems never to have been raised in this state. It was not noticed in the initial case upholding the act, for in that case, Los Angeles v. Hunt, 198 Cal. 753, at page 756, 247 P. 897, it was said: "An examination of the aforesaid act of 1925 discloses that the controlling purpose of those who framed it and of the Legislature in its adoption was to provide a simplified plan, and at the same time a comprehensive procedure for the acquisition and improvement of public ways, parks, and pleasure grounds, whether lying entirely within unincorporated territory of a county or within the territory of a municipality, or lying partly within such unincorporated territory and partly within one or more municipalities, or lying within two or more municipalities, or forming the exterior boundary of any municipality where the same joins unincorporated territory of a county or the territory of another municipality whether partly within or without such boundary."

The title of the act contains language almost identical with that quoted from the Hunt Case. Evidently in framing the body of the act the Legislature did not expressly provide for the situation involved where the improvement is partially in the municipality and partially in unincorporated territory. This point we do not deem it necessary to decide, the issue not being involved on this appeal. It is clear that the Legislature has provided for jurisdiction in the municipality when the termini of the improvement are in different municipalities, and the improvement crosses unincorporated territory. In the absence of an expressed or implied limitation to the contrary, this grant of jurisdiction, by necessary inference, must be interpreted to include jurisdiction over all similar improvements of a lesser degree, which would include an improvement where the termini of the improvement are in the same municipality and the improvement crosses unincorporated territory. This interpretation we think is justified under section 52 of the act, supra, which provides in part that "this act and all of its provisions shall be liberally construed to the end that the purposes hereof may be effective."

[30] The unincorporated territory herein included, consists entirely of the lands and waters of Mission bay. This territory is included within the exterior boundaries of the assessment district, but the lands therein included, it is admitted and the trial court found, are not subjected to any assessment. Appellants' contentions that the district is neither contiguous nor continuous because bisected by this unincorporated nonassessable land are obviously erroneous. It is too well settled to require citation of authority that nonassessable land may be included within an assessment district, without affecting the validity of the district.

[31, 32] Moreover, the trial court expressly found that "it is not true that the lands contained in such district are not contiguous." This finding has not been attacked by the appellants, and the evidence to support the same

has not been included in the bill of exceptions and cannot, therefore, be considered by this court. Furthermore, this point was waived by failure to object on that ground before the common council, it not being jurisdictional. Teeter v. Los Angeles (Cal. Sup.) 290 P. 11.

[33] It is admitted that the consent of the board of supervisors of the county of San Diego has never been secured to cross the unincorporated territory of the county, and for that reason the appellants contend that the proceedings are void. Such consent is provided for in section 2 of the act above quoted. But we are not here dealing with a situation where county land is included in an assessment district, and subjected to assessment. The entire land included within the district and crossed by the improvement is free from assessment, being lands owned by the sovereign. Under such circumstances, the consent of the county for permission to cross Mission bay would be merely a formal consent, and we are of the opinion that such defect does not go to due process, and was, therefore, waived by failure to object on that ground before the common council. It should be noted that the county has at no time objected to the improvement on this or any other ground.

[34-36] Appellants next object to the improvement on the ground that the city of San Diego owns a large acreage within the assessment district, consisting of pueblo lands not used in the performance of a public function, and which lands are subjected to the assessment. It is contended that such liability creates an indebtedness of the city in violation of the debt limitations found in the Constitution and city charter. The conclusive answer to this contention is found in the fact that the lands of the city so subject to assessment are admittedly not lands used in the performance of a public function. The lands themselves, therefore, are the primary debtor and not the city. In the case of Pasadena v. McAllaster, 204 Cal. 267, 267 P. 873, chiefly relied on by the appellants, the lands involved were public lands used in the performance of a public function, and, therefore, the lands themselves could not be sold to satisfy the assessment, the city, under the terms of the act, being personally liable for the assessment. Here, however, the lands are not being used in the performance of a public function, and they may, therefore, be sold to satisfy the assessment. Under such circumstances, the liability is primarily that of the lands and not of the city, and, obviously, the debt limitations of the state Constitution and the city charter are not applicable.

[37] The last objection to the proceeding, of which some mention should be made, is that the same person was employed as engineer of work and as superintendent of work. It is contended that this violates a charter provision prohibiting any officer or employee of the city from being directly or indirectly interested in the performance of any work, contract or business with or for the city. It appears that one Paul R. Watson has been appointed superintendent of the work for the city, with no compensation, and that the same person is likewise engineer of work, his compensation for this service to be three per cent. of the contract price. The trial court sustained a demurrer without leave to amend to this allegation of the complaint, and was undoubtedly correct in so doing. Primarily, it was correct, because we are of the opinion that Watson, as superintendent of work for this one improvement, was not an "officer or employee" of the city, as used in the charter provision under discussion. Under similar provisions, it has uniformly been held that the terms "officers and employees," as so used, imply that the person render regular and continuous services; that the services are not limited to a particular transaction; that the person has a fixed tenure or position; that the person is liable to account for misfeasance or nonfeasance; and that he receive compensation. It is true that all these elements need not concur, but in reference to Watson not one of them is present. Under such circumstances he cannot be held to be an officer or employee within the prohibition found in the charter. See Louisville R. R. Co. v. Wilson, 138 U. S. 501, 505, 11 S. Ct. 405, 34 L. Ed. 1023; Coulter v. Pool, 187 Cal. 181, 201 P. 120; Kennedy v. City of Gustine, 199 Cal. 251, 248 P. 910; Reid v. Boyle, 43 Cal. App. 34, 184 P. 423.

[38] In the second place, the trial court was undoubtedly correct in sustaining the demurrer without leave to amend to this allegation of the complaint, because it does not appear that this objection was made before the common council, and, therefore, under section 16 of the act and the authorities already cited, it must be conclusively deemed to have been waived.

For the foregoing reasons, the judgment appealed from should be and it is hereby affirmed.

212 Cal. 52

SHAW v. STATE BAR OF CALIFORNIA.

L. A. 12551.

Supreme Court of California.
March 26, 1931.

1. Attorney and client 🔑53(1).

That person employing attorney to prosecute personal injury action was licensed adjuster was immaterial as respected attorney's liability to suspension (Pol. Code, § 633e).

2. Attorney and client 🔑38.

"Unlicensed person," as used in rules for professional conduct for members of Bar, refers to persons unlicensed to practice law.

> Rules of professional conduct adopted by the State Bar and approved by Supreme Court provide, among other things, that a member of the State Bar should not employ another to solicit, or obtain, or remunerate another for soliciting or obtaining professional employment for him; nor shall he directly or indirectly share with unlicensed person compensation arising out of, or incidental to, professional employment; nor shall he directly or indirectly aid or abet unlicensed person to practice law or to receive compensation therefrom nor knowingly accept professional employment on behalf of claimant in personal injury or death case offered to him as result of, or incident to, activities of unlicensed person controlling, directing, or influencing such employment, for compensation.
>
> [Ed. Note.—For other definitions of "Unlicensed Person," see Words and Phrases.]

3. Attorney and client 🔑58.

Attorney accepting employment in personal injury action from insurance adjuster soliciting case *held* properly suspended for one year.

In Bank.

Application by D. L. Shaw for review of proceedings had against him before the Board of Governors of the State Bar and recommendation made by that body that petitioner be suspended from practice of law for the period of one year.

Petitioner suspended.

Wilbert C. Hamilton, of Los Angeles, for petitioner.

Meserve, Mumper, Hughes & Robertson, of Los Angeles (Timon E. Owens, of Los Angeles, of counsel), for respondent.

PER CURIAM.

The petitioner applies to this court for a review of the proceedings had against him before the Board of Governors of the State Bar and of the recommendation made by that body that the petitioner be suspended from the practice of the law for the period of one year. There were two accusations presented by the Los Angeles Bar Association against the petitioner before the local administrative committee of the Board of Bar Governors of the State Bar in the county of Los Angeles. In each of these the accused was charged with the violation of rule 3 of the rules of professional conduct adopted by the State Bar of California and approved by this court on May 24, 1928, which rule reads as follows: "A member of The State Bar shall not employ another to solicit or obtain, or remunerate another for soliciting or obtaining, professional employment for him; nor shall he directly or indirectly share with an unlicensed person compensation arising out of or incidental to professional employment; nor shall be directly or indirectly aid or abet an unlicensed person to practice law or to receive compensation therefrom; nor shall he knowingly accept professional employment on behalf of a claimant in a personal injury or death case offered to him as a result of or as an incident to the activities of an unlicensed person who for compensation controls, directs or influences such employment."

The particular facts relied upon as constituting a violation of the aforesaid rule in respect to the first of these accusations were these: In the month of August, 1928, an automobile accident occurred in said county, in which three persons, viz., Marie Rasmussen, Ruth Rasmussen, and Charles Aney were injured. Very shortly after the occurrence of such injury one Ben S. Levy, then doing business as "Golden State Adjustment Organization," solicited from these injured persons employment as their and each of their agent and representative to adjust, settle, or litigate their claims for damages as a result of their injuries, and procured from them and each of them an agreement in writing authorizing him to represent them fully in the matter of the adjustment and settlement of their aforesaid claims and in the course thereof, if necessary, to employ an attorney or attorneys to represent them in the course of such litigation as might ensue, and for which service, including counsel fees, the said Levy was to receive 50 per cent. of whatever sums were secured or recovered, in the course of such adjustment or litigation. An action in each of these cases being found necessary or advisable, the original complaints therein were prepared by one Fainer at the instance and under the direction of Levy, but shortly after said actions were commenced the petitioner herein was, at the instance of Levy, substituted as the attorney of record in the place and stead of Fainer. The cases were subsequently settled and dismissed at the instance of the petitioner, and from the sum or sums received in the course of such settlement the petitioner retained the sum of 50 per cent. which, lessened by the amount of his agreed fees, he paid over to Levy. The petitioner prior to and in the course of his employment as the attorney of record in said cases had no connection with and did not come in contact with the parties plaintiff in either of said actions up to the time of the settlement and adjustment thereof, his entire activities and conduct of said litigation being carried on through and by virtue of his relationship with Levy.

In the second of said accusations substantially the same facts and conditions were alleged and found to exist with relation to the employment and conduct of the cases referred to therein, with the exception of the fact that the adjuster in the solicitation of the cases referred to in said accusation was one Gusseroff, who was at the time operating under the name of "Royal Adjustment Company." In the settlement of these cases also the accused received and distributed whatever sums of money were paid in compromise of said claims, receiving as his fee the agreed portion of the 50 per cent. to be retained by Gusseroff as his share of the recovery under his agreement with the injured parties.

The evidence taken before the administrative committee supported the foregoing statement of facts and showed that the accused in accepting employment in the cases referred to in these two accusations was fully advised of the fact that each of said so-called adjusters was engaged in the business of soliciting claims of this character, or, to use a modern phrase, was regularly engaged in the business of ambulance chasing under the cloak of their respective fictitious titles and names. The evidence educed before the committee further sufficiently showed that the controlling factor in the procurement of the claims referred to in each accusation and in the employment of the accused, and in the conduct and disposition of said causes, both before and after the complaint filed respectively therein, was none other than the solicitor and adjuster, by whom the accused was employed and through whom he was paid, and who in each instance was a person who was unlicensed to practice law.

[1, 2] The first contention which the petitioner urges in justification of his employment and conduct in the causes referred to in each of said accusations is that in each instance the person by whom he was employed was a licensed adjuster under the provisions of section 633e of the Political Code (St. 1925, p. 421, as amended by St. 1929, p. 1045); and that this being so the provision of rule 3 of the rules for professional conduct of the State Bar, which prohibits a member of the State Bar from sharing with an "unlicensed person" compensation arising out of or incidental to professional employment, and which forbids an attorney from aiding or abetting such "unlicensed person" to practice law or to receive compensation therefrom, and which makes it unethical and a violation of such rule to accept professional employment on behalf of a claimant in a personal injury or death case offered to him as a result of or as an incident to the activities of an "unlicensed person who for compensation controls, directs or influences such employment," has no application to his case or to his conduct in respect to which said two accusations were presented. We find no merit in this contention. The phrase "unlicensed person" in the several connections in which the same is used in rule 3 obviously refers to a person unlicensed to practice law and has no reference whatever to that class of persons, not being admitted to practice law, who may obtain permits to do the business referred to in section 633e of the Political Code. It is immaterial, therefore, to this proceeding whether or not the two individuals, neither of whom was a licensed attorney, were licensed adjusters. The law, so far as framed, has not attempted to interfere with or to regulate the activities and engagements of persons who have not been admitted to practice law in their effort to negotiate agreements between themselves and others injured in accidents or casualties of various sorts, whereby they shall be authorized to adjust claims or make settlements for the damages caused by such injuries, provided that in so doing, or in acting under such agreement, if made, such unlicensed persons do not engage in the practice of the law; but the law does undertake to define and limit the right which those who have been admitted to practice law, and as such have become attorneys and counselors at law and by virtue thereof have become active members of the organization known as the State Bar of California, to enter into those certain engagements with such unlicensed persons and particularly with reference to personal injury cases which are embraced within the inhibition of rule 3 of the rules of professional conduct above set forth.

[3] Upon the hearing of the two accusations presented against the petitioner before the administrative committee of the State Bar much evidence was presented relating to the relationship existing between the petitioner and the two unlicensed persons who, through the process known as "ambulance chasing" obtained from the persons injured, or their relatives named in said accusations, the agreements under and in pursuance of

which the petitioner was professionally employed to represent such injured persons in actions wherein he appeared as their attorney of record, and in the course of which he received as his fees a portion of the money the said unlicensed persons were entitled to retain under their agreements with the persons, or their relatives, who had sustained the injuries out of which the employment of the petitioner arose. An examination of such evidence convinces us of the sufficiency thereof to justify the findings and conclusions of the administrative committee of the State Bar to the effect that the petitioner accepted professional employment on behalf of the persons named as plaintiffs in the personal injury cases referred to in said accusations, and that such professional employment was offered to the petitioner and knowingly accepted by him as a result of and as incident to the activities of such unlicensed persons who, for compensation, controlled, directed, and influenced such employment, and who shared with the petitioner the compensation which arose out of and was incident thereto. We do not deem it necessary to deal in further detail with respect to said evidence or to the findings of the administrative committee or the final conclusion of the Board of Governors of the State Bar based thereon. We are satisfied from the record before us that the petitioner was justly censurable and that the recommendation of the Board of Governors of the State Bar that he be suspended from the practice of the law for the period of one year should be confirmed.

It is therefore ordered that the petitioner be suspended from practice as an attorney and counselor at law of this state for the period of one year from and after the filing of this order.

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212 Cal. 49

McCOULOU v. VEJAR.

L. A. 11108.

Supreme Court of California.

March 25, 1931.

1. Automobiles 🔑244(36).

In action for injuries in automobile crossing collision, evidence supported implied finding that defendant's negligence was sole proximate cause of accident.

> Evidence showed defendant approached intersection at high speed and struck plaintiff's car as he entered paved highway from private road.

2. Automobiles 🔑245(80).

In action for injuries in automobile crossing collision, plaintiff's testimony *held* not to show, as matter of law, contributory negligence.

3. Automobiles 🔑246(20).

In automobile collision case, refusal of instruction that there was no speed limit on highways *held* not error (St. 1923, p. 553, § 113, as amended by St. 1927, p. 1436, § 30).

> The proposed instruction contained an incorrect statement of the law and was properly refused, although California Vehicle Act (St. 1923, p. 553) § 113, as amended by St. 1927, p. 1436, § 30, does not purport to fix any definite number of miles per hour at which speed driver may propel automobile and escape responsibility on claim that he did not exceed such speed limit.

4. Automobiles 🔑168(1).

Court properly informed jury that maximum legal rate of speed of automobile on public highway in neither residence nor business district was 40 miles per hour.

In Bank.

Appeal from Superior Court, Orange County; H. S. Ames, Judge.

Action by H. T. McCoulou against Alfonso R. Vejar. Judgment for plaintiff, and defendant appeals.

Affirmed.

George L. Green, and Z. B. West, Jr., and S. B. Kaufman, both of Santa Ana, for appellant.

Crowell L. Ormsby and Joseph L. Fainer, both of Los Angeles, for respondent.

WASTE, C. J.

The defendant appeals from a judgment entered against him for $8,000 and costs in an action brought by plaintiff to recover damages for personal injuries caused by a collision between an automobile driven by plaintiff and another automobile driven by the defendant. Respondent having failed to file any reply to the appellant's opening brief, the cause stands submitted upon an order to the respondent to show cause why the judgment should not be reversed.

The collision occurred at about 7:30 o'clock on an evening in January. Plaintiff was driving his automobile easterly on a private road in the county of Orange. According to the evidence in support of the plaintiff, when about fifty feet from the point where the private road intersects Carolina avenue, a paved highway, he first saw the defendant's machine approaching the intersection from the north and on his left, and approximately one-quarter of a mile away. Plaintiff thereupon proceeded the intervening distance to the intersection, stopped his car, looked to the north and south on Carolina avenue, and, assuming that he had ample time to cross the paved roadway to the easterly side and turn to the north thereon before defendant would arrive at the intersection, he gave the required hand signal indicating a left-hand turn, and proceeded on to Carolina avenue. As plaintiff's car entered that avenue, defendant was approximately three hundred feet away. Plaintiff then for the first time discovered that the defendant was traveling at an excessive rate of speed. In an endeavor to avoid a collision the plaintiff accelerated his car, but to no avail. As his car reached the center of the roadway defendant's machine violently struck plaintiff's car on the left side. Plaintiff and his minor son were thrown from the machine and rendered unconscious.

A disinterested witness testified that just prior to the accident, and when approximately one-half mile north of the intersection, the defendant was traveling "not less than fifty miles" an hour. Defendant's version is to the effect that when he was about fifty feet north of the intersection, and traveling at a speed of thirty miles an hour, he saw the plaintiff's car proceeding at a moderate rate of speed, at about an equal distance from the intersection; that plaintiff decreased his speed as though he intended stopping, and then suddenly "stepped on it" with the resulting collision.

[1, 2] The evidence is conflicting. Our examination of the record satisfies us that there is ample support therein for the jury's implied finding that the negligence of the defendant was the sole and proximate cause of the accident. Nor do we find any merit in the contention that plaintiff's own testimony proves him to have been contributorily negligent as a matter of law in attempting, under the circumstances, to cross the path of a vehicle proceeding along Carolina avenue. A similar contention, based on a state of facts substantially identical with those now before us, was found to be without merit in the recent case of Cherry v. Delaney (Cal. App.) 290 P. 895. As there pointed out, the circumstances under which a court can declare that certain acts constitute contributory negligence as matter of law are rare. Whether plaintiff acted in a reasonable and prudent manner in thus attempting to cross in front of the defendant's car presented, along with the other issues in the case, merely a question of fact which the jury resolved in plaintiff's favor.

[3, 4] Appellant argues that the court erred in refusing an instruction which, if given, would have told the jury that "there is no speed limit on the highways of this state. * * *" The proposed instruction contained an incorrect statement of the law and was properly refused. While it is true that section 113 of the California Vehicle Act (St. 1927, p. 1436) does not purport to fix any definite number of miles per hour at which speed a driver may propel an automobile and escape responsibility on the claim that he did not exceed such speed limit, but rather requires that motor vehicles be driven at all times and under all circumstances "at a careful and prudent speed not greater than is reasonable and proper, having due regard to the traffic, surface and width of the highway, * * *" and so as not "to endanger the life, limb or property of any person" (subd. a), yet the section does specify certain maximum speed limits for designated places beyond which it is unlawful to propel a motor vehicle (subds. b and c). In this connection see Benjamin v. Noonan, 207 Cal. 279, 282, 283, 277 P. 1045; Krause v. Rarity (Cal. Sup.) 293 P. 62; Buzby v. Lewis, 103 Cal. App. 124, 126, 127, 283 P. 958; Armstrong v. Day, 103 Cal. App. 465, 471, 284 P. 1083; Davis v. Brown, 92 Cal. App. 20, 24, 267 P. 754. The court therefore properly refused the instruction and correctly informed the jury that at the time of the accident here involved "the maximum legal rate of speed of an automobile traveling on a public highway, * * * where said highway is in neither a residence district nor a business district, is forty (40) miles per hour."

We have examined the remaining two instructions designated by the defendant, one of which was given and the other refused, and find nothing of a prejudicial character in the court's action. The charge to the jury was full, fair, and accurate, and covered all of the issues in the case.

The judgment is affirmed.

We concur: RICHARDS, J.; SHENK, J.; SEAWELL, J.; LANGDON, J.; PRESTON, J.; CURTIS, J.

212 Cal. 76

PEOPLE ex rel. STEVENOT, Director of Natural Resources, v. ASSOCIATED OIL CO. et al.

L. A. 12311.

Supreme Court of California.

March 26, 1931.

1. Mines and minerals ⚷92.

Large reduction of gas and oil production because of unregulated operations *held* to warrant public regulation under police power (St. 1915, p. 1404, as amended by St. 1929, p. 923).

2. Mines and minerals ⚷92.

Oil company cannot produce more gas than injunctive order allows to prejudice of other producers' rights because it happens to strike place of greatest gas pressure (St. 1915, p. 1404, as amended by St. 1929, p. 923).

3. Mines and minerals ⚷91.

Reasonableness of wastage of gas in producing oil is fact question, which superior court should determine, in view of both landowners' and public's rights (St. 1915, p. 1404, as amended by St. 1929, p. 923).

4. Mines and minerals ⚷91.

Order enjoining gas wastage *held* not void for discrimination against oil company allowed more gas than average throughout field (St. 1915, p. 1404, as amended by St. 1929, p. 923).

In Bank.

Appeal from Superior Court, Los Angeles County; William Hazlett, Judge.

Action by the People, on the relation of Fred G. Stevenot, Director of Natural Resources, against the Associated Oil Company, the Twin Bell Oil Syndicate, and others. From an order granting a preliminary injunction, defendants Oil Syndicate and others appeal.

Affirmed.

See, also, 294 P. 717; 296 P. 273.

Neil S. McCarthy, Earl L. Banta, Harmell L. Pratt, and Howard P. Hall, all of Los Angeles, for appellants.

James S. Bennett, of Los Angeles, and U. S. Webb, Atty. Gen., for respondent.

M. C. Sloss, of San Francisco, amicus curiæ.

SHENK, J.

This is an appeal from an order granting a preliminary injunction. The action was brought against some forty-three oil producers in the Santa Fé Springs oil field in Los Angeles county to enjoin the unreasonable waste of natural gas pursuant to the provisions of the so-called Oil and Gas Conservation Act of 1915 (St. 1915, p. 1404), as amended in 1929 (St. 1929, p. 923). After notice and hearing, the court, on March 19, 1930, issued a temporary injunction as prayed for in the complaint. The terms of this injunction were modified on March 28, 1930. From the injunction as modified this appeal was taken by three of the defendants in the action, to wit, Twin Bell Syndicate, Second Twin Bell Syndicate, and Star Petroleum Company. An application was then made by these appellants for a writ of supersedeas to stay the operation of the injunction pending the appeal therefrom. The application was denied by this court on December 3, 1930. People v. Associated Oil Co. et al., 294 P. 717.

The order appealed from is attacked first on the ground that the statute under which the action was brought is unconstitutional, and, secondly, that the injunction issued is void as to these appellants by reason of alleged discrimination against them, but particularly as against the operations of well No. 4 of the Star Petroleum Company.

The questions involving the alleged unconstitutionality of the statute were presented for determination and were decided by this court contrary to the appellants' contentions upon the application for the writ of supersedeas. The terms of the temporary injunction were also set forth in the opinion rendered on that application.

It will be unnecessary to discuss the several questions raised by the appellants as to the alleged unconstitutionality of the statute for the reason that they are the same as those presented and determined in the former proceeding. It was also there stated by this court that, conceding the effect of the preliminary injunction to be that Star Well No. 4 would have to be shut down, the showing of the unreasonable waste of gas therefrom would justify it.

When the matter of the present appeal came on for argument on December 5, 1930, counsel for the appellants stated that the effect of the preliminary injunction had been in fact to kill Star well No. 4, and that the circumstances thereof demonstrated the discriminatory character of the injunction order as to that company; whereupon counsel for the respondent immediately disputed the fact. Thereafter on December 9, 1930, the respondent filed an application herein for leave to produce evidence pursuant to section 956a of the Code of Civil Procedure as interpreted in Tupman v. Haberkern, 208 Cal. 256, 280 P. 970. In response to the application an appropriate order was entered in the minutes of this court; the Hon. Leon R. Yankwich, a judge of the superior court in and for the county of Los Angeles, was appointed a referee to take the evidence either orally or by affidavit and report the same to this court. In due time the referee filed his report which consists of affidavits and exhibits attached thereto presented by the respective parties. This evidence shows beyond dispute that Star well No. 4 has been on continuous production from a time prior to the commencement of the action until the expiration of the time covered by the referee's report, which included the entire month of December, 1930. During the month of March, 1930, when the original injunctive order was issued, the daily average production of gas in the entire Santa Fé Springs oil field was 565,705,000 cubic feet per day. The injunctive order fixed the allowable daily production at 334,000,000 cubic feet per day. Taking into consideration and eliminating the amount of gas put to beneficial use, the court determined that any additional blow into the air in excess of 100,000,000 cubic feet per day was unreasonable waste. The Star Petroleum Company was originally allowed 3,000,000 cubic feet per day. By the modified order this company was allowed 3,285,000 cubic feet per day. This was an allowance to these appellants of 4,000 cubic feet of gas to each barrel of oil produced, as against an average of 2,600 cubic feet of gas to each barrel of oil throughout the entire field. On this state of the facts, any claim of unlawful discrimination between the Star Petroleum Company and other operators in the field would seem to be without merit.

[1] The record now before us shows that from March until June of 1930 the Star Petroleum Company far exceeded the allowance of gas specified in the order of court, and that it came within the allowance only because the average daily production of gas in the entire field declined to such an extent that this company could not produce even the allowable amount, due to the depletion of gas in the zones in the field. In January of this year the daily average of production of gas in the entire field was reduced to 177,251,000 cubic feet. This reduction was due wholly to the decrease in gas pressure in the various sands of the field. The production of oil in the whole field was necessarily reduced proportionately. It therefore appears that the effort on the part of the state to prevent the improvident and wasteful use of natural gas has been frustrated by unregulated operations in the field or by operations conducted in spite of attempted regulation, with the result that the further recovery of oil in the discovered zones in this field has been unduly reduced by the heretofore wasteful process, and that such further recovery must depend on artificial gas repressuring or putting the wells on pumps. It is estimated that only about 20 per cent. of the gas has been beneficially used, and that a very large proportion of the oil deposit has not been recovered from the discovered and developed zones in this field. It would seem to require no argument to support the statement that such a situation falls within the purview of public regulation under the police power, not only to the end of protecting the correlative rights of the owners and operators in this field, but also the rights of the public which has a direct interest in safeguarding this important natural resource.

[2] The appellants, particularly the Star Petroleum Company with reference to its well No. 4, insist that, if it had been compelled to observe the injunctive order, it would have been required to shut down the well, but there is no showing that it endeavored to comply with the order by "beaning back" (restricting the outlet), or by the employment of other means to prevent the prohibited waste. It is insisted that this appellant is being penalized because it happened to strike the top of the structure where the gas pressure was greatest. In effect this is a contention that it should be permitted to exercise a right to the prejudice of a coequal right possessed by its neighbors in the field. This contention cannot be sustained on well-known principles of law with reference to the exercise of rights in private property generally, but it also runs counter to adjudications on the subject of gas and oil development regulations by the highest court in the land. Ohio Oil Co. v. Indiana, 177 U. S. 190, 20 S. Ct. 576, 44 L. Ed. 729; Lindsley v. Natural Carbonic Gas Co., 220 U. S. 61, 31 S. Ct. 337, 55 L. Ed. 369, Ann. Cas. 1912C, 160; Standard Oil Co. v. United States, 221 U. S. 1, 31 S. Ct. 502, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734; Walls v. Midland Carbon Co., 254 U. S. 300, 41 S. Ct. 118, 65 L. Ed. 276. The decisions of the Supreme Court of the United States have recognized and determined that the states have the right to enact laws, under the police power, providing for the conservation of the oil and gas resources within their borders, and that such laws, if not clearly arbitrary or unreasonable, do not contravene the due process and equal protection provisions of the federal Constitution nor take property for public use without compensation. In harmony with the reasoning of the Supreme Court of the United States in the foregoing cases, conservation measures have been approved by the highest courts of the oil and gas producing states, as is shown by the many cases cited from those jurisdictions in the briefs of the respondent and amicus curiæ, with the exception of Montana. Gas Products Co. v. Rankin, 63 Mont. 372, 207 P. 993, 24 A. L. R. 294.

[3] We reiterate that the legislation in question has lawfully vested in the superior court the power to determine what wastage of gas in the production of oil is reasonable or unreasonable. Whether such wastage be reasonable or unreasonable is a question of fact

and should be determined in view of the necessity of one land owner to make productive use of his parcel, in view of the equal right of the adjoining owners not to be deprived of correlative production from their parcels, and in view of the right of the public to prevent the waste of that which cannot be replaced.

[4] The preliminary injunction generally is supported by the facts presented to the court. That these particular appellants have not been discriminated against is evidenced by the terms of the order itself and by the record present before the trial court and before this court on the supplemental hearing.

The order is therefore affirmed.

We concur: WASTE, C. J.; PRESTON, J.; RICHARDS, J.; SEAWELL, J.; CURTIS, J.; LANGDON, J.

A. L. YOUNG MACHINERY CO. v. CUPPS et al.*

Sac. 4097.

Supreme Court of California.

March 25, 1931.

Rehearing Granted April 23, 1931.

1. Highways 🔑113(5).

Bucket elevator, screen, one-yard drag scraper, pulleys, belts, lanterns, hose, and extension for elevator, furnished for and consumed on particular highway job, *held* "materials" and "supplies" covered by contractor's statutory bond (St. 1919, p. 487).

> Public Works Act (St. 1919, p. 487) provides that on public work the contractor must give a bond for at least one-half of the contract price of the work, guaranteeing that, if the contractor fails to pay for any materials, provisions, provender, or other supplies or teams, used in the performance of the work contracted to be done, the surety or sureties will pay the same.
>
> [Ed. Note.—For other definitions of "Materials" and "Supply," see Words and Phrases.]

2. Highways 🔑113(5).

Public contractor's statutory bond does not cover purchase price of equipment usable on more than one job, and which becomes part of contractor's general equipment (St. 1919, p. 487).

3. Highways 🔑113(5).

Equipment which will ordinarily be entirely consumed on particular job for which it is purchased is "materials" and "supplies" within public contractor's statutory bond (St. 1919, p. 487).

4. Pleading 🔑214(1).

Demurrer admits truth of allegations in petition.

In Bank.

Appeal from Superior Court, San Joaquin County; C. W. Miller, Judge.

Action by the A. L. Young Machinery Company against I. H. Cupps and others, including the Indemnity Insurance Company of North America. From a judgment of dismissal in favor of Indemnity Insurance Company of North America, plaintiff appeals.

Reversed and remanded with directions.

Kirkbride & Gordon and Kirkbride, Wilson & Brooks, all of San Mateo, for appellant.

Hartley F. Peart and Gus L. Baraty, both of San Francisco, for respondent Indemnity Ins. Co. of North America.

PER CURIAM.

Plaintiff appeals from a judgment of dismissal in favor of defendant insurance company entered after the trial court had sustained a demurrer to plaintiff's second amended complaint without leave to amend. The facts as set forth in plaintiff's complaint, so far as necessary to be considered on this appeal, are as follows:

On November 26, 1924, defendant Cupps entered into a contract with the county of San Joaquin for the construction of a designated public highway in that county for the total sum of $10,459.50. On December 4, 1924, Cupps filed with the board of supervisors of the county of San Joaquin a bond in the sum of one-half the contract price, naming the defendant insurance company as surety. The bond specifically recited that it was given and executed pursuant to the Public Works Act of 1919 (St. 1919, p. 487). It is then alleged that during the performance of the work under this contract, and between January 13 and February 16, 1926, the plaintiff sold, delivered, and furnished to the contractor certain materials, supplies, implements, and machinery, consisting of one 30-foot steel frame bucket elevator complete; one 36 by 12 inch screen; a one-yard drag scraper; and certain pulleys, belts, lanterns, hose, and extension for the elevator; that there still remains due and unpaid on the above articles the sum of $1,405.75. It is then specifically alleged that the above equipment was "furnished for use under the contract above mentioned and were used in, upon, for and about the work contracted to be executed and performed under said contract, and

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*Rehearing granted 2 P.2d 321.

were totally used up, consumed, destroyed and worn out in, upon, for and about the performance of said work under said contract, and at the completion of said work had no further use or value for the purpose for which they were constructed, and were without salvage value." The date of completion of the work and the filing of the verified claim and withhold notice required by the statute are then alleged, it appearing from such allegations that these steps were all taken within the time and in the manner provided by law. Plaintiff asks judgment against the surety on its bond for the amount of the unpaid balance on the purchase price of the above equipment.

[1-3] The trial court, holding the view that the purchase price of such equipment was not covered by the bond, sustained a demurrer without leave to amend. Respondent surety company contended on the demurrer, and contends now, that it is not liable on the bond for the purchase price of such equipment, on the theory that the bond required by the public works statute allows recovery only for the reasonable rental value of such equipment, when such equipment is in fact rented, and allows no recovery for the purchase price thereof.

As stated above, the bond in question was a statutory bond given and executed under the 1919 act, as it then read. That act provides that on public work the contractor must give a bond for at least one-half of the contract price of the work, which bond must guarantee that if the contractor "fails to pay for any materials, provisions, provender or other supplies, or teams, used in, upon, for or about the performance of the work contracted to be done, or for any work or labor done thereon of any kind, that the surety or sureties will pay the same. * * *" The bond issued by respondent is broader in many respects than the bond required by the statute. Both appellant and respondent devote the major portion of their briefs to the question as to whether those provisions in the bond more onerous than those required by the statute can be enforced against the surety. It is not necessary to determine that point on this appeal. It is our opinion that the expressions "materials" and "supplies" found in the statute are sufficiently broad to include equipment of the nature involved herein, when such equipment is purchased for the particular job, and is entirely consumed thereon, except for normal salvage value. It is true, of course, that the purchase price of equipment capable of being used on more than one job, and which becomes part of the contractor's general equipment, is not covered by the statute, but when the equipment is of such a nature that in the usual course of events it will be entirely used and consumed on the particular job for which it was purchased, it is our opinion that such equipment is included within the meaning of "materials" and "supplies," as used by the statute. Respondent cites several mechanics' lien cases which indicate that in those cases the lien extends only to those articles which physically go into the structure against which the lien is sought to be exerted. Those cases are not in point. It has repeatedly been held in reference to the 1919 act, and its predecessors, that such acts are to be more liberally construed than the mechanic's lien statutes, and that the reasons for giving a limited construction to the latter are not applicable to the former. Pacific Wood & Coal Co. v. Oswald, 179 Cal. 712, 178 P. 854; Sherman v. Amer. Surety Co., 178 Cal. 286, 173 P. 161; French v. Powell, 135 Cal. 636, 68 P. 92; Associated Oil Co. v. Commary-Peterson Co., 32 Cal. App. 582, 163 P. 702. It has been held under the 1919 act and similar public work statutes, that rental of machinery, money, expended on the hiring of mule teams, money spent for provisions, harness, and other equipment, including scrapers, freight on mules and equipment, etc., are all recoverable against the surety. Williamson v. Egan (Cal. Sup.) 287 P. 503; Pacific Wood & Coal Co. v. Oswald, supra; Bricker v. Rollins & Jarecki, 178 Cal. 347, 173 P. 592, 594; Sherman v. Amer. Surety Co., supra; People's Nat. Bank v. Southern Surety Co. (Cal. App.) 288 P. 827. The theory of these cases is that the statute was intended to cover all those things which have contributed to the improvement, whether directly by physically going into the construction, or indirectly, by being entirely consumed or used in the construction. In discussing the word "supplies," as used in a previous statute, the court in Bricker v. Rollins & Jarecki, supra, stated: "The ordinary meaning of this term in its general and accepted use is such as to include goods, wares, and merchandise of almost every kind and nature, whether used in the household or on the farm, or in any sort of productive or constructive work requiring the labor or service of men or animals or machinery. In the instant case they were furnished to be used and were actually used in advancing the work to be done under this contract, and in that sense entered into and became a component part of it and of the thing produced by it. This being so, we are of the opinion that as to the above classes of claims the trial court was correct in their allowance."

The true test in such cases was indicated by the Supreme Court of South Dakota in the recent case of Dennis v. Enke, 224 N. W. 925. In that case the question involved was whether the seller of a $3,000 tractor could recover from the surety the balance of the purchase price on a bond somewhat similar to the one here involved. We take the liberty of quoting from that case at some length. At page 927 of 224 N. W., that court, after analyzing certain earlier cases, stated:

"This court has indicated in those cases that absolute and entire consumption in the work is not essential to liability, and liability is not necessarily prevented by the fact that there may be some salvage value in the materials or other supplies. It is enough if they were purchased directly and particularly for the work, were proper for the work, and were used therein, and consumed therein to such an extent that their residual value is a salvage value only as distinguished from a new value, as illustrated by pipe cut and threaded in certain lengths, lumber cut up and nailed in place to make a tool shed or a form for cement, etc. That these items have some residual value is of course true, but it is a very different value both in kind and amount from that of new lumber or new pipe in standard lengths and dimensions, and this court has held, under the circumstances of the cases heretofore considered, that the existence of some such residual salvage value did not necessarily prevent liability on the part of the surety.

"The same rule was applied to the matter of minor tools and appliances in the Dennis Case [53 S. D. 646], 222 N. W. 269, where the items involved were two scrapers at $25.50 each, and certain repair items, and where the court below found as a fact (the appeal being from the judgment only) that all of the items were purchased for the purposes of the contract and were practically worn out in carrying out the provisions of the contract."

Again, at page 927 of 224 N. W., it is stated:

"It is a matter of common knowledge that the performance of contracts of this kind requires a plant and equipment suitable therefor, many items of which are expensive and the purchase of which could not be justified by any single contract unless it was extremely large. It is further a matter of common knowledge that this kind of work is generally performed by persons who engage therein as a business and who maintain, for the purpose of the general contracting business, a very considerable amount of equipment intended and designed to be used in that business over a period of several years and in the performance of a number of contracts. We do not think it can be said to be within the contemplation of the parties that the surety on such a bond as this should be liable for the purchase price of tools and appliances which constitute and create, or become a part of, the general plant and equipment of the contractor, as distinguished from those minor tools and appliances which are consumed or practically consumed in the performance of a particular contract. The underlying principle which distinguishes between liability and nonliability is comparatively easy to perceive and grasp, difficult to phrase accurately, and still more difficult to apply precisely in border line cases. There must always be somewhat of a twilight zone in these cases between liability and nonliability dependent upon the facts in particular cases. The problem is similar to that faced by the cost accountant of a manufacturing plant in determining whether a certain tool or appliance should be charged as a direct expense item to a particular job, or should be charged to plant and equipment; the established cost of its use in the particular job being ultimately taken into account by being embraced in the percentage of general overhead expense of plant equipment and factory charged to the particular job.

"In order to create liability on the part of the surety for the purchase price of tools and appliances under these contract bonds, at least the following elements we think must be present: First, the tool or appliance must be purchased specifically and particularly for use in the performance of the particular contract; second, the use of such tool or appliance must be at least proper, if not reasonably necessary, in connection with and about the carrying out of the contract; third, the tool or appliance must be used in or about the performance of the contract; fourth, the tool or appliance must be such that it is reasonably to be expected in the natural course of events that its normal life for the purpose for which it was designed will be practically consumed by its use in and about the performance of the contract, and in this connection the facts of each particular case must be taken into consideration. For example, general experience indicates that a crew of men engaged in the performance of a contract of this kind lose and break numerous small tools and items of equipment, such as shovels, spades, hammers, etc., by reason of which they are for all practical purposes really consumed in the performance of the contract, notwithstanding the fact that such tools, if carefully handled and not lost, would be far from worn out by the actual amount of work for which they are used in the performance of a particular contract. If such small tools are purchased for the performance of the contract, are proper or reasonably necessary therefor, are used in such performance, and in such performance are lost or broken, and such loss or breakage is reasonably to be anticipated, it is entirely possible that the surety on the bond might be liable."

[4] The articles herein involved fully comply with all the requirements suggested by the above case. It is our opinion that if the articles in question were totally used up in the usual and ordinary performance of the contract, so that nothing remained in excess of normal salvage, they then lost their identity as tools, appliances, implements, and machinery, and are included within the broader

definition of the words "materials" and "supplies." In such a case, in effect, they entered into and became a component part of the construction work. Certainly it is true that their full usefulness has entered into the work to the same extent as has hay for the horses or food for the men. Each case must be determined on its own facts. In the case at bar, the plaintiff has alleged the articles were purchased for the particular job and were entirely used up and consumed thereon. The truth of these allegations is admitted on demurrer. We are of the opinion that it was error to sustain the general demurrer without leave to amend. It is our opinion that plaintiff not only can, but has stated a cause of action. We do not mean by this to forecast the result of the action which, of course, must await upon the character of the evidence adduced at the trial.

Defendant surety, in addition to the general demurrer, also demurred specially to the complaint. It may be that several of these specifications are meritorious. It is therefore ordered that the judgment be reversed, and the case remanded to the trial court, with instructions to overrule the general demurrer and to pass upon the various specifications of special demurrer.

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212 Cal. 45

CAMPBELL et al. v. NORTHROP et al.

Sac. 4376.

Supreme Court of California.

March 25, 1931.

1. Landlord and tenant 🔑34(3).

Where party against whom rescission is claimed is in possession and has received full benefit of all money expended on property, offer of restoration is not required.

2. Landlord and tenant 🔑157(11).

On annulment of lease, allowance, if any, to lessee for improvements, is enhanced value of land.

In Bank.

Appeal from Superior Court, of Shasta County; Walter E. Herzinger, Judge.

Action to annul a lease and recover possession of premises brought by George Dack against J. R. Northrop and others, in which Lee Milton Campbell and another, executors of the last will and testament of George Dack, deceased, were substituted as parties plaintiff. Judgment for plaintiffs, and defendants appeal.

Affirmed.

Carter & Smith and L. C. Smith, all of Redding, for appellants.

Carr & Kennedy, of Redding, for respondents.

PRESTON, J.

This action was instituted on September 6, 1927, to annul a lease made by plaintiff George Dack to defendant Lillian B. Northrop on the 1st day of April, 1926, and to recover possession of the premises covered thereby. The plaintiff died on April 14, 1928, a short time before the trial of the action, and his executors were substituted as parties plaintiff in his stead. The word "plaintiff" as used in this opinion will refer to the original plaintiff, the decedent George Dack.

The cause of action counted upon fraud and undue influence, asserted to be of a sufficient degree and strength to warrant a rescission of the instrument. Issue was joined upon the allegations of the amended complaint and trial was had, followed by elaborate and sweeping findings of fact, followed by a judgment sustaining in toto the averments made, from which judgment defendants have prosecuted this appeal. No serious contention is made touching the sufficiency of the evidence to warrant a rescission upon the ground of fraud and undue influence. This fact is practically shown by the terms of the instrument itself, when read in the light of the surrounding circumstances, together with the physical and mental condition of the plaintiff. However, it is necessary, for a proper consideration of the points urged, to set forth briefly certain of the facts and circumstances.

Plaintiff at the time in question was eighty-five years of age, with a life expectancy of 2.77 years, in failing health and in an extremely weak mental condition, being childish and obsessed with an abnormal sense of his own fascinations and power over the opposite sex. He owned eighty acres of land, known as the George Dack Mountain Ranch Garage and Camp Grounds, together with a valuable water right appurtenant thereto. Previous to the time in question he had leased to one Miller the garage on said property. Miller in turn attempted to transfer this lease to the defendants, who in the year 1925 took possession of said garage. From this period until after the instrument in question was executed plaintiff boarded with the defendant Lillian Northrop. The evidence is plain that during all this time said defendant set on foot a systematic line of conduct to overreach and control the will power and action of said plaintiff. Her influence and power over him she frequently admitted. There is considerable evidence that in order to secure the lease in question she even went so far as to display her physical charms over the old man. The terms of the lease show a demise period of twenty years, with a monthly rental of $6, payable, however, only "during the life" of plaintiff. The court found the monthly rental value of the property to have been, on the date of the lease $50.

Said property is located on the state highway, between Redding and Dunsmuir, north of Gibson, Shasta county. It was used as a garage and camping ground. A survey developed the fact that part of the camp buildings mentioned in the lease were on the land of the adjoining owner, Martin, and it was necessary to move the buildings over onto the Dack property. This the defendants did. In addition they erected a cabin, from which they received $10 per month rent, a second cabin from which they received $12.50 per month rent, and a cookhouse from which they received $20 per month rent. After securing the lease defendants also went outside the boundaries of the camp grounds, but on land of the plaintiff, cleared such additional land, and built cabins thereon. They also constructed a camp for the highway engineers on the same property, but outside that portion thereof covered by the lease. They also permitted a concern known as the North Beach Auto Hauling Company to build a camp on the property under an arrangement whereby the buildings would belong to the defendants when vacated.

The grounds urged for reversal, although appearing in different forms, really amount to the claim that, before granting a rescission in this case, a court of equity should have required, as a condition precedent, that plaintiff refund to defendants all outlays made by them for the above and other improvements on the property. In this respect the court found that after execution of the lease, on April 1, 1926, defendants encroached upon and occupied real property belonging to the plaintiff and adjoining that described in the lease but not embraced therein, and constructed improvements thereon; that said injury to and occupancy of such land and said construction of improvements thereon was without the consent of and against the will of plaintiff and the improvements were the result of a wrongful and unlawful trespass upon plaintiff's lands. The court then concluded with this finding: "It is true that said George Dack did not offer to reimburse defendants herein for any expenditures made and that the said George Dack and these plaintiffs did not offer to restore defendants to their former position, but in this behalf the court finds that the use of the property of said George Dack and the withholding of the same from the owner, as hereinabove expressly found, sufficiently compensated said defendants for any payments made or detriment suffered by said defendants and that the case is not one in which an offer of restoration was necessary before bringing this action."

The basis for appellants' attack is found in the facts shown in the findings above summarized. In the first place, it is contended that the complaint is defective in that notice was not given of a rescission nor was an offer of restoration made, and, secondly, that the laches of plaintiff in bringing the action were so great that on the merits no rescission should be decreed without provision to restore defendants to their status quo by providing for the repayment to them of all sums spent in and about the improvement of the property and construction of the buildings in question.

[1] Respondents meet the question respecting the complaint by citing the following cases: Wilson v. Moriarty, 77 Cal. 596, 20 P. 134; Whyte v. Rosencrantz, 123 Cal. 634, 56 P. 436, 69 Am. St. Rep. 90; Isom v. Rex Crude Oil Co., 147 Cal. 659, 662, 663, 82 P. 317, from which we deduce the conclusion that where the party against whom rescission is claimed is in possession of the property involved and has thereby received the full benefit of all money expended on the property, an offer of restoration is not required to maintain an action for a cancellation of the instrument and restoration of possession of the property.

[2] Coming now to the merits of the case, the court found, as above stated, that the value of the use and occupation of the premises by defendants was an offset to any outlays made by them. We are not prepared to say that the evidence does not support this finding. Moreover, had the court been required to decree any relief of this nature it would only have been the amount representing the enhanced value of the land due to such improvements, and the cost thereof was not a proper criterion. Conlan v. Sullivan, 110 Cal. 624, 42 P. 1081; Petit v. Flint, etc., Co., 119 Mich. 492, 78 N. W. 554, 75 Am. St. Rep. 417; Fountain v. Semi-Tropic Co., 99 Cal. 677, 34 P. 497. But we search in vain in the record for any evidence that the value of plaintiff's property was to any extent enhanced by the outlays in question.

Further discussion is unnecessary. It follows from the above that the judgment of the court below should be, and it is hereby, affirmed.

We concur: WASTE, C. J.; CURTIS, J.; LANGDON, J.; SHENK, J.; RICHARDS, J.; SEAWELL, J.

212 Cal. 26

SECURITY TRUST & SAVINGS BANK v. QUICK.

L. A. 10936.

Supreme Court of California.

March 24, 1931.

Limitation of actions ⚷148(4).

Letter written by maker of note to attorney complaining of treatment accorded him was not unequivocal recognition of existing indebtedness sufficient to stay running of limitations (Code Civ. Proc. § 337, subd. 1).

The letter purporting to be a response to letter written by attorney presumably demanding payment of note contained a series of complaints against payee for its unfair treatment of maker of note with relation to properties and securities which payee held and which should have been applied to payment of note, and closed with the statement that, "I would be very glad to see you and talk this matter over with you, for I feel like that I have not had a square deal."

In Bank.

Appeal from Superior Court, Imperial County; V. N. Thompson, Judge.

Action by the Security Trust & Savings Bank against D. L. Quick. Judgment for defendant, and plaintiff appeals.

Affirmed.

Robert G. Hill, of San Diego, for appellant.

C. B. Smith, of El Centro, and Alford & Wilford, for respondent.

PER CURIAM.

This appeal is from a judgment of the superior court of Imperial county, in favor of the defendant and respondent in an action brought by the plaintiff upon a promissory note executed by the defendant to the First National Bank of Seeley, on January 4, 1921, for the sum of $1,320, with interest, payable on June 4, 1921, and which note after maturity had been assigned to the plaintiff herein. The action was commenced on June 11, 1925, to recover a balance alleged to be due on said note, with interest at 10 per cent. per annum, and for the foreclosure of a chattel mortgage upon certain cattle and horses given by the defendant to secure the same. The plaintiff alleged in its complaint that on November 19, 1924, the defendant acknowledged that the promissory note sued on therein was a subsisting indebtedness against him. The defendant demurred to the complaint upon the ground that it appeared upon the face thereof that the action was barred by the provisions of subdivision 1 of section 337 of the Code of Civil Procedure. The court overruled the demurrer, whereupon the defendant answered, denying liability on the note, and setting up several defenses thereto, including that of the statute of limitations which had theretofore been asserted by him in his demurrer. Upon the trial of the cause the plaintiff introduced a letter which the defendant admitted having written on November 19, 1924, to the attorney for the plaintiff, and which read as follows:

"Niland, Cal., Nov. 19, 1924.
"Mr. Robert G. Hill,
"El Centro, Calif.

"Your letter received. Will say in reply that the stock that the First National Bank that Seeley had a mortgage on I left them on pasture in the Paliverda Valley near Blythe in June, 1922, where they are now I do not know. I informed the bank at Seeley and the bank in Los Angeles that I could not keep them any longer as I had no money, feed was very high and I had to go to work for wages to make a living for my family and self. Neither bank made no reply I have been informed that they were sold some time ago for pasture bill I came back here to this valley June 10th, 1922, have been here ever since.

"The First National Bank of Seeley is holding a judgment of mine which I got against the Harris brothers for $600.00 cost and attorney fee which amounts to almost $900.00 which they refuse to sign over to me it did not belong to them any more than it did to you or any other man unknown in the matter. My attorney Harry Horton can tell you all about it. I also turned over six bales of cotton whether I ever received any credit for any of this I don't know. I would be very glad to see you and talk this matter over for I feel like that I have not had a square deal.

"Very respectfully yours,
"D. L. Quick."

It was this letter upon which the plaintiff relied to defeat defendant's plea of the statute of limitations. Upon the submission of the cause the trial court made its findings of fact and conclusions of law wherein it found and concluded that the foregoing letter did not constitute such an acknowledgment in writing of the existence of the obligation and of a subsisting indebtedness against him thereon as would serve to relieve plaintiff of the operation of the statute of limitations. It accordingly rendered judgment in defendant's favor upon the ground, among others, that the plaintiff's cause of action was barred by the provisions of subdivision 1 of section 337 of the Code of Civil Procedure. Plaintiff has appealed from said judgment and has filed its opening brief herein. Respondent has filed no brief in reply and has made no response to an order to show cause.

The record herein consists solely of the judgment roll and letter which is above set

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

forth. We are satisfied with the findings and conclusions of the trial court with reference to the effect of said letter. The letter purports to be a response to a letter written by the plaintiff's attorney, presumably demanding payment of the note. The letter contains a series of complaints against the Bank of Seeley for its unfair treatment of him with relation to the properties and securities which it held and which should have been applied to the payment of said note. The letter closes with the statement: "I would be very glad to see you and talk this matter over with you, for I feel like that I have not had a square deal." We are satisfied that such a letter could not reasonably be interpreted as containing such an unequivocal recognition of an existing indebtedness as would serve to stay the running of the statute of limitations. This is the conclusion which the trial court arrived at, and the authorities cited by the appellant in its opening brief do not, in our opinion, suffice to overthrow that conclusion or to justify a reversal of the judgment of the trial court based thereon.

It follows that the judgment must be affirmed, and it is so ordered.

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212 Cal. 58

MATHEWS v. DUDLEY et al.

L. A. 11036.

Supreme Court of California.

March 26, 1931.

As Corrected May 1, 1931.

1. Automobiles 🔑243(5).

Admitting testimony showing course of defendants' truck short distance from place of and immediately preceding collision *held* within trial court's sound discretion.

> Witness testifying to course of conduct of driver of defendants' truck short distance from place of and immediately preceding collision was driving automobile a short distance behind the truck. Witness did not see collision, but while following truck observed manner in which truck rounded curves and relative position on highway.

2. Trial 🔑131(2).

Objection for first time to alleged misconduct of counsel during argument, after jury had retired for deliberation, *held* too late.

3. Negligence 🔑138(4).

Defendants' instruction on question of joint or common enterprise between plaintiff and driver of automobile at time of collision *held* properly refused under evidence.

> Evidence showed that plaintiff was minor; that she had accompanied her two older sisters on their vacation; that plaintiff had no ownership or interest in automobile and had never driven same and had no control over car or action or conduct of two sisters in operating same.

4. Automobiles 🔑246(2).

Instructions on duty of driver of automobile to anticipate presence of others on highway, using word "vigilant," *held* not erroneous.

> Instruction complained of, in substance, told jury that driver had no right to assume that road was clear, but that he must be most "vigilant" and must anticipate presence of others, and the fact that he did not know that any one was on highway was no excuse for conduct which would have amounted to recklessness if he had known that another vehicle or person was on highway. Term "vigilant" is defined as "watchful, awake and on the alert; attentive to discover and avoid danger, or to provide for safety; circumspect; cautious; wary."
>
> [Ed. Note.—For other definitions of "Vigilant Watch," see Words and Phrases.]

In Bank.

Appeal from Superior Court, Ventura County; Edward Henderson, Judge.

Action by Eva Grace Mathews, a minor, by Charles O. Mathews, guardian ad litem, against George A. Dudley and another, doing business under the fictitious name and style of the National Linen Supply Company, and another. Judgment for the plaintiff, and the defendants appeal.

Affirmed.

Culver & Nourse, W. I. Gilbert, Clarke & Bowker, and Forrest A. Betts, all of Los Angeles, for appellants.

Blackstock & Rogers, of Ventura, and Brittan & Brittan, of Bakersfield, for respondent.

RICHARDS, J.

This appeal is from a judgment of the superior court in and for the county of Ventura, rendered and entered after the verdict of a jury in favor of the plaintiff for the sum of $35,000, in an action for damages for personal injuries sustained by her in an automobile collision which occurred upon what is known as the Old Conejo grade which lies along the highway between Ventura and Los Angeles, and on which the Ford automobile in which the plaintiff was riding and which was being driven by one of her elder sisters, while ascending said grade, was struck by a Reo truck owned by the defendants George A. Dudley and Maybelle M. Dudley, doing business under the fictitious name and style of National Linen Supply Company, and being at the time driven by Raymond Dudley, acting in the operation of the same under the authority of the owners of said truck.

[1] The appellants make four contentions upon this appeal, the first of which is that the trial court committed prejudicial error in the admission of certain evidence over their objection. The evidence in question was that of a witness for the plaintiff named Overly, who was driving an automobile down said grade a short distance behind the Reo truck and a short while before the collision. Overly did not see the collision, but he did observe the Reo truck and the place it was occupying upon the highway as it rounded several of the curves therein and in the course thereof just a short distance above the place where the collision occurred. The highway at this point is, as to the concrete portion thereof, twenty feet wide, and down the center thereof there was painted a white strip. The testimony of Overly was to the effect that as the Reo truck was being driven down said grade and came within the line of his vision as it rounded the curves in the road and proceeded down the grade it was traveling with its left wheels on the left-hand side of the white line on the highway, and that the truck kept this position on the highway up to the time when it was last within his vision and which was but a short space and a few seconds at most before the collision occurred. The objection which the defendants urged to the introduction of this evidence was that it failed to show that the witness saw the accident or saw the position upon the highway which the truck occupied with relation to the center thereof at the moment of the occurrence of the collision. We can perceive no merit in this contention, since the testimony of this witness had relation to a course of conduct which was being pursued by the driver of the truck for a considerable distance in the course of its descent along said highway and up to within a very short distance and a very brief space of time before his truck collided with the car in which the plaintiff was riding. In support of their contention the appellants cite but one California case, that of Blackford v. Beckworth, 90 Cal. App. 37, 265 P. 514, in which case it was held error to admit testimony of a driver's habit six months prior to a collision while traveling in a place eight miles distant from the place of the accident. This decision has no relevancy to the facts of the instant case, since the question to which the testimony of the witness Overly was directed related to the conduct and course of proceeding of the driver of the truck at a place but a short distance above and at a time immediately prior to the accident. The question before the court had relation to the weight and not to the admissibility of the testimony of the witness Overly and the questions of its remoteness, in view of the fact that the witness did not see the collision, was one which rested in the sound discretion of the trial judge as to the admission or rejection of such evidence. In the recent case of Ritchey v. Watson, 204 Cal. 387, 268 P. 345, this court had occasion to pass upon this precise question, wherein evidence was offered as to the speed of a bus a few hundred feet distant from where the collision between it and the plaintiff's car occurred and in which it was held that the admission of such evidence laid within the sound discretion of the trial court, and that its ruling thereon would not be disturbed upon appeal in the absence of a showing of a manifest abuse of such discretion. In the case of Traynor v. McGilvray, 54 Cal. App. 31, 200 P. 1056, 1057, the question was presented as to the admissibility of evidence with relation to the action and conduct of a party, particularly as to the rate of speed and method of driving an automobile, just before a collision occurred, and with respect to which the court said: "We do not regard it as significant that these witnesses did not actually see the impact of the machines, since they were within 500 or 600 feet of the point of impact, which occurred within a few seconds after the existence of the conditions which they related." The most recent decision of this court touching this question is that of Hughes v. Hartman, 206 Cal. 199, 273 P. 560, in which the evidence of a witness was offered and admitted to the effect that he had himself been nearly forced off the grade by the defendant's truck traveling on the wrong side of the road just before the driver thereof had collided with the plaintiff's car. This court held the evidence admissible, although the witness did not actually see the collision with the plaintiff's car. In this connection the plaintiff's witnesses, consisting of herself and her two sisters, who were riding with her in their car at the moment of the collision, all testified that the Reo truck immediately before and at the time of the collision with their car was, as to the portion thereof which struck their machine, some distance over on the left side of the median line of the highway.

[2] The appellants' second contention related to the alleged misconduct of plaintiff's counsel occurring during the argument of the cause. This misconduct, however, if it be such, was not objected to by counsel for the defendants at the time it occurred, nor at any time during the argument, nor until the instructions had been given to the jury and the jury retired to deliberate upon their verdict. The defendants' counsel then for the first time called the attention of the trial court to such alleged misconduct and asked that the jury be

recalled for the purpose of further instruction directing them to disregard the specific act of misconduct alleged on the part of plaintiff's counsel. Without reference to the question as to whether or not the comment of plaintiff's counsel amounted to misconduct, we are of the opinion that the objection came too late. Anderson v. United States, 192 Cal. 250, 219 P. 748; Hale v. San Bernardino Valley Traction Co., 156 Cal. 715, 106 P. 83. In this connection it may be noted that, while the defendants in their assignments of error on motion for a new trial stated that the verdict was excessive, as a result of passion and prejudice on the part of the jury, they did not persist in this assertion during the courses of this appeal, and made no reference thereto among the points urged in their brief for a reversal. In this state of the case it would seem that the alleged misconduct of plaintiff's counsel, even if made the subject of time by objection, could not be held to be sufficiently prejudicial to justify a reversal of the case.

[3] The appellants' third contention is that the court erred in refusing to give certain instructions requested by the defendants. As to the first of these instructions, it had reference to the question as to whether the plaintiff was engaged at the time of the accident in such a joint or common enterprise with her two sisters, who were the owners and alternate drivers of the car, as would render her, though a minor, subject to the defense of contributory negligence. The court refused to give the proposed instruction and indorsed thereon the statement that it was "refused, as given in effect elsewhere." An examination of the record shows the court's action in this regard to have been correct, since it had already given two instructions upon the same subject as that covered by the defendants' proposed instruction and in almost the same terms, one at the request of the defendants and the other of its own motion. In addition, however, it may be stated that there is no sufficient evidence contained in the record which would have justified the conclusion that the plaintiff was in fact engaged in a joint or common enterprise with her two sisters in relation to the ownership or operation of the car in which they were riding when the collision occurred. The plaintiff was a minor of the age of fifteen years. Her two sisters were out for a vacation, driving from their home in Bakersfield across to Monterey, and thence by the coast route to Los Angeles. They had brought their younger sister along, but she had no ownership or interest in the car, and had never driven the same, and had no control over the car or the action or conduct of her two sisters in its operation. She was simply their guest on their vacation, and thence cannot be said to have come within the rule with relation to a common enterprise or adventure as that rule has been laid down by this court in the cases of Bryant v. Pac. Electric Co., 174 Cal. 737, 741, 164 P. 385, and Pope v. Halpern, 193 Cal. 168, 173, 223 P. 470. The trial court was, therefore, under no compulsion to give any instruction upon the subject of a joint or common enterprise in so far as the plaintiff in this action was concerned.

[4] The next and final contention urged by the appellants is that the court committed prejudicial error in giving the following instruction:

"You are instructed that a driver has no right to assume that the road is clear, but under all circumstances and at all times he must be vigilant and must anticipate the presence of others. The fact that he did not know that anyone was on the highway is no excuse for conduct which would have amounted to recklessness if he had known that another vehicle or person was on the highway.

"I further instruct you that a person lawfully and carefully driving upon a highway has the right to assume that all persons using the highway will also use ordinary care and caution. This rule allows drivers of motor vehicles to assume that motor vehicle drivers will obey and abide by the traffic laws and regulations."

The gravamen of defendants' objection is directed against the use of the word "vigilant" in the foregoing instruction, and counsel for the appellants quotes certain definitions of that word as given in several dictionaries. The word, however, has numerous significances and synonyms, depending upon the particular place and context in which it is used and also to the subject to which in its various uses it relates. One of the meanings given to this word "vigilant" is that contained in the Century Dictionary, wherein it is defined as "watchful, awake and on the alert; attentive to discover and avoid danger, or to provide for safety; circumspect; cautious; wary." If each of these synonyms of the word "vigilant" had been employed in the instruction complained of, it could hardly, in respect to the duties of the driver of an automobile upon the public highways, be said to have been erroneous. But, however that may be, the instruction complained of has been approved by the appellate tribunals of this state in a number of decisions, some of which are the following: Meyers v. Bradford, 54 Cal. App. 157, 201 P. 471; Wright v. Salzberger, 81 Cal. App. 690, 701, 254 P. 671; Truitner v. Knight, 83 Cal. App. 655, 661, 257 P. 447; Alkus v. Davies, 86 Cal. App. 355, 260 P. 894; Rush v. Lagomarsino, 196 Cal. 308, 317, 237 P. 1066, and Hatzakorzian v. Rucker-Fuller Desk Co., 197 Cal. 82, 99, 239 P. 709, 41 A. L. R. 1027. We discover no prejudicial error in the giving or refusing to give any of the instructions of which the appellants complain, nor any other error on the part of the trial court which would warrant a reversal of this case.

The judgment is affirmed.

We concur: WASTE, C. J.; SEAWELL, J.; SHENK, J.; CURTIS, J.; LANGDON, J.; PRESTON, J.

212 Cal. 70

PEOPLE v. McCABE.

Cr. 3400.

Supreme Court of California.
March 26, 1931.

Homicide ⚷253(1).
Robbery ⚷24(1).

Evidence sustained convictions for murder in first degree and attempted robbery.

In Bank.

Appeal from Superior Court, Los Angeles County; Marshall F. McComb, Judge.

Wilbur McCabe was convicted for murder in the first degree and attempted robbery, and, from the judgments of conviction and an order denying his motion for new trial, he appeals.

Affirmed.

Frederic H. Vercoe, Public Defender, Franklin Padan, Chief Deputy Public Defender, and R. F. Bird, Deputy Public Defender, all of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., John L. Flynn and James S. Howie, Deputy Attys. Gen., and Charles J. Orbison, of Los Angeles, for the People.

PRESTON, J.

Information filed by the district attorney of Los Angeles county charged defendant in the first count with the crime of murder and in the second count with the crime of attempted robbery. Defendant admitted prior conviction of a felony, to wit, robbery, for which he had been imprisoned and less than six months previously released on parole. After due proceedings, this cause came to trial, and the jury thereafter returned two verdicts, one finding the defendant guilty of murder in the first degree and the other finding him guilty of attempted robbery. Judgments of conviction followed, imposing the death penalty, and, from said judgments and the order denying his motion for a new trial, defendant now prosecutes this appeal.

The record leaves not the slightest doubt concerning the guilt of appellant. It appears that Henry P. Miller, for many years night clerk at the University Club of Los Angeles, came on duty about 11 o'clock p. m. of June 15, 1930. At about 12:35 a. m., the following morning, appellant, armed with a loaded revolver, entered the lobby for the purpose of committing a robbery. Said clerk was seated in his office facing the lobby. Appellant approached and handed him a note reading in substance: "You are stuck up. Don't put you hands up or dare make a sign. If you try to make signs to anyone you will die. Put all cash from drawer into bag and pass it to me. Then get in the closet for five minutes. Slam door shut." The night watchman, making his regular rounds, passed the office, observed the man he later identified as appellant talking to said clerk, heard nothing of what was being said, and passed through a door into the club garage. The clerk, however, was evidently resisting the demands of appellant; at any rate, a scuffle followed, during which appellant fired two shots in quick succession, inflicting fatal wounds from which said clerk died the following day. These shots were heard by said watchman and by the elevator man; thus police and surgeon arrived at the scene within a short time.

During the affray the clerk with his penknife stabbed appellant in the face, causing it to bleed profusely. Appellant fled through the lobby and club garage and through the byways to his room, leaving a trail of blood spots to guide the police to him. They soon apprehended him while in his bathroom endeavoring to cleanse the blood from his face. Here they also found his blood-stained clothing. Along the route taken by appellant to his room, and where cast near the sewer drain, was found the revolver from which said shots were fired, with cylinders missing, but with three loaded shells of the same caliber nearby.

Said clerk, in the consciousness of approaching death, identified the note above set forth, and on two different occasions gave statements describing the whole occurrence and the appearance of the robber. Appellant was taken to his bedside in the hospital, and there, after the bandages were removed from appellant's face, the dying man identified him positively as his assailant. Appellant himself was questioned by the police a number of times, and, although first denying his participation in the crime, later admitted that he went to said club to commit a robbery and shot when he was resisted. Upon the trial, he repudiated all of his admissions of guilt, charging the police with unfair methods in forcing a confession upon him when he was still weak from loss of blood. He claimed that during the period in question he was under the influence of intoxicants, although competent witnesses testified that he was perfectly sober at the time his wounds were treated. In defense, appellant further asserted that decedent was a moral pervert and planned the attempted robbery for him after having engaged with him in numerous acts of depravity. The evidence in refutation of these foul aspersions was both abundant and conclusive.

Appellant therefore finds himself on appeal with the sole contention that the trial court erred in refusing to give two instructions requested by him, one with respect to discretion of the jury as to which punishment should be imposed in the event they found him guilty of murder in the first degree, the other with reference to the death penalty. The contention does not merit a detailed discussion. The charge as given by the court contained a full and correct exposition of the law upon the subject-matter in question. All of the instructions given and requested have received our careful consideration. We find that the charge of the court was ample, complete, free from prejudicial error, and covered all points necessary to a proper determination of the cause. In fact, the entire record is free from prejudicial error.

The judgment and order are therefore affirmed.

We concur: WASTE, C. J.; CURTIS, J.; LANGDON, J.; SEAWELL, J.; RICHARDS, J.; SHENK, J.

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211 Cal. 766

CALHOUN v. DOWNS et al.

L. A. 9679.

Supreme Court of California.
March 17, 1931.

1. Reformation of instruments ⟹11.

Contract to pay real estate commission, failing to contain all essential elements of contract, could be reformed so as to include all omitted elements.

Complaint in broker's action to reform contract and for specific performance alleged that purchaser and vendors entered into agreement for sale of property and to pay commission, but that, in reducing agreement to writing, by mutual mistake of parties certain figures and name were omitted therefrom so that the last line read as follows: "I agree to pay a commission of $—— to ——."

2. Brokers ⟹74.

Purchaser of property *held* to have assumed obligation to pay broker's commission.

Purchaser not only signed the original contract providing for payment of commission, and which, as reformed, would constitute an obligation of broker against purchaser and vendors for payment of commissions, but, in addition, thereafter agreed with vendors to pay any commission which might be claimed by any person because of sale of property.

3. Contracts ⟹187(1).

Third party may recover on agreement made for his benefit, although not party thereto.

In Bank.

Appeal from Superior Court, San Diego County; W. P. Cary, Judge.

Action by F. G. Calhoun against George C. Downs and others. Judgment for defendants, and plaintiff appeals.

Reversed, with directions.

Superseding opinion 289 P. 857.

E. W. Peterson and Sherman Lacey, both of San Diego, for appellant.

Wright & McKee and C. M. Monroe, all of San Diego, for respondent George P. Ahlborn.

Hendee & Rodabaugh, of San Diego, for respondents George G. Downs and Lola Downs.

CURTIS, J.

This is an appeal from a judgment dismissing the action after an order sustaining demurrers to the amended complaint without leave to amend.

It is alleged in said amended complaint that the defendants George Downs and Lola Downs, who are husband and wife, were the owners of certain real property described therein and situated in the county of San Diego, and that, while such owners, they listed said real property with the plaintiff a duly licensed and commissioned real estate broker, and employed plaintiff to sell said real property for the sum of $10,000, agreeing to pay plaintiff the usual broker's commission of 5 per cent. for making sales of real estate in said county in case the plaintiff should make a sale of said real property, or the sum of $500; that, in pursuance of said agreement, plaintiff procured the defendant, George P. Ahlborn as a purchaser of said real property, who was ready, able, and willing to buy the same for the sum of $10,000, and that on the 13th day of April, 1926, Downs and wife entered into an agreement with the defendant Ahlborn whereby they agreed to sell, and Ahlborn agreed to buy, said real property for the sum of $10,000, and to pay to plaintiff a commission of $500, but in reducing said agreement to writing by the mutual mistake of plaintiff and defendants the figures "500" after the dollar sign and the words "F. G. Calhoun" after the word "to" in the last line of said agreement were omitted therefrom, so that said last line reads as follows: "I agree to pay a commission of $——— to ———."

It is further alleged in said amended complaint that thereafter, and on the 1st day of June, 1926, the defendants, without the knowledge or consent of the plaintiff, entered into a second written agreement whereby Downs and wife agreed to sell, and Ahlborn agreed to buy, the same real property for the sum of $9,500. This latter agreement contained no provision for the payment of any real estate commission, but did contain the following paragraph upon that subject: "It is hereby mutually agreed that any commission which may be claimed by any firm or individual because of the sale of the herein described property is to be paid by the party of the second part and the party of the second part hereby guarantees the parties of the first part against any loss whatsoever through any such claim, deed not to be delivered to the party of the second part until the parties of the first part have been satisfied that no claim for commission will be made."

The amended complaint contains other allegations, but it is not necessary to refer to any of them except those averring that the sum of $500 was the reasonable value of the services rendered by plaintiff in effecting said sale, and that said sum had not been paid. Plaintiff asked for a reformation of the agreement of April 13, 1926, by the insertion of "500" after the dollar sign and the words "F. G. Calhoun" after the word "to" in the last line of said agreement, and for judgment of $500 against the defendants and each of them, together with interest from the date of said agreement. The defendants Downs and wife appeared separately from their codefendant Ahlborn, each filing a general demurrer to the amended complaint. These demurrers were sustained, and the plaintiff has appealed.

[1] The position of the trial court, and that taken by the respondents on this appeal, is that a contract to pay a real estate commission being one which is required under the statute of frauds to be in writing, if it fails to contain all the essential elements of such a contract, cannot be reformed so as to include any of the elements omitted therefrom for by so doing the court makes a new contract for the parties which is not in writing but which is based upon oral evidence. In their briefs, the respondents state that this is a question of first impression in so far as the appellate courts of this state are concerned, and in this statement the appellant agrees. Numerous authorities are cited by the respective parties from other jurisdictions bearing upon this question, from which it appears that the courts of these jurisdictions are not in entire harmony in their decisions as to the power of the courts in this respect.

It will not be necessary for us to review these authorities, for the reason that, since the filing of the briefs of the parties hereto, this court has passed upon practically the identical question and has decided the same adversely to the contention of the respondents. We refer to the case of Oatman v. Niemeyer, 207 Cal. 424, 278 P. 1043. In that case one Garrison had employed the plaintiff to care for him, nurse him, and keep house for him until his death, and in consideration thereof, agreed to give to plaintiff all of his property, both real and personal. Plaintiff performed her part of said agreement, and a few weeks before his death Garrison sent for a justice of the peace and directed him to prepare the necessary papers which would invest the plaintiff with all of his property. Thereupon the justice of the peace prepared a deed, and the same was executed by Garrison and delivered to the plaintiff. Garrison died some two weeks thereafter, and it was then discovered that, although the deed purported to grant to plaintiff "all the certain lot, piece or parcel of land situate, lying and being in the city of Wheatland, County of Yuba, State of California, and bounded and particularly described as follows, to wit," no description of the property sought to be conveyed appeared in said deed. An action was brought by the plaintiff against the administrator of the estate of Garrison to reform said deed and to quiet plaintiff's title to a certain tract of land owned by Garrison and situated in said city of Wheatland, and being the only real property owned by him in said city. It was alleged in the complaint in said action, and the trial court so found, that it was the intention of Garrison to convey by said deed said tract of land, but, by the mistake of the person who prepared it, the description of said land was omitted therefrom. The trial court by its judgment reformed the deed and quieted plaintiff's title to said real property. On appeal, this court affirmed said judgment. The case was given most careful and thorough consideration by this court. In its decision in department it held that the deed was void, and that the reformation thereof would amount to the making of a new contract, and is therefore never granted. A petition for a hearing in bank was granted, and, in our opinion, in which all members of the court were in accord, we held that the trial court properly admitted oral evidence of the contract and the description of the property, and rightly granted reformation of the instrument and quieted the grantee's title to the property. We quote from the concluding paragraph of our opinion as follows:

"There can, of course, be no question but that the deed was void in law, that is, that it failed wholly as a conveyance of property, since no property was described. But the contention that, for that reason, it cannot be reformed, fails to distinguish between a contract which is void for some fundamental reason and an instrument or writing which is void because of mistake in its preparation. If the contract itself is void, as, for example, because it is immoral or because the parties have not agreed on all of its terms, and there is, for that reason, no final contract or understanding between them, or, because the contract lacks consideration, reformation is impossible, since there is no valid contract to reform. But this is entirely different from a case where there is a valid contract and the parties have endeavored to put it in writing, and have made a mistake in writing down its terms, or have endeavored in accordance with the contract to execute an instrument, such as a deed, for the purpose of carrying it out and, through mistake in the preparation of the instrument, the document fails, either wholly or partially, to accomplish such purpose. The instrument may be void in such a case because of the mistake, but there is still a valid contract; and, the contract being valid, equity will reform the instrument to make it what it should be, and would have been except for the mistake. There is no making of a new contract in such a case. There is but the making of a new instrument, either to correctly express the contract or to carry it into effect."

We think that case completely answers every argument advanced by the respondents in support of the action of the trial court in sustaining respondents' demurrers to appellant's amended complaint. It must be held to state the law of this state relative to the question of the power of the court to reform instruments like that involved in this action.

[2, 3] The further contention is made by the respondent Ahlborn that, conceding the liability of Downs and wife to the appellant, he (Ahlborn) has not assumed any obligation to pay the appellant any commission. There is no merit, we think, in this contention. In the first place, Ahlborn signed the original contract which provided for the payment of a commission which, if reformed, as we have indicated it may be, would be an obligation of the plaintiff against the three defendants for the payment of a commission. Furthermore, in the second agreement, being the agreement of date June 1, 1926, as we have seen, Ahlborn agreed to pay any commission which might be claimed by any person "because of the sale of the herein described property." It is true that this agreement was not made with the plaintiff. It cannot be said, however, that it was not made for his benefit. If made for his benefit, although he was not a party to the agreement, he may recover thereon. Sherwood & Sherwood v. Gill & Lutz, 36 Cal. App. 707, 173 P. 171. Reading the two contracts, that of April 13, 1926, and that of June 1, 1926, together, with certain allegations of the complaint, it appears that it was at Ahlborn's suggestion that the contract of June 1, 1926, was executed and substituted for the first contract. In this second contract, as we have seen, the purchase price of the property was reduced from $10,000 to $9,500. No agreement to pay a commission was made therein, but, in lieu thereof, was the provision, already referred to, wherein Ahlborn agreed to pay any commission which might be claimed by any person for making said sale. If these averments of the amended complaint should be sustained by competent evidence, we would have no hesitation in holding that a sufficient case had been made out against Ahlborn for the payment of said commission. The amended complaint, therefore, states facts sufficient to constitute a cause of action, not only against Downs and wife, but also against Ahlborn. The demurrers were therefore improperly sustained.

The judgment is reversed, with directions to the trial court to overrule the demurrers to the amended complaint interposed by the defendants.

We concur: WASTE, C. J.; PRESTON, J.; SEAWELL, J.; SHENK, J.; RICHARDS, J.; LANGDON, J.

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212 Cal. 64

SECURITY-FIRST NAT. BANK OF LOS ANGELES v. LAMB et al.

L. A. 12347.

Supreme Court of California.

March 26, 1931.

1. Mortgages ⚿200(2).

Under mortgage, mortgagee had authority to pay assessment, validity of which was being contested by mortgagor.

> The mortgage provided, among other things, that mortgage was given to secure faithful performance of all covenants, agreements, and conditions set forth; that mortgagor agreed to pay as soon as due all taxes and assessments which might appear, or appeared to be liens, and that, in case taxes and assessments were not paid, "then mortgagee, being hereby made sole judge of legality thereof, may without notice to mortgagor, pay such taxes, assessments or incumbrances."

2. Mortgages ⚷399.

Where mortgagee paid assessments under provisions of mortgage, and mortgagor refused to refund same, he was in default, and mortgagee could foreclose.

3. Mortgages ⚷200(2).

Provision conferring on mortgagee power to determine whether assessments should be paid or contested is not unconscionable or against public policy.

4. Mortgages ⚷200(3).

Mortgagee's payment of assessment being contested by mortgagor was not "voluntary payment" where, if it had not been paid when due, large penalty would have been added.

[Ed. Note.—For other definitions of "Voluntary Payment," see Words and Phrases.]

In Bank.

Appeal from Superior Court, Los Angeles County; Marshall F. McComb, Judge.

Action by Security-First National Bank of Los Angeles against Josephine M. Lamb, Ellen Augusta Donovan, and others. From a default judgment, Ellen Augusta Donovan appeals.

Affirmed.

James Donovan, of Los Angeles, for appellant.

Bordwell, Mathews & Wadsworth, Ray W. Bruce, and John H. Mathews, all of Los Angeles, for respondent.

PER CURIAM.

This is an appeal from a default judgment in a foreclosure action, entered against defendant Ellen Augusta Donovan, after a demurrer to her answer had been sustained, with leave to amend. The facts out of which this controversy arose, as disclosed by the record, are as follows:

On October 3, 1925, Josephine M. Lamb and Ellen Augusta Donovan, joint owners of certain real property, executed their joint promissory note in the sum of $4,000, payable to the plaintiff bank October 3, 1928. This note was secured by the mortgage which is the subject of this action. Subsequently, the plaintiff bank granted an extension until October 3, 1931. Appellant, Augusta Donovan, performed all of the terms and conditions of the mortgage, and paid interest on the note, up to the time this foreclosure action was commenced, with the exception that a certain street assessment levied by the city of Los Angeles was not paid. The ordinance of intention in reference to this assessment was passed by the city council on September 4, 1925, approximately a month before the mortgage involved herein was executed. The city continued proceedings under the Street Opening Act of 1903 (Cal. Stats. 1903, p. 376), condemned certain property necessary for the improvement, and, on June 20, 1928, assessed the property here involved in the sum of $7,500. Defendant Augusta Donovan filed a written protest against the assessment, as required by law, which protest was denied on November 9, 1928. On November 14, 1928, the city slightly lowered the assessment against the property involved herein, making the final assessment the sum of $7,088. On December 31, 1928, defendant Augusta Donovan commenced an action in the superior court, contesting the validity of the entire assessment procedure. On May 17, 1929, the trial court upheld the validity of the assessment. Defendant Augusta Donovan thereupon perfected her appeal from the judgment so entered. This court, on June 11, 1930, upheld the validity of the assessment. Donovan v. City of Los Angeles (Cal. Sup.) 288 P. 1083.

[1] In the meantime, on April 10, 1929 (before the trial court had rendered its decision in the assessment case, and while that action was pending), the plaintiff mortgagee paid to the city of Los Angeles the sum of $7,088 in full satisfaction of the assessment. After having paid the assessment, which it is alleged was a prior lien and a cloud on the title, the mortgagee demanded of the mortgagors the sum of $7,088, which it had advanced to pay the assessment. The mortgagors refused to pay the same, whereupon the mortgagee instituted this foreclosure action, electing to declare the amount of the note and the assessment immediately due and payable, under certain provisions of the mortgage. Defendant Augusta Donovan answered, admitting the execution of the note and mortgage, and the payment of the assessment by the mortgagee, but setting up as a defense that the mortgagee had no authority to pay an assessment, the validity of which was being contested by the mortgagor. Plaintiff bank generally demurred to this defense. The trial court sustained the demurrer with leave to amend. Augusta Donovan refused to amend and elected to stand on her answer. Her default was duly entered, and, from the judgment so secured, she prosecutes this appeal. The main point presented is in reference to the sufficiency of this defense, which depends, of course, on the terms and conditions of the mortgage.

The mortgage here involved contains the usual provisions commonly found in such instruments. Among other things, it provides that the mortgage is given to secure "the faithful performance of all the covenants, agreements and conditions" therein set forth; that the mortgagor "agrees to pay, as soon as due, all taxes, assessments and incumbrances, which may be, *or appear to be*, liens" against the property, and "to pay and settle promptly (or cause to be removed by suit or otherwise) all adverse claims against said property"; that "in case said taxes, assessments or incumbrances so agreed to be paid by the mortgagor be not so paid * * * *then the mortgagee, being hereby made the sole judge of the legality thereof, may, without notice to the mortgagor, pay such taxes, assessments, or encumbrances,* * * *" that all sums expended by the mortgagee, "in doing any or all of the things authorized in this mortgage," shall be secured by the mortgage; that the mortgagor promises to pay the note and in case of default in the payment of the same, or "in the performance of any of the covenants or agreements herein contained * * * the whole sum of money then secured by this mortgage shall become immediately due and payable at the option of the holder of said note, and this mortgage may thereupon * * * be foreclosed. * * *" It is then provided that "the mortgagor also hereby mortgages the property * * * to secure every promise and agreement therein contained. * * *" (Italics added.)

When the above provisions are read together, there can be no doubt that the contracting parties clearly provided that the mortgagee rather than the mortgagor should be the one to determine whether to pay the assessment or whether to contest the same. In other words, the mortgage expressly confers on the mortgagee the very power here exercised. The appellant tacitly admits this, but contends that the clause should not be enforced in a situation where the mortgagor is contesting in good faith, the validity of the assessment, for the reason that it is violative of public policy and unconscionable to thus place the mortgagor at the mercy of the mortgagee. It is also contended that the payment of the assessment, under the circumstances here presented, amounted to a voluntary payment, and that the clause italicized above, if enforced, ousts the courts of jurisdiction and is therefore void. All of these contentions are without merit.

In the first place, it is admitted that the assessment involved herein, if valid, would be a prior lien to that of the mortgage, although subsequent in time. Under the terms of the Street Opening Act of 1903, the assessment became due and payable as soon as the assessment was recorded, and became delinquent 30 days after the publication of the notice of recording. If not paid by that time (or allowed to go to bond, which could not be done here, because, under the Bond Act, it is provided that any person desiring the assessment to go to bond must waive all objections to its validity), certain penalties immediately accrued. Respondent bank has computed that, if it had not paid the assessment on April 10, 1929, and had waited until this court passed upon the validity of the assessment, it would have had to pay $10,632, which includes the $7.088 assessment, penalties, and interest. It is obvious, therefore, that the mortgagee had an important interest to protect, and that it would have been injured had it not paid the assessment.

[2, 3] In the second place, it is well settled that, if the mortgagor fails to pay due taxes and assessments, under provisions similar to those set forth above, the mortgagee may pay the same, and add the amount so paid to the mortgage debt, and, if the mortgagor refuses to refund the same, he is in default, and the mortgagee may foreclose. Section 2876, Civ. Code; Windt v. Covert, 152 Cal. 350, 353, 93 P. 67; Weinreich v. Hensley, 121 Cal. 647, 656, 54 P. 254; Brickell v. Batchelder, 62 Cal. 623, 630; Brichetto v. Raney, 76 Cal. App. 232, 240, 245 P. 235. This is so, even where the validity of the prior lien has not been finally determined. Windt v. Covert, supra; Weinreich v. Hensley, supra; see, also note in L. R. A. 1915D, 432. The only way in which this case differs from the last two cases is that here the mortgagor was directly attacking the validity of the assessment at the time the mortgagee paid it. However, the mortgage expressly conferred on the mortgagee the power to determine whether the assessment should be paid or contested. We can see no reason why such a clause is unconscionable or against public policy, as contended by the appellant. There is no public interest involved. The contract is between the contracting parties and concerns them alone.

[4] It must be kept in mind that, at the very time this mortgage was executed, the ordinance of intention in reference to this improvement had already been passed. It was, therefore, clear to both contracting parties that an assessment would probably be levied against the property, and that one of the contracting parties would have to determine whether the assessment should be paid or contested. The mortgagee, as a condition of making the loan, required that it be given that power. The payment by the mortgagee can in no sense be said to have been a voluntary payment. As already pointed out, not only was the assessment a prior lien, but unless it had been paid at the time it was due, a large penalty would have been added, which would have materially decreased the mortgagee's security. Nor do we perceive in what manner the mortgagor's rights were invaded by such a clause. A remedy was open to her. She could have paid the assessment under protest and then brought an action for its recovery. Spencer v. City of Los Angeles, 180 Cal. 103, 179 P. 163.

The other assignments of error are highly technical and are without merit.

For the foregoing reasons, the judgment appealed from is affirmed.

212 Cal. 73

MOFFITT v. FORD MOTOR CO. et al.

L. A. 12724.

Supreme Court of California.
March 26, 1931.

1. Trial 🔑178.

Judgment on directed verdict, no less than judgment of nonsuit, is decision of court rather than of jury.

2. Appeal and error 🔑110.

Order granting new trial after judgment of nonsuit at close of plaintiff's opening statement to jury in action for personal injuries *held* appealable (Code Civ. Proc. § 592, and § 963, subd. 2).

Code Civ. Proc. § 963, subd. 2, provides that an appeal may be taken from an order granting a new trial only in actions or proceedings tried by jury where trial by such jury is matter of right.

3. Appeal and error 🔑110.

Action is "tried by a jury," within statute giving right to appeal from order granting new trial, although in proceedings before jury court renders judgment (Code Civ. Proc. § 963, subd. 2).

[Ed. Note.—For other definitions of "Tried," see Words and Phrases.]

In Bank.

Appeal from Superior Court, Los Angeles County; Arthur Keetch, Judge.

Action by Alice D. Moffitt against the Ford Motor Company and others. From order granting plaintiff new trial, defendants appeal. On motion to dismiss appeal.

Motion denied.

See also (App.) 292 P. 698.

Lucius K. Chase and Chase, Barnes, & Chase, all of Los Angeles, for appellants William Hughson Co., George M. Sutton, Ray F. Chesley, and Schultz, Peckham & Schultz.

Hardy, Elliott & Aberle, of Los Angeles, for appellants T. Lyell Puckett, Chester I. Meels, and Clinton L. Clark.

Joe Crider, Jr., of Los Angeles, for appellant Ambassador Hotel Corporation.

Harry D. Parker, of Los Angeles, for appellants Roy C. Armstrong and George R. Bell.

George L. Greer, of Los Angeles, for appellants Hufford, etc.

Dave F. Smith, and Guy B. Graham, both of Los Angeles, for appellant Bill Freolich Motor Co., etc.

George H. Moore and Gerald O'C. Egan, both of Los Angeles, for appellant Ford Motor Co.

Mott, Vallee & Grant and Benjamin M. Stansbury, all of Los Angeles, for respondent.

SEAWELL, J.

This is a motion to dismiss defendants' appeal taken from an order granting a new trial. Said order was made after entry of a judgment of nonsuit in favor of defendants at the close of plaintiff's opening statement to the jury. Plaintiff contends that said order is nonappealable. Section 963, subdivision 2, Code of Civil Procedure, provides that an appeal may be taken from an order granting a new trial only "in an action or proceeding tried by a jury where such trial by jury is a matter of right." Plaintiff's action was brought to recover damages for personal injuries alleged to have resulted from the negligence of defendants, and hence was an action in which she was entitled to trial by jury as a matter of right. Section 592, Code Civ. Proc. Her argument upon this motion to dismiss is that an action or proceeding cannot be said to have been "tried by a jury" where the jury has returned no verdict, but the only determination made in the case is a judgment of nonsuit rendered by the court at the close of plaintiff's opening statement.

Defendants' contention is that an action is "tried by a jury" within the meaning of said section where proceedings are commenced before a jury impaneled and sworn to try the case, although the disposition thereof may involve the granting of a nonsuit or directed verdict because the evidence as a matter of law is insufficient to sustain a judgment for plaintiff, or the granting of a nonsuit upon plaintiff revealing the weakness of his case in his opening statement to the jury. We are of the view that Estate of Baird, 195 Cal. 59, 231 P. 744, 746, relied upon by defendants, sustains their contention. In that case the trial court had submitted issues raised upon a petition for partial distribution to the jury, which had returned a verdict for the petitioner. This court was of the view that the evidence as a matter of law required a decision against petitioner and that it would have been proper for the trial court to have granted a nonsuit or directed verdict against said petitioner. We therefore directed the trial court to enter judgment denying the petition for partial distribution. From the judgment entered in the trial court in pursuance of the order of this court, the trial court granted a new trial. In holding the order granting a new trial appealable this court said:

"Respondents contend that '* * * the proper construction to be placed on section

963, C. C. P., is that what is meant by an action or proceeding tried by a jury is a trial by jury under the direction of the court subject to existing laws, one of which is that the trial court has the power in such a case as this to direct a verdict, and, although the verdict is rendered under the direction of the court, it is nevertheless a proceeding tried by a jury.'

"The petitioner, on the other hand, argues that 'it is perfectly manifest from the statute that what is meant by a trial by jury is that instance in which, a verdict having been rendered in favor of a party and judgment entered thereupon in his favor, and the court below, at the instance of the other party, sets aside that judgment and verdict and grants a new trial, the right of appeal exists in favor of the person in whose favor the verdict was rendered. * * *'

"To give to the provision 'tried by jury' in section 963, Code of Civil Procedure, the interpretation contended for by petitioner would have the effect of giving a narrow and restricted meaning to the language of the section. * * *

"What is meant by section 963, Code of Civil Procedure, is that there cannot be an appeal from an order granting a new trial unless there has been a trial by jury as distinguished from a trial by the court without a jury or in an equity proceeding."

In said case this court repudiates a construction of section 963 which would allow an appeal from an order granting a new trial only where the determination set aside by said order is based upon a jury verdict. That the court would have found the order appealable if the judgment had been entered upon a verdict directed by the trial court rather than by the order of this court, is indicated by the following quotation: "There is no merit in petitioner's contention that even in a case where the verdict is directed by the trial court no appeal can be taken from an order granting a new trial."

[1-3] For the purposes of the problem before us, the same effect must be given a judgment of nonsuit as a judgment entered upon a directed verdict. A judgment upon a directed verdict, no less than a judgment of nonsuit, is the decision of the court rather than of the jury. Estate of Sharon, 179 Cal. 447, 177 P. 283; Gaskill v. Pacific Electric Ry. Co., 30 Cal. App. 593, 159 P. 200; Umsted v. Scofield Engineering Cons. Co., 203 Cal. 224, 263 P. 799; Engelberg v. Sebastiani, 207 Cal. 727, 279 P. 795. In interpreting the meaning of section 963 no reasons exist for distinguishing the cases disposed of by the court through the procedure of a directed verdict from those determined by nonsuit. Nor can a distinction be drawn between cases in which the nonsuit is granted upon evidence and those in which it is granted upon the opening statement to the jury.

Plaintiff argues that the Baird Case does not establish the rule to be applied herein for the reason that in the Baird Case the jury had actually returned a verdict upon issues submitted to it, which is not the case where a nonsuit is granted in the trial court. But the verdict of the jury had been overthrown by the order of this court directing judgment to be entered contrary thereto, and the judgment from which a new trial was granted in that case, as in the proceeding now before us, was not entered upon a jury verdict. We are of the view that an action or proceeding is "tried by a jury" within the meaning of section 963, Code of Civil Procedure, although in the course of the proceedings before the jury it may become proper for the court to render the judgment in the case.

The motion to dismiss the appeal is denied.

We concur: WASTE, C. J.; SHENK, J.; RICHARDS, J.; CURTIS, J.; LANGDON, J.; PRESTON, J.

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212 Cal. 1

PERRY v. McLAUGHLIN et al.

Sac. 4463.

Supreme Court of California.
March 20, 1931.

1. Automobiles 🔑6.

Statute limiting liability of automobile driver and owner for injuries to guest *held* not applicable to actions for personal injuries pending at its effective date (California Vehicle Act, § 141¾, as added by St. 1929, p. 1580).

> California Vehicle Act, § 141¾, as added by St. 1929, p. 1580, relieves automobile driver and owner of liability for injuries to guest, except in case of injuries arising from intoxication, willful misconduct, or gross negligence of driver or owner.

2. Appeal and error 🔑204(1).

Competency of evidence admitted without objection in trial court could not be questioned for first time on appeal.

3. Negligence 🔑108(1).

Negligence may be pleaded in general terms.

4. Negligence 🔑108(2).

Complaint is sufficient if it alleges specific acts which constitute negligence complained of.

5. Automobiles 🔑238(5).

Automobile guest's complaint against driver and owner for injuries sustained when guest was thrown from seat to floor of automobile *held* to state cause of action.

The complaint stated that driver was operating automobile as agent of owner, and that the road over which the automobile was being driven was rough, rugged, bumpy, and jagged, that driver knew condition of road, that the automobile was operated in negligent and careless manner, in that driver operated automobile at excessive speed, and that guest riding in back seat was thrown to floor of automobile injuring her back.

6. Negligence 🔑136(10).

Negligence is for jury, where evidence is such that inferences may be drawn for or against existence thereof.

7. Automobiles 🔑245(24).

Negligence of automobile driver *held* for jury, where guest had been thrown from back seat to floor of automobile and injured.

The evidence produced by the automobile guest was to the effect that the road at point where accident occurred was rough and full of potholes and ruts, that the culvert where guest was thrown from her seat was in bad shape, and at time of accident automobile was traveling at the rate of thirty or thirty-five miles per hour, and that the driver had been over road on several occasions and knew condition thereof.

8. Trial 🔑235(1).

Instruction that jury could not indulge in speculation, guess, or conjecture as to whether automobile driver's negligence caused injuries to guest, but in such event jury must find for defendants, *held* properly refused as ambiguous.

9. Automobiles 🔑246(20).

Instruction that, in determining whether automobile driver used due care, as regards injury to guest, and drove automobile at reasonable speed, jury should consider all circumstances influencing conduct of ordinarily prudent driver, *held* proper.

The instruction was objected to because it omitted all reference to element of knowledge on part of driver as to condition of road, and failed to confine consideration of jury to condition of road as it was known to driver at time of accident.

10. Damages 🔑213.

Instruction existence of disease would not prevent recovery by automobile guest from driver and owner, but recovery could be had for aggravation of disease, *held* proper.

The evidence disclosed that the guest's injured vertebra had been weakened by disease before accident, but that the accident broke down the diseased vertebra and necessitated an operation, resulting in permanently stiffened back.

11. Damages 🔑159(3).

Under plea of general damages, evidence as to wages and earning capacity prior to personal injuries *held* admissible.

12. Evidence 🔑151(4).

Testimony of automobile driver that her daughter at church was on her mind *held* admissible in guest's action for injuries as showing motive for fast driving.

13. Automobiles 🔑243(3).

Admitting evidence that road for quarter of mile in approaching place of accident was rough *held* admissible, in guest's action for injuries.

14. Evidence 🔑474(8).

Automobile guest suing for injuries *held* competent to testify as to speed of automobile.

15. Automobiles 🔑244(30).

Proof that wife operated automobile with husband's consent created prima facie case authorizing inference that wife was using automobile as husband's agent.

16. Automobiles 🔑244(30).

Evidence that at time of accident wife was acting as husband's agent in driving automobile *held* sufficient to sustain judgment against husband, in guest's action for injuries.

The evidence disclosed that the husband had driven automobile to country club and turned automobile over to wife and requested her to call for him later in the day, and that, as wife was returning from country club, automobile guest was thrown from seat to floor of automobile and injured.

17. Damages 🔑132(3).

$12,500 for breaking down of diseased vertebra of woman, forty years of age, before injuries receiving $16 to $18 per week, *held* not excessive.

In Bank.

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

Action by Mary Perry against Porter McLaughlin and another. From a judgment for plaintiff, and from an order denying motion for judgment notwithstanding verdict, defendants appeal.

Affirmed.

Superseding opinion of District Court of Appeal in 287 P. 354.

Irving D. Gibson, of Sacramento, for appellants.

Butler, Van Dyke & Desmond and Butler, Van Dyke, Desmond & Harris, all of Sacramento, for respondent.

PER CURIAM.

[1] At the time the petition for a transfer of this cause was before this court after decision thereof by the District Court of Appeal, there were under submission to this court one or more cases in which the applicability of section 141¾ of the California Vehicle Act, often referred to as the "Guest Law," enacted in 1929 (St. 1929, p. 1580), to cases of the character of the instant case was under consideration. Said section in effect provides that a guest in a vehicle may not recover for personal injuries, based upon ordinary negligence of the driver of said vehicle, and in the cases mentioned, as well as in the present action, counsel contended that said section of the California Vehicle Act was retroactive in its scope and applied to all cases pending at the time of its enactment, wherein the judgments had not become final. For this reason the petition for a transfer was granted. Since then it has been definitely established by the decisions of this court, and particularly by that rendered in the case of Callet v. Alioto, 290 P. 438, that said section of the California Vehicle Act does not apply to or in any way affect actions for damages for personal injuries pending at its effective date.

As the decision of the District Court of Appeal in this action is in harmony with the recent decisions of this court on that subject, we hereby adopt the same as the opinion of this court. The original opinion of the District Court of Appeal was written by Hon. F. M. Jamison, sitting as a justice pro tempore, and is as follows:

"This is an appeal from a judgment in favor of respondent, upon a verdict of a jury in an action for damages for injuries alleged to have been sustained by respondent while riding as a guest of appellants in an automobile owned by appellant Porter McLaughlin, and operated by appellant, Pauline McLaughlin, at the time of the accident that caused the injuries. Also, an appeal from the orders of the court denying motions of appellants for a new trial, and for judgment notwithstanding the verdict.

[2] "Appellants are husband and wife, and were such on the 15th day of May, 1927. On that day appellant Pauline McLaughlin invited respondent to attend at the St. Francis church, in the city of Sacramento, to witness the ceremony of the first communion of appellants' eldest daughter. At the conclusion of the ceremony, the daughter not being ready to leave the church, appellant Porter McLaughlin wished to drive out to the Del Paso Country Club and invited respondent to accompany himself and wife in his automobile. Respondent accepted the invitation and got in the automobile. Upon arriving at the country club appellant Porter McLaughlin got out of the automobile, turned the wheel over to his wife, and requested her to call for him later in the day. Appellant Pauline McLaughlin then started to drive back to the said church where she had left her daughter, returning over the same road which they had just traversed in going to said country club. Respondent was in the back seat of the automobile, which was a Packard sedan, and with her in the back seat were the younger daughter of appellants' and their Japanese cook, respondent being seated on the left-hand side of said automobile, the daughter next to her and the cook on the right-hand side and appellant Pauline McLaughlin being alone in the front seat. At a point about one-quarter of a mile from said club, and near a bridge or culvert which crosses the road at that point, respondent was thrown from her seat with force sufficient to fracture or break the eleventh vertebra of her spine. The evidence produced upon the part of the respondent tended to prove that the road at the point where the accident happened was a dirt road, was rough and full of potholes and ruts, and that the said bridge or culvert was in bad condition, and the approach to it was full of ruts and potholes, with a sway in the road near the said bridge or culvert, and that at the time of the accident appellant Pauline McLaughlin was driving the automobile at the rate of from thirty to thirty-five miles per hour; that the automobile swayed back and forth across the road before the final bump or shock that threw respondent from her seat. Appellant Pauline McLaughlin denied that she was driving said automobile, at the time of the accident, in excess of twenty or twenty-five miles per hour, and denied that the front part of said automobile swayed or swerved at all. She further testified that she was under the impression that the rear wheel of her automobile went into a rut which caused the jolt that threw respondent from her seat. The principal witness produced by respondent to prove the condition of the road at the point where the accident happened was

A. H. Becker, who testified that for the past five or six years he had been in the habit of passing over what he called the back road from Sacramento to the said club, twice a week, and did so in May, 1927; that from the club to the culvert or bridge, being approximately a quarter of a mile, the road was always rough, full of potholes, and that the approach to the culvert was in bad shape, that is, was rough, full of ruts and potholes, with a sway before hitting the culvert. Appellants raise the point in their brief that the testimony of Becker should not be considered for the reason that the road, regarding which he testified, was not identified as being the identical road upon which the accident happened. Appellants made no cross-examination of this witness, except to ask him a few formal questions; made no objection before the trial court to this testimony upon the ground that the road about which the witness testified was not the road upon which the accident happened; nor moved to have the same stricken on that ground. Even though this testimony was incompetent, still, being admitted without objection, and treated by the parties as competent in the trial court, the question of its competency cannot be raised in the appellate court. Curiac v. Packard et al., 29 Cal. 194; Mercantile Trust Co. v. Sunset, etc., Co., 176 Cal. 461, 168 P. 1036; Parsons v. Easton, 184 Cal. 764, 195 P. 419. However, all of the witnesses agree that the road upon which the accident happened was a dirt road leading from the city of Sacramento to the Del Paso Country Club, several of them, testifying that this dirt road connects Eighth street with the road upon which the club is situated. It is admitted that the accident happened on the dirt road at the culvert about a quarter of a mile from the club. Becker testified that in going to the club from Sacramento he went out Eighth street, and then went over a back road leading from Eighth street and turning to the left to the club; that this was a dirt road, and that about a quarter of a mile from the club there was a bridge or culvert across the road. We are of the opinion that, in any event, there was evidence from which the jury might fairly deduce the inference that the road about which the witness Becker testified was the road upon which the accident happened.

[3-5] "The first ground for reversal put forward by appellants is that the third amended complaint fails to state a cause of action. Said complaint, after stating that appellants were husband and wife, sets forth that appellant Porter McLaughlin was the owner of the automobile, and that at the time of the accident respondent was riding therein as a guest of appellants, and that appellant was driving and operating the said automobile as the agent of said Porter McLaughlin, and under his authorization and direction, and that the road over which the automobile was being driven was a dirt road and was rough, rugged, bumpy, and jagged, and that said appellant Pauline McLaughlin had operated said automobile over said road prior to said accident on other occasions, and knew the said road to be in said condition, and further stated 'that the said Pauline McLaughlin did on the said 15th day of May, 1927, and at that time on said day when plaintiff herein was accompanying said defendant in said Packard automobile, drive and operate said Packard automobile along and upon said dirt road in a reckless, negligent and careless manner, in that said defendant did drive and operate said automobile at so great a rate of speed, and with such disregard to the said condition of said road as to cause the automobile, by reason of said excessive speed, combined with the condition of said road, to suddenly swerve across said road and rebound onto said road with great force, thereby causing plaintiff, who was then and there riding in the back seat of said automobile, to be thrown and hurled with great force and violence to the floor of said automobile and that plaintiff was then and there injured,' etc. While it is sufficient to plead negligence in general terms (Dewhirst v. Leopold, 194 Cal. 424, 229 P. 30; Mathes v. Aggeler & Musser Seed Co., 179 Cal. 697, 178 P. 713), a complaint is sufficient if it alleges the specific acts which constitute the negligence complained of. Cal. Jur., vol. 19, p. 674.

"We are of the opinion that the complaint stated a cause of action and that the demurrer was properly overruled. Furthermore, appellants answered and went to trial upon the issues thus formed, and there is nothing to indicate that they were misled in any way as to the issues they were to meet, and in fact did meet as best they could, and the cause appears to have been fairly tried upon the merits. Irrgang v. Ott, 9 Cal. App. 440, 99 P. 528.

[6, 7] "The next contention of appellants is that the evidence is insufficient to support the verdict because it fails to show any negligent act or omission of appellant Pauline McLaughlin which proximately caused injury to respondent. The evidence produced by respondent was to the effect that the road, at the point where the accident occurred, was a dirt road, very rough, and full of potholes and ruts, and that the bridge or culvert, at the point where respondent was thrown from her seat, was in bad shape, and the approach to the said bridge or culvert was also in bad condition, and that at the time of the accident the automobile was traveling at the rate of thirty or thirty-five miles per hour; that appellant Pauline McLaughlin had driven over the said road on two different occasions before the accident, and had been seated in the front seat with her husband

when he had driven the automobile over this road in going to the said club the day of the accident. She testified that the road where the accident happened was rough; that the earth was worn away from the ends of the planks on the bridge; that she thought there were ruts in the road, although she did not get out to examine them. She further testified that the accident happened at the edge of the bridge or culvert just before she went over it, as she had passed over the bridge when she stopped the automobile, and that at the time of the accident she was traveling at the rate of twenty or twenty-five miles per hour. Respondent testified that at first the car zigzagged, then it turned to the right a little bit, then to the left, then it hit a bump and threw the small daughter of appellants between her and the front seat; that she grabbed the little girl and just then the car swung around to the right and she was thrown between the seat and the door and struck her back against something. Where the evidence is such that inferences may be drawn for or against a conclusion of negligence, it is for the jury to determine whether or not negligence existed. 19 Cal. Jur., p. 723. In the case of Hatzakorzian v. Rucker-Fuller Desk Co., 197 Cal. 82, 239 P. 709, 713, 41 A. L. R. 1027, the court said: 'The rule by which appellate courts must be guided in passing upon the question whether findings of fact or verdicts of juries are sufficiently supported by the evidence is this: "That where an honest difference of opinion between men of average intelligence can arise as to the effect of the evidence—that is, if the evidence is such as that different conclusions upon the matter can rationally be drawn [from the evidence]—then the case presented is one for the jury, or the court, if the questions of fact be submitted to its arbitrament." ' So in the instant case, if the jury believed that the testimony produced by respondent and her witnesses was true, that is to say, that at the place where the accident occurred the road was a dirt road, that it was rough and full of ruts and potholes, and that the approach to the bridge, near where respondent was injured, was in bad condition, that appellant had been over this road previously on several occasions, and knew that the road was rough and in bad condition, and with this knowledge she drove the automobile in which respondent was riding as a guest, over this road at the point where the accident happened, at an excessive rate of speed, taking into consideration, on the question of speed, the condition of the road at that point, and thereby produced such jolting and swerving of the automobile that respondent was thrown and cast from her seat and injured, there was certainly evidence sufficient upon which to base their verdict that appellant Pauline McLaughlin was guilty of negligence and that this negligence was the proximate cause of respondent's injuries. Upon that state of facts the said last-named appellant would have been acting in violation of section 113 of the California Vehicle Act (St. 1923, p. 553), which, among other things, provides that no person shall operate or drive a motor vehicle on a public highway at such rate of speed as to endanger the life or limb of any person.

[8] "The next ground for reversal urged by appellants is that the trial court committed prejudicial error in giving instructions and in modifying and refusing proposed instructions. The instructions in this case are not numbered; we cannot, therefore, refer to them by numbers, which is to be regretted. One of the proposed instructions on behalf of appellants, which was refused by the court, is as follows:

" 'You cannot speculate or guess *that* caused the alleged accident. In case the evidence should show that the alleged injury to plaintiff may have occurred as a result of negligence of defendants, or may have occurred without any negligence on the part of defendants, you cannot indulge in speculation, guess or conjecture as to whether negligence on the part of defendants may have caused the injury but in such event you must return a verdict for defendants and against plaintiff.'

"Presumably, it was the intention, by this instruction, to inform the jury that mere speculation, guess, or conjecture that defendants were guilty of negligence would not justify the jury in finding that defendants, or either of them, were guilty of negligence. If this was the intention of appellants, then, in substance, it was covered by the instruction given by the court, and found on pages 137 and 138 of the reporter's transcript, wherein the court instructed the jury that mere supposition or surmise that negligence on the part of defendant Pauline McLaughlin proximately caused the alleged accident would not justify a verdict against defendants, or either of them.

"The court refused the above quoted instruction on the ground that it was ambiguous, and in the ruling we think the court was right.

[9] "Appellants object to the instruction on page 161 of the reporter's transcript. In this instruction the court told the jury that, in determining whether or not defendant Pauline McLaughlin used due care and prudence and circumspection, and drove her car at a reasonable and prudent speed, it was the duty of the jury to take into consideration all the circumstances then and there existing which would have influenced the conduct of an ordinarily prudent driver in the same situation. Appellants claim

that this instruction is objectionable, because it omits all reference to the element of knowledge or notice on the part of Pauline McLaughlin, and fails to confine the consideration of the jury to the condition of the road as it was known to her at the time of the accident. It is true that the instruction did not contain the words 'at the time and place of the accident,' but it is evident that the jury could not have been misled by this omission. As applied to the facts in this case, the instruction unquestionably is a correct statement of the law. Furthermore, in its instructions on pages 126–127 of the reporter's transcript, the court fully instructed the jury upon the matter of the knowledge or notice of Pauline McLaughlin regarding the condition of the road at the place of the accident. Taking the instructions as a whole they fully and fairly presented to the jury, for its determination, whether or not, under the facts of this case, the said Pauline McLaughlin was or was not guilty of negligence.

[10] "Appellants also take exception to the instruction of the court set forth on page 162 of the reporter's transcript, claiming that there was no evidence upon which it could be supported. This instruction, in substance, is to the effect that the existence of disease does not prevent recovery, but, on the contrary, recovery may be had for the increase or aggravation of same. The testimony of all the experts is that the eleventh vertebra had been weakened by disease, presumably tuberculosis; that the accident broke down this diseased vertebra and necessitated an operation by means of which the vertebral column was in a manner united and again supported, but at the expense of a permanently stiffened back, and the necessity for respondent having to wear a steel jacket. There is no evidence that, except for this accident, this defective vertebra would not have continued to support the vertebral column. Even though the ravages of the disease had been stayed or stopped prior to the accident, yet, according to the testimony of the experts, this vertebra was left, by virtue of said disease, in a defective condition, so much so, indeed, that the shock given to it at the time of the accident broke it down and rendered it wholly useless as a means of support to the remainder of the vertebral column. No error was committed in giving this instruction. Campbell v. Los Angeles Traction Co., 137 Cal. 565, 70 P. 624; White v. Red Mountain Fruit Co., 186 Cal. 335, 199 P. 318.

[11] "The objection of appellants to the instruction given on pages 165–166 of the reporter's transcript is without merit. The part objected to is to the effect that, if the jury finds the issues in favor of respondent, then in estimating her damage they must take into consideration the condition of her health and physical ability before the accident, the nature and extent of her injuries, etc. The testimony of respondent was that before the accident she worked for the Almond Growers' Association as an almond grader, and prior to that work she had done laundry work; that since her injury she had not been able to perform manual labor of any kind; has been compelled to keep a servant to do her house work. She further testified that she had worked for the Almond Growers' Association up to within a month prior to the accident, and that her wages were $16 to $18 per week. Appellants claim that the admission of this testimony was erroneous for the reason that no claim had been made by respondent for special damages of this character. There was no error committed by the court in the admission of this testimony. Under the plea of general damages, and to prove loss of earning capacity, it is permissible to show what wages, salary, or emolument respondent was earning and capable of earning prior to the injury. Zibbell v. Southern Pacific Co., 160 Cal. 237, 116 P. 513; Ehat v. Scheidt, 17 Cal. App. 430, 120 P. 49, 50. In this last case, Hart, J. said: 'The earning capacity of the plaintiff prior to receiving the injuries complained of in the business which he had customarily followed was a proper element to be considered in the assessment of damages.'

[12] "On cross-examination Pauline McLaughlin was permitted by the court, over objection, to testify that when she left the country club she intended to drive back to get her daughter, and, in reply to questions as to whether she was anxious to get back to the church on account of her daughter, and for the reason was hurrying her return, she said that she did not think she was specially hurrying, but that her daughter at the church was on her mind. The admission of this evidence is assigned as error. Inasmuch as this witness had testified that she was driving the automobile at only a moderate rate of speed on her return from the country club to the place of the accident, and by that evidence seeking to controvert the evidence of respondent that she was driving at a speed of thirty or thirty-five miles per hour, the fact, if proven, that she had a motive for hurrying back to the church, or was hurrying back at the time of the accident, would have some evidentiary force as tending to contradict her statement that she was not traveling at the rate of thirty or thirty-five miles per hour, as testified to by respondent. For that purpose this evidence was admissible.

[13, 14] "Error is also claimed by appellants in the ruling of the court permitting testimony to be given to the effect that from the Country Club road to the place of the accident, a distance of about a quarter of a mile, the road was rough, bumpy, and full of potholes. It is urged by appellants that testimony as to the character of the road upon which the accident occurred should be limited to the place of the accident. While as a general rule this is true, yet, as tending to show notice to, and knowledge upon the part of, Pauline McLaughlin, of the nature and condition of the surface of the road over which she was traveling just prior to the accident, it was permissible to show that for at least a reasonable distance in approaching the place where the accident happened, and continuing to that place, the road was rough and in bad condition. Under the circumstances surrounding this accident, and as tending to prove that Pauline McLaughlin did know, or, in the exercise of her judgment as a reasonable person, should have known that the road, at the place of the accident, was rough and in bad condition, we are of the opinion that the trial court did not err in admitting this evidence. Nor did the court err in permitting respondent to testify as to the speed at which the automobile was traveling. She being a person of at least ordinary intelligence, so far as the evidence shows, and having opportunity for observing the said speed, was competent to testify to same. Shimoda v. Bundy, 24 Cal. App. 675, 142 P. 109; Johnsen v. Oakland, S. L. & H. E. Ry., 127 Cal. 608, 60 P. 170; Snyder v. Reeg, 86 Cal. App. 231, 260 P. 600.

[15, 16] "Appellants further contend that the verdict and judgment against Porter McLaughlin is not supported by any sufficient evidence that at the time of the accident Pauline McLaughlin was acting as his agent in driving the said automobile. Porter McLaughlin himself testified that he was the owner of the automobile; that he personally invited respondent to ride out to the country club with himself and wife; he also testified that he heard his wife invite respondent to ride with them, and heard his wife say she would bring respondent back. Upon arriving at the country club he turned over to his wife the control and operation of the car, knowing that his wife intended to immediately return to the said church with respondent. Where proof is made that the car in question was owned by the husband, and was being operated by the wife at the time of the accident, with his express consent and permission, there is created a prima facie case authorizing an inference by a court or jury, in the absence of substantial proof to the contrary, that the wife was using the car as the agent of the husband. McWhirter v. Fuller, 35 Cal. App. 288, 170 P. 417; Randolph v. Hunt, 41 Cal. App. 739, 183 P. 358; Perry v. A. Paladini, Inc., 89 Cal. App. 275, 264 P. 580; Ransford v. Ainsworth, 196 Cal. 279, 237 P. 747. Appellants offered no evidence in any way controverting the inference or presumption thus created. In addition to the aforesaid presumption arising from ownership of the automobile, there was evidence from which the jury could draw the inference that at the time of the accident Pauline McLaughlin was acting as the agent of her said husband.

[17] "And, lastly, appellants contend that the verdict awarding respondent the sum of $12,500 as general damages, is excessive. At the date of the accident respondent was about forty years of age. Previous to that date she had been troubled with what her physicians termed 'smouldering tuberculosis,' but prior to the accident had been cured of this disease and had been employed as an almond assorter at wages ranging from $16 to $18 per week. Her expectation of life was stipulated to be 28.18 years. The injury inflicted upon her by the accident necessitated a very painful operation which kept her in the hospital for over three months, and thereafter she was confined to her bed in her home for another month, and was not able to get out of the house until in March, 1928, a period of some ten months after the injury. Dr. Harris, one of the physicians who treated respondent, testified that she will always have to wear a steel brace or jacket for her back, and, speaking of her future disability growing out of said injury and the operation, that she would never be able to do housework or hard work of any kind, and that for relief from continuing pain she will require future treatment. There is ample evidence that she has suffered great physical pain, and she will continue to suffer pain in the future.

"Upon this state of the evidence, we are unable to say, using the language of the Supreme Court in the case of Kelley v. Hodge Transportation System, 197 Cal. 598, 242 P. 76, 81, 'that the award of damages made by the jury and sustained by the trial court were grossly disproportionate to any compensation reasonably warranted by the facts as presented to us on appeal as to shock the sense of justice and raise at once a presumption that it was the result of passion, prejudice, or corruption, rather than an honest and sober judgment.' And this being the case, this court cannot exercise the power of revision. Darling v. Pacific Electric Co., 197 Cal. 702, 242 P. 703; Driscoll v. California Street R. R. Co., 80 Cal. App.

208, 250 P. 1062; Hale v. San Bernardino, etc., Co., 156 Cal. 713, 106 P. 83."

The judgment and the order denying the motion for a judgment notwithstanding the verdict are affirmed.

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212 Cal. 29

PEOPLE v. LA VERNE et al.

Cr. 3379.

Supreme Court of California.

March 25, 1931.

As Modified on Denial of Rehearing April 23, 1931.

1. Criminal law 🔑829(1).

Refusal of instructions included in charge as given was not error.

2. Criminal law 🔑729.

District attorney's argument respecting life sentence and common knowledge that defendant would be out again *held* not prejudicial, he substituting "would" for "could."

> Prosecuting officer, after objection to remark and on inquiry by court, explained that he meant "could be" and not "would be" out again, whereupon the court, after objections and assignment of misconduct had been made, said "Proceed."

3. Criminal law 🔑304(2).

It is common knowledge that a parole may be granted to defendant serving term of life imprisonment.

4. Homicide 🔑313(3).

Verdict of first-degree murder was not defective for failure to specify punishment (Pen. Code, § 190).

> Pen. Code, § 190, does not require a jury to specify the death penalty in their verdict, but where the crime of murder in the first degree is found, without recommendation as to punishment, the law imposes the death penalty.

5. Witnesses 🔑337(5).

Requiring defendant taking stand in murder prosecution to answer questions respecting previous conviction for felony *held* not erroneous (Pen. Code, § 1025; Code Civ. Proc. § 2051).

> Defendant having voluntarily offered himself as a witness was subject on cross-examination to the usual rules for testing his credibility by impeachment, and in particular became subject to the provision of Code Civ. Proc. § 2051, to effect that a witness may be impeached by evidence that his general reputation for truth is bad, but not by evidence of particular wrongful acts, except that it may be shown by examination of witness that he had been convicted of a felony.

In Bank.

Appeal from Superior Court, Alameda County; Fred V. Wood, Judge.

Edward La Verne, alias George Kretchmer, was convicted of murder in the first degree, and he appeals.

Affirmed.

Willard W. Shea, Public Defender, and Raymond Ferrario, Deputy Public Defender, both of Oakland, for appellant.

Frederick Dubovsky, of Oakland, amicus curiæ, for appellant.

U. S. Webb, Atty. Gen., W. R. Augustine, Deputy Atty. Gen., and Earl Warren, Dist. Atty., of Oakland, for the People.

PRESTON, J.

On June 9, 1930, the Alameda county grand jury returned an indictment charging defendant with the murder of one, Marcello La Gorio and also with a prior conviction of a felony, to wit, burglary. Upon trial of the cause, the jury returned a verdict finding defendant guilty of murder of the first degree without recommendation of life imprisonment. Judgment carrying the death penalty was thereafter pronounced upon him, and from said judgment and the order denying his motion for new trial, he now prosecutes this appeal.

The case is admittedly a clear one. On the night of May 28, 1930, defendant entered the grocery store of said La Gorio at 5932 San Pablo avenue, Oakland, with the intention of committing a robbery. He pointed a revolver at La Gorio and told him to "stick them up," and, as La Gorio turned, told him to "hurry up," drawing back the hammer of the revolver to make La Gorio move faster. Defendant told the police inspector that he had his thumb on the hammer and that the hammer slipped, accidently discharging the gun, and La Gorio fell to the floor, where he was found by his family. Two days later he passed away from the effects of the wound. On June 4th, defendant was apprehended and charged as above set forth. He admitted having committed approximately fifteen other specified robberies between April 29th and June 1, 1930; that he was armed on all these occasions, but that he had never attempted to shoot any person, even when resistance was offered, which statement was found by a police officer to be true. He testified that his gun and ammunition had been furnished him by a confederate who was waiting in an automobile at the time La Gorio was shot. When arrested defendant was armed with two loaded revolvers, from one of which had been fired the bullet that killed La Gorio.

Counsel in effect admit, as they must, that defendant is guilty of first-degree murder and direct their entire efforts towards having the punishment reduced. In this behalf they make the following contentions: Failure to give certain instructions requested by defendant and misconduct on the part of the district attorney, not admonished by the court, occurring during the trial and argument. Amici curiæ have also filed briefs for appellant wherein they urge the additional points that the verdict failed to specify the punishment as provided in section 190 of the Penal Code, and that error was committed in asking appellant to answer incriminating questions in violation of the provisions of section 13, article 1, of the state Constitution and section 1025 of the Penal Code. These points may be disposed of briefly, as they are all without merit.

[1] We have studied carefully the requested instructions submitted by the appellant and also the entire charge of the court. The substance of each and every one of said requested instructions was included in the charge, and the jury were completely and properly instructed in all matters necessary to a proper determination of the cause.

[2, 3] The misconduct assigned against the district attorney is that in the course of his argument he stated: "Apparently he would want you to turn this man to the penitentiary under a life sentence when it is common knowledge that he would be out on the streets again, * * *" and when objection was made to the remark and others of like character the court failed and refused to admonish the jury to disregard them. The prosecuting officer, on inquiry by the court, explained that he meant "could be" and not "would be" "out again," whereupon the court, after objections and an assignment of misconduct had been made, said "Proceed." We are unable to say that this matter constituted reversible error, for it is a matter of common knowledge that a parole may be granted to a defendant serving a term of life imprisonment. Expressions of this kind by overzealous prosecuting officers, should, however, be avoided, for they are unnecessary and under a different state of facts might be serious error. People v. Reilly, 208 Cal. 385, 387, 281 P. 606; People v. Rowland, 207 Cal. 312, 277 P. 1041.

[4] With reference to the contention of amici curiæ, we may only say in passing that it is well settled that section 190 of the Penal Code does not require a jury to specify the death penalty in their verdict, but, where the crime of murder in the first degree is found, without recommendation as to punishment, the law imposes the death penalty. People v. Hall, 199 Cal. 451, 455, 249 P. 859. We are not disposed to overrule the case of People v. Welch, 49 Cal. 174, and like cases to this effect.

[5] Appellant took the witness stand; he did not testify as to the circumstances of the murder, but did give evidence on some collateral matters. The alleged incriminating questions asked him, of which amici curiæ complain, were whether he had ever been convicted of a felony, answered in the affirmative; then "What felony?" and other questions along the same line. Had these questions been asked for other than purposes of impeachment, the provisions of section 1025 of the Penal Code would be applicable; appellant, however, having voluntarily offered himself as a witness, was subject, upon cross-examination, to the usual rules for testing his credibility by impeachment, and in particular became subject to the provision of section 2051 of the Code of Civil Procedure to the effect that a witness may be impeached "by evidence that his general reputation for truth * * * is bad, but not by evidence of particular wrongful acts, except that it may be shown by the examination of the witness * * * that he had been convicted of a felony."

We do not deem it necessary to prolong this discussion, as abundant authority exists to support the views above set forth, and the plain and inescapable conclusion is that this record is singularly free from material error of any character.

The judgment is affirmed.

We concur: WASTE, C. J.; CURTIS, J.; LANGDON, J.; SHENK, J.; SEAWELL, J.; RICHARDS, J.

112 Cal. App. 712

REYNOLDS v. DRYER.

Civ. 6432.

District Court of Appeal, Second District, Division 1, California.
March 20, 1931.

1. Executors and administrators ⚷221(4).

That claimant was in possession of instrument after maker's death directing executor to pay claimant $5,000 for realty constituted prima facie proof that claimant was owner thereof (Code Civ. Proc. § 1963, subd. 11).

2. Executors and administrators ⚷221(1).

Presumption, created by claimant's possession, after maker's death, of instrument directing maker's executor to pay claimant $5,000 for realty, supported finding of delivery (Code Civ. Proc. § 1963, subd. 11).

3. Witnesses ⚷168.

Claimant could testify that on date of maker's death he was in possession of instrument directing executor to pay claimant $5,000 for realty (Code Civ. Proc. § 1880).

The claimant could so testify, since there was nothing to show that the evidence referred to anything other than after maker's death and the inhibition of Code Civ. Proc. § 1880 is only against the claimant testifying to matters that occurred prior to the death of the maker.

4. Executors and administrators ⚷221(1).

Presumption that claimant was owner of instrument directing maker's executor to pay claimant for realty entitled claimant to recover, in absence of evidence that the reconveyance of the realty to claimant had discharged the obligation (Code Civ. Proc. § 1963, subd. 11).

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Action by Cecil E. Reynolds against George W. Dryer, as executor of the last will and testament of Elizabeth Marion Steele Wall, also known as Elizabeth Marion Steele Hallenbeck, etc., deceased. From judgment for plaintiff, defendant appeals. Affirmed.

Dryer, Castle, McConlogue & Richards, of Los Angeles, for appellant.

Fredericks, Hanna & Morton, of Los Angeles, for respondent.

YORK, J.

This is an appeal from a judgment in favor of the respondent on a claim against the decedent's estate, which claim was based upon a document (Plaintiff's Exhibit 1), in words and figures as follows:

"In event of my death I direct my executor Philip Goodell of Montclair, New Jersey, to pay to Cecil E. Reynolds the sum of Five Thousand Dollars ($5,000.00) in consideration of the transfer to me of lots 492 & 493 in tract 1719 as per map recorded in Book 21 P 162–163 Records of Los Angeles County, California.

"Marion Steele Hallenbeck.

"Subscribed and sworn to before me this 27th day of June—1917. [Seal] Claire Lehman, Notary Public in and for the County of Los Angeles, State of California."

The record discloses that conveyance was made of the real property to decedent, such conveyance having been duly executed, acknowledged, and recorded on the same day, June 27, 1917. On August 10, 1917, the decedent signed and acknowledged a deed which recited a consideration of $10, transferring said property to the respondent. This deed was not recorded until July 21, 1921. On September 27, 1919, Marion Steele Hallenbeck and respondent were married; on March 30, 1921, decedent filed an action for divorce against respondent; and on September 19, 1921, an interlocutory decree was entered in said action. On October 10, 1927, Marion Steele Hallenbeck died.

Appellant relies upon three points on this appeal: First, insufficiency of the evidence to sustain the finding of the delivery of Plaintiff's Exhibit 1. Second, that the finding that the allegations of appellant's second to tenth separate defenses are untrue is against the evidence. Third, that the court erred in permitting respondent to testify that the instrument was in his possession on the date of decedent's death.

[1, 2] The fact that the written instrument, Plaintiff's Exhibit 1, was in the possession of respondent after the death of the maker of the instrument, was sufficient to constitute proof, prima facie, that respondent was the owner thereof. A disputable presumption is a presumption which "may be controverted by other evidence." One of these is: "That things which a person possesses are owned by him." Code Civ. Proc., § 1963, subd. 11. The respondent did not occupy any position of trust, such as that of an executor, which might create an exception in the application of the presumption relied upon here.

As to point 2, there was sufficient evidence to support the said findings.

[3] As to the third point, that the court erred in permitting respondent to testify that the instrument was in his possession on the date of decedent's death, there is noth-

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ing to show that this evidence referred to anything other than after the decedent's death. The inhibition (Code Civ. Proc., § 1880) is only against the claimant testifying to matters of fact that occurred prior to the death of the decedent, and it does not appear that this evidence refers to any time prior to the death of the decedent.

[4] Much of the argument of the appellant is that the respondent failed to put in evidence certain things which he was precluded by law from testifying to himself. When the document, Plaintiff's Exhibit 1, was filed and it was shown that this document was in the possession of the claimant and was actually produced by him, it was presumed to be owned by him (in the absence of any evidence to the contrary), and it would have taken some evidence to prove that the conveyance by decedent to respondent of the real property, referred to herein, and its acceptance by him, was a discharge of this written obligation.

The judgment appealed from is affirmed.

We concur: CONREY, P. J.; HOUSER, J.

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112 Cal. App. 595

LONG et ux. v. LESTER et al.

Civ. 332.

District Court of Appeal, Fourth District, California.

March 16, 1931.

Appeal and error ⚷103.

Orders refusing to vacate order striking out portions of answer and denying motion to file amended answer *held* not appealable (Code Civ. Proc. § 963).

Appeal from Superior Court, Tulare County; J. A. Allen, Judge.

Action by Charles E. Long and wife against H. D. Lester and wife. From orders striking out portions of an answer, refusing to vacate such order, and denying motion to file amended answer, defendants appeal.

Appeal dismissed.

C. W. Braswell, of Long Beach, for appellants.

Jas. R. McBride, of Lindsay, and Power, McFadzean & Crowe, of Visalia, for respondents.

MARKS, J.

In the court below respondents made a motion to strike out certain portions of an answer filed by appellants, which motion was granted. Appellants made a motion to vacate and set aside the foregoing order and another motion for an order giving them leave to file an amended answer. Both of the latter motions were denied. They have filed a notice of appeal in which they attempt to appeal from the foregoing orders. No judgment has been rendered in the court below.

Section 963 of the Code of Civil Procedure provides when an appeal may be taken. By the terms of this section, no right of appeal is given from orders such as those of which appellants complain. These orders are not appealable. California Portland Cement Co. v. Boone, 181 Cal. 35, 183 P. 447; Cleland v. Walbridge, 78 Cal. 358, 20 P. 730; Tedford v. San Diego, etc., Co., 79 Cal. App. 505, 249 P. 1093; Cuddahy v. Gragg, 46 Cal. App. 578, 189 P. 721. "An attempt to appeal from a nonappealable order does not give this court jurisdiction or authority to review it." Sherman v. Standard Mines Co., 166 Cal. 524, 137 P. 249.

It is ordered that the proceedings in this court be dismissed.

We concur: BARNARD, P. J.; JENNINGS, J.

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113 Cal. App. 55

TOTH v. METROPOLITAN LIFE INS. CO.

Civ. 373.

District Court of Appeal, Fourth District, California.

March 27, 1931.

Appeal and error ⚷773(2).

Good-faith appeal will not be dismissed for slight delay in filing points and authorities on motion presented after appellant filed brief (Code Civ. Proc. § 1013; District Court of Appeal Rule 5).

District Court of Appeal Rule 5 provides that if transcript or points and authorities, though not filed within time prescribed, be on file when notice of motion to dismiss appeal is given, such facts shall be sufficient answer to motion.

Appeal from a judgment of the Superior Court of Kern County, Erwin W. Owen, Judge. Motion denied.

Action by Hazel Toth against the Metropolitan Life Insurance Company. Judgment for plaintiff, and defendant appeals. On respondent's motion to dismiss the appeal.

Motion denied.

Knight, Boland & Christin, of San Francisco, for appellant.

Rowen Irwin, J. O. Reavis, and R. W. Henderson, all of Bakersfield, for respondent.

JENNINGS, J.

Motion by respondent to dismiss an appeal. The motion is based on the ground that the appellant did not file its points and authorities within the time prescribed by the provisions of section 4 of rule I of the rules of this court. The transcript was filed on February 2, 1931. The time for appellant to file its opening brief expired, therefore, on March 4, 1931. Notice of the presentation of this motion was given by mail. The affidavit of mailing shows that a copy of the notice of motion, properly addressed to counsel for appellant, was deposited in the United States Post Office at Bakersfield, Cal., on March 5, 1931. The notice of motion was filed in the office of the clerk of this court on March 5, 1931. An affidavit filed by counsel for appellant shows that appellant's opening brief, addressed to the clerk of this court, was deposited in the United States mail at San Francisco, Cal., on March 5, 1931. Appellant's opening brief was filed in this court on March 6, 1931. The motion to dismiss the appeal herein was noticed for presentation on March 24, 1931, and was presented on that day.

In support of their contention that the appeal herein should be dismissed, counsel for respondent rely upon rule V of the rules of this court, wherein it is provided that if the transcript of the record or appellant's points and authorities be not filed within the time prescribed, the appeal may be dismissed, upon notice given, either on motion of the respondent or of the court in which the appeal is pending. It is contended that notice of the motion to dismiss the appeal was given by depositing a copy of the notice of motion, properly addressed, in the United States mail at Bakersfield, Cal., on March 5, 1931, and that on that date the service of the motion to dismiss the appeal was complete. Section 1013, Code Civ. Proc.

Rule V of the rules of this court provides as follows: "If the transcript, or the points and authorities, though not filed within the time prescribed, be on file at the time such notice is given, that fact shall be sufficient answer to the motion." In Jacques v. Board of Supervisors, 22 Cal. App. 627, 135 P. 686, 688, the court used the following language: "Besides, although the language of rule 5 is that if the transcript, not having been filed within the time prescribed, 'be on file at the time the notice is given, that fact shall be a sufficient answer to the motion,' it has been held that if the transcript, properly authenticated by the clerk of the superior court, has been filed prior to the hearing of the motion, the ground for the motion has thereby been removed. In re Ryer, 110 Cal. 560, 42 P. 1082; Woodside v. Hewel, 107 Cal. 141, 40 P. 103; Warren v. Hopkins, 110 Cal. 506, 42 P. 986; Poole v. Grand Circle, Women of Woodcraft, 17 Cal. App. 229, 119 P. 201."

Furthermore, the affidavit of counsel for appellant shows that the appeal has been taken and is presented in good faith and it is obvious that the slight delay complained of has not appreciably postponed the hearing of the appeal on its merits. Tyner v. Axt (Cal. App.) 295 P. 97; Fishman v. Silva (Cal. App.) 291 P. 430; Righetti v. Monroe, etc., Inc. (Cal. App.) 289 P. 650.

The motion to dismiss the appeal herein is denied.

We concur: BARNARD, P. J.; MARKS, J.

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112 Cal. App. 672

DALLAS v. CHURCH, Superior Judge.

Civ. 7884.

District Court of Appeal, First District, Division 1, California.

March 19, 1931.

Executors and administrators ⚷22(1).

Superior court had jurisdiction to hear and determine application for appointment of special administrator.

Petition by Robert L. Dallas for writ of prohibition to be directed to Lincoln S. Church, Judge of the Superior Court, in and for the County of Alameda.

Writ denied.

Superseding 296 P. 622.

H. H. McPike, of San Francisco, for petitioner.

E. J. Talbott and W. H. Metson, both of San Francisco, for respondent.

PER CURIAM.

Petition for writ of prohibition.

It appears therefrom that Mary Hickman died on March 3, 1930. Thereafter an instrument in writing, purporting to be her last will and testament, was filed by A. B. Costigan, one of the executors thereof. Costigan subsequently applied to be appointed special administrator of said estate. One Robert L. Dallas filed his answer to said petition and prayed that the petition be denied, and that special letters upon said estate be issued to him. In his answer Dallas alleged that he was an heir at law of the deceased. Further

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answering, he alleged that the instrument filed by Costigan as the last will and testament was not her last will, as the testatrix by an instrument in writing other than a will, but executed with all the formalities thereof, which instrument was entirely written, dated, and signed in the handwriting of Mary Hickman, revoked all wills made by her. This revocation was executed subsequent to the making of the will in question. It is alleged in the petition that the court, after a hearing, has expressed the opinion that the petition of the executor to be appointed special administrator should be granted. The filing of the instant petition followed. The court has beyond question jurisdiction to hear and determine the application in question. Having jurisdiction it has the power to decide it correctly or incorrectly. Dalgren v. Superior Court, 8 Cal. App. 622, 97 P. 681.

The petition is denied.

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113 Cal. App. 21

BRUNE v. SUPERIOR COURT IN AND FOR CITY AND COUNTY OF SAN FRANCISCO et al.

Civ. No. 7851.

District Court of Appeal, First District, Division 1, California.

March 25, 1931.

1. Certiorari 🔑64(2).

On certiorari to annul order of Superior Court, appellate court is limited to consideration of whether Superior Court exceeded its jurisdiction.

> Under foregoing rule, even though it appear that, during hearing or in the determination of the matter before it, the trial court may have erred to the prejudice of the petitioner, either in matters of fact or matters of law, relief may not be afforded through the medium of a writ of review.

2. Certiorari 🔑64(2).

Record on certiorari to annul order of Superior Court adjudging petitioner guilty of contempt for failure to pay alimony *held* to show complete jurisdiction over parties and subject-matter, warranting discharge of writ.

> Affidavit by which contempt proceedings were brought about contained averments to effect that petitioner had full knowledge of orders and decrees directing payment of alimony, that he was in arrears, that he was well able to pay same, and that he willfully refused and neglected to do so. Judgment of contempt confirmed truth of all necessary jurisdictional facts averred in affidavit, and declared that petitioner was well able to pay alimony, but willfully, deliberately, and contemptuously neglected and refused to do so.

3. Certiorari 🔑66.

Every intendment is in favor of validity of judgment.

4. Certiorari 🔑66.

In absence of contrary showing in record on certiorari, appellate court will presume trial court proceeded within its jurisdiction.

5. Divorce 🔑269(2).

Where divorced husband admitted default in payment of alimony, court was vested with power to adjudge him guilty of contempt, regardless of amount of arrearage.

Certiorari by Herman W. Brune to annul an order of the Superior Court in and for the City and County of San Francisco, and Frank H. Dunne, a Judge thereof, adjudging petitioner guilty of contempt for failure to pay alimony.

Writ discharged, and proceedings dismissed.

Milton H. Silverberg, of San Francisco, for petitioner.

Joseph A. Brown, of San Francisco, for respondents.

KNIGHT, J.

The petitioner, Herman W. Brune, was adjudged guilty of contempt by the Superior Court for failure to pay certain sums of money for the support and maintenance of his wife and his minor child as directed by the terms of an interlocutory decree of divorce theretofore entered in the divorce action; and he seeks in this proceeding in certiorari to have the judgment of contempt annulled, it being alleged in his petition, as grounds for the issuance of the writ, that no testimony was taken at the hearing of the contempt proceeding to substantiate the averments of the affidavits initiating the contempt proceedings; and that petitioner was precluded from introducing testimony showing his inability to comply with said decree or that the amount of the alleged arrearage was incorrect.

[1] As frequently held, in a proceeding such as this, the reviewing court is restricted to a consideration of the single question of whether the trial court exceeded its jurisdiction; and, even though it appear that, during the hearing or in the determination of the matter before it, the trial court may have erred to the prejudice of the petitioner, either in matters of fact or matters of law, relief

may not be afforded through the medium of a writ of review. White v. Superior Court, 110 Cal. 60, 42 P. 480, 481. In the case cited the court goes on to say: "The question being purely one of power, the mere manner in which the contempt proceeding was tried, the rulings of the court upon the admissibility of evidence, and kindred matters, are things wholly without the range of our investigation. Nor can we look into the evidence to inquire as to its sufficiency to sustain the finding and conclusion of the superior court. If the court had jurisdiction, and the recitals of the judgment or order are sufficient to sustain it, those recitals are conclusive upon us in this proceeding. We are confined to the record. 'If the order is one which the court had power to make, it is not for us to inquire whether this power was properly exercised or not. The writ of review is not a writ of error.' Von Roun v. Superior Court, 58 Cal. 358."

[2] In the present case, the affidavit by which the contempt proceedings were brought about contains averments to the effect that defendant had full knowledge of the orders and decrees of the court directing him to pay said sums of money, that he was in arrears in making such payments, and that, although well able to pay the same, he willfully refused and neglected so to do. At the hearing of the contempt proceeding, petitioner was present and represented by counsel, and the minutes of the court show that petitioner and his wife were sworn and examined. In its judgment of contempt, besides confirming the truth of all of the jurisdictional facts averred in the affidavit, the court declared "that defendant is well able to pay each and all of said sums," but "willfully, deliberately, and contemptuously" neglected and refused so to do. The record therefore shows complete jurisdiction over the parties and the subject-matter of the proceeding, and consequently is legally sufficient to sustain the judgment of contempt. In re Rasmussen, 56 Cal. App. 368, 205 P. 72; In re McCarty, 154 Cal. 534, 98 P. 540.

[3-5] Answering the contention that petitioner was precluded from showing an inability to pay the amount of the arrearage, it is necessary only to advert to the rule heretofore stated, that every intendment is in favor of the validity of the judgment; and therefore, in the absence from the record of any showing to the contrary, it will be presumed that the trial court proceeded within its jurisdiction with due regard for the rights of the parties. Goodrich v. Superior Court, 92 Cal. App. 695, 268 P. 669. And, with reference to the question of the correctness of the amount of the arrearage, petitioner admits that he was in default in the payment of a considerable sum; consequently, the court was vested with power to adjudge him guilty of contempt, providing the other elements of jurisdiction were present; and the contents of the return to the writ and the records of the court which are made part of the return clearly show that they were.

For the reasons stated, the writ of review is discharged, and the proceedings taken in pursuance thereof are dismissed.

We concur: TYLER, P. J.; CASHIN, J.

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112 Cal. App. 715

HAMMONS, Superintendent of Banks of Arizona, v. CROZIER et al.

Civ. 355.

District Court of Appeal, Fourth District, California.

March 20, 1931.

1. Judgment ⚷101(1).

Plaintiff's right to judgment against defaulting defendant depends on whether complaint states cause of action.

2. Banks and banking ⚷47(2).

Arizona superintendent of banks, commencing action to enforce stockholders' double liability before judicial determination of degree of bank's insolvency, *held* not entitled to judgment against defaulting defendants.

3. Appeal and error ⚷544(1).

Trial court's finding that certain defendants, in action to enforce double liability of insolvent bank's stockholders, were never stockholders thereof, is conclusive on appeal taken on judgment roll alone.

4. Banks and banking ⚷44.

Double liability of insolvent Arizona bank's stockholders *held* inapplicable to one acquiring stock before 1912.

Appeal from Superior Court, Los Angeles County; Harry R. Archbald, Judge.

Action by A. T. Hammons, Superintendent of Banks of Arizona and ex officio receiver and in charge of the Bank of Winslow, an insolvent banking corporation of that state, at the relation and to the use of the creditors thereof, against W. J. Crozier and others. Judgment for defendants, and plaintiffs appeal.

Affirmed.

Frank G. Falloon, of Los Angeles, for appellant.

Hibbard & Kleindienst, of Los Angeles, for respondents Crozier, Ensign, and Tuttle.

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Herbert Cutler Brown, of Hollywood, for respondent Smith.

BARNARD, P. J.

A. T. Hammons, superintendent of banks of the state of Arizona and ex officio receiver and in charge of the Bank of Winslow, an insolvent banking corporation of the state of Arizona, brought this action against these defendants residing in the state of California, for the purpose of enforcing and collecting their "double liability" as stockholders of the Bank of Winslow. Before trial, the action was dismissed as to certain of the defendants. Defendants Brown, Moritz, and Zwickey defaulted. Issue was joined by defendants Crozier, Smith, Tuttle, and Ensign, and, after trial, the court entered a judgment that the plaintiff take nothing as against any answering defendant; and, further, that the plaintiff take nothing as against any defaulting defendant. From this judgment the plaintiff has appealed upon the judgment roll alone.

[1, 2] Appellant first urges in his opening brief that he is entitled to a judgment against the defaulting defendants. Whether or not this is so depends upon whether the complaint states a cause of action. Swain v. Burnette, 76 Cal. 299, 18 P. 394. In his reply brief, appellant calls attention to the fact that the Supreme Court of Arizona, in the case of Dagg v. Hammons, 34 Ariz. 445, 272 P. 643, an action involving the same bank and the same principles of law as are here involved, decided that there was no cause of action against the stockholders of this bank until the degree of insolvency was judicially determined in the superior court of Arizona, in order to determine what percentage of liability is to be called for from the stockholders. Appellant then admits that this action was prematurely brought, having been commenced before any such judicial determination of the degree of insolvency. In view of this decision of the Supreme Court of Arizona, it appears from the record that the complaint in this action fails to state a cause of action, and no reason appears for reversing that portion of the judgment referring to the defaulting defendants.

[3] Not only does the same situation appear as to the answering defendants, but the record also shows that the trial court found that the defendants Tuttle, Smith, and Crozier were not stockholders in said bank at the time it became insolvent, and have never at any time been such stockholders. This appeal being taken upon the judgment roll alone, this finding of the trial court must be taken as conclusive.

[4] In reference to the defendant Ensign, the court found that he was the owner of ten shares in the Bank of Winslow at the time it became insolvent, but that said ten shares were acquired by him prior to January 1, 1912. In Dagg v. Hammons, supra, the Supreme Court of Arizona held that, under the Constitution and laws of the state of Arizona, the double liability of a stockholder in the particular bank which is involved in this proceeding does not apply to any stock which was originally issued before the year 1912 or to any reissue thereof. Under the facts found herein, the portion of the judgment referring to the answering defendants was therefore correct.

For the reasons given, the judgment is affirmed.

We concur: JENNINGS, J.; LAMBERSON, Justice pro tem.

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112 Cal. App. 609

PEOPLE v. McENERNEY.

Cr. 1612.

District Court of Appeal, First District, Division 2, California.

March 17, 1931.

Rehearing Denied April 1, 1931.

Hearing Denied by Supreme Court April 16, 1931.

1. Executors and administrators ⚷43.

Administrator, taking possession of deposit, in which rents, collected before and after depositor's death, were commingled, cannot deny receipt thereof as administrator (Code Civ. Proc. § 1581).

2. Criminal law ⚷147.

Prosecution of former administrator for grand theft of money, demanded by successor within three years before indictment, *held* not barred by limitations.

3. Criminal law ⚷554.

Jury was not bound by former administrator's unsupported testimony, in trial for grand theft, that he parted with money long before successor's demand therefor.

4. Embezzlement ⚷11(1).

Whether former administrator, indicted for grand theft of money, actually converted bonds in which invested, *held* immaterial.

5. Embezzlement ⚷11(1).

Substituted administrator's demand, on day of order restoring discharged administrator to capacity, for money received by latter, *held* not made during his incompetency.

6. Criminal law ⚿1144(16).

Appellate court must assume, on appeal from conviction of grand theft, if evidence did not prove other embezzlements by defendant, that jury found accordingly.

7. Criminal law ⚿680(2).

Trial court had power, in trial for grand theft, to admit evidence of other embezzlements by defendant before corpus delicti was proved (Pen. Code, §§ 1093, 1094).

Appeal from Superior Court, City and County of San Francisco; J. J. Trabucco, Judge.

Charles L. McEnerney was convicted of grand theft, and he appeals.

Affirmed.

Francis T. Cornish, of Berkeley, for appellant.

U. S. Webb, Atty. Gen., Matthew Brady, Dist. Atty., August Fourtner, Asst. Dist. Atty., and Robert D. Duke, Sp. Prosecutor, all of San Francisco, for the People.

STURTEVANT, J.

The defendant was convicted under a charge of grand theft, he made a motion for a new trial, his motion was denied, and he has appealed from the judgment and order and has brought up typewritten transcripts.

For several years prior to 1924 the defendant was an attorney at law practicing his profession in San Francisco. On September 25, 1924, he was appointed administrator of the estate of John Quinn, deceased, and thereupon he qualified and continued to act as such administrator until he was removed by an order of court and Eugene Quinn was appointed in his place on August 18, 1926. About one month prior to that date the defendant was adjudged insane and was committed to an asylum where he remained for several months, and then he was released and a short time after he was restored to competency August 14, 1930. Other facts will be stated in connection with the point to which those facts are specially pertinent.

The attorney for the defendant has filed a masterly brief in which he has set forth many points, the facts contained in the record which give rise to the point, and his authorities applicable thereto. The prosecution does not dispute the soundness of many points, but contends that there is no error in the record and presents its theory of the case tending to support its contention. The case is, in this manner, reduced to a few points which we will take up in the sequence in which they appear in the defendant's brief.

[1] The defendant asserts that the property which he embezzled, if any, was not the property of the estate of John Quinn, but in truth and in fact belonged to certain charities. The deceased had been the owner of certain real property in the state of Arizona. Before his death he conveyed certain interests to the above-mentioned charities, reserving a life estate. The rents collected both before and after the death of the decedent had been commingled in one bank deposit at Needles. The defendant took the entire deposit into his possession as administrator. It was his duty to do so. Code Civ. Proc. § 1581. Thereafter the defendant as administrator had at least a special property in said properties until the rights of the real owners were ascertained and determined. Until he had been so discharged, he will not be heard to say he did not receive such properties in his capacity as administrator. People v. Royce, 106 Cal. 173, 37 P. 630, 39 P. 524; People v. Robertson, 6 Cal. App. 514, 92 P. 498.

[2] In his next point the defendant asserts that the offense was more than three years old when he was indicted, and that the conversion took place in 1925 or 1926, and that the statute of limitations was not tolled by a belated demand August 14, 1930, that being the date of the conversion as claimed by the prosecution. A search of the record does not disclose facts to sustain any of these contentions. From the beginning and until the end of the trial the learned trial judge received any and all evidence which was offered by either party proving or tending to prove a criminal conversion. At the end of the trial the court gave a set of instructions directly to the point that, unless the offense, if any, was committed within three years of the filing of the indictment, the defendant should be acquitted. The evidence shows the defendant received the moneys alleged in the indictment September 27, 1924. In a probate account, filed March 23, 1926, he admitted the receipt of the money. Since that date he has not accounted to the estate of John Quinn for a single dollar. During the presentation of his defense he testified that he did not have the money at the time of the trial, but he produced no vouchers or evidence of lost vouchers. From the time the money was received by him, it would be presumed, until the contrary appeared, that the defendant was innocent of crime. Nothing to the contrary is contained in the record until the making of the demand August 14, 1930. The mere failure of the defendant to pay over money, standing alone, did not constitute an offense. People v. Page, 116 Cal. 386, 48 P. 326; Blake v. State, 12 Okl. Cr. 549, 160 P. 30, L. R. A. 1917B, 1261 and extended note. But when thereafter the prosecution made a legal demand the case stood otherwise. People v. Hatch, 163 Cal. 368, 374, 125 P. 907. True it is that

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⚿For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Eugene Quinn, after he had qualified as the defendant's successor as administrator of the estate of John Quinn, could have made a demand. But he did not do so till August 14, 1930. If this were a civil case his rights might be affected by his delay. However, in this criminal proceeding the prosecution was entitled to present the facts as it found them. In doing so it based its case on the constructive conversion evidenced by the demand dated August 14, 1930. If, as contended by the defendant, the conversion in fact had taken place long prior to that date, he could have shown the fact, but he did not do so.

[3] The defendant earnestly asserts that the evidence shows he parted with the money long before the date of the demand which was made August 14, 1930. In this he is clearly overstating the case. He so testified, but he produced no other evidence showing the payment of any of the moneys to any one at any time. The jury was not bound to accept the defendant's unsupported oath. In this connection it is material to note that the evidence showed that he had previously been convicted of a felony.

[4] It is next claimed that, if the defendant converted any property, it was bonds and not money, and that there was a fatal variance between the allegations and the proof. In the account which the defendant filed in the probate court in March, 1926, he stated that he had invested the moneys in U. S. bonds and had the bonds in a safe deposit box. At the trial of the instant case he testified that the foregoing recitals in the probate account were not true. He never attempted to exhibit the bonds at any time. He never at any time exhibited any vouchers showing such an investment. If he did make the investment, he had no authority to do so. Brenham v. Story, 39 Cal. 179, 188; Estate of Broome, 162 Cal. 258, 263, 122 P. 470. As he received moneys he was bound to account for moneys. In State v. Disbrow, 130 Iowa, 19, 106 N. W. 263, 8 Ann. Cas. 190, at page 192, the Supreme Court of Iowa was considering a similar claim. The court said: "It is unnecessary for us to go into the question whether in any case an indictment charging an embezzlement of money may be upheld by proof of the conversion of a promissory note. In the case before us the appellant guardian received the money. If he let it out upon interest, the promissory notes thus received represented money. In the due course of his business it was his duty to collect and safely keep the funds thus invested. When called upon to surrender his trust, it was incumbent upon him to produce the money or its approved representative. If by a fraudulent abuse of his trust the money which he received for his ward is dissipated and lost, it would seem to be immaterial whether it was lost in the very form in which it came into his hands or after he had changed it into the form of moneyed securities. In any event, the loss or embezzlement is to all intents and purposes the loss and embezzlement of the money intrusted to his keeping. Appellant held the notes as the means or evidence by which he could collect or obtain the actual money for his ward, and if he made use of the power or opportunity thus intrusted to him to get the money into his hands and fraudulently applied it to his own use, the proof of that fact sufficiently sustained the charge made in the indictment. It was money which he received and money for which he must account. (State v. Brooks, 85 Iowa, 366, 52 N. W. 240.)"

[5] It is claimed that the demand was made while the defendant was still incompetent and had not been restored. A petition for restoration was filed May 16, 1930. Later a hearing was had and an order of restoration to capacity was made August 14, 1930. That order spoke as of the 16th day of May, 1930, the day the petition was filed. Metropolis, etc., Sav. Bank v. Barnet, 165 Cal. 449, 452, 132 P. 833. The demand was made August 14, 1930. The making of the demand occurred after the date when the defendant had recovered his health as such date stood determined by the order of restoration.

[6, 7] During the trial the prosecution offered evidence tending to prove other embezzlements by this defendant of other properties which came into his hands as administrator of the estate of John Quinn. The defendant claims such evidence did not prove other embezzlements. Conceding that to be so, we must assume that the jury found accordingly. He also claims that such evidence was not admissible until the corpus delicti had been proved. But the trial court had the power to vary the order of proof. From what has been said above we think it is clear that, when the case went to the jury, the prosecution had introduced sufficient evidence to prove the guilt of the defendant. At that time it could not be said that the corpus delicti had not been proved. The contention that the trial court committed error rests, therefore, on the sole ground that the evidence complained of was admitted out of order. But, as we have stated above, such practice is not error. Pen. Code, §§ 1093, 1094.

We find no error in the record. The judgment and order appealed from are affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

112 Cal. App. 665

FIRST NAT. BANK OF MARYSVILLE v. McCOY, Sheriff.

Civ. 4255.

District Court of Appeal, Third District, California.

March 18, 1931.

Rehearing Denied April 17, 1931. Hearing Denied by Supreme Court May 14, 1931.

1. Execution 🔑158(2).

Invalidity of bond to stay execution because of erroneous recital of court to which appeal was taken *held* immaterial on question whether court order justified sheriff's return of property levied on to judgment debtor.

> The order recited that good and sufficient bonds on appeal and to stay execution had been filed, and there was no evidence that sheriff was aware of error in recital of court to which appeal was taken.

2. Appeal and error 🔑460(1).

Satisfaction of money judgment is stayed on appeal only on filing of statutory undertaking (Code Civ. Proc. § 942).

3. Execution 🔑158(2).

Filing of bond to stay execution does not authorize sheriff to release property levied on, unless judgment creditor fails to object to sufficiency of sureties for five days (Code Civ. Proc. § 946).

> Code Civ. Proc. § 946, as amended by St. 1913, p. 216, provides that perfected appeal stays all further proceedings and releases property levied on under execution, but that such property shall not be released, if respondent excepts to sufficiency of sureties within five days after giving of undertaking, until such sureties or others justify in manner prescribed by law.

4. Execution 🔑158(2).

Order directing sheriff to return property to judgment debtor *held* premature, where made within five days after filing of bond to stay execution (Code Civ. Proc. § 946).

5. Appeal and error 🔑477.

Superior court has jurisdiction to stay execution pending appeal and direct sheriff to return property levied on to judgment debtor.

6. Execution 🔑149.

Ordinarily, sheriff must retain custody of property levied on under execution until he may legally dispose of it in satisfaction of judgment.

7. Sheriffs and constables 🔑77.

Sheriff's powers and duties are ministerial.

8. Sheriffs and constables 🔑87.

Sheriff, as court officer, must execute order or process, apparently regular and valid on face and executed by competent authority (Pol. Code, § 4168).

9. Execution 🔑158(2).

Court order specifically directing sheriff to return property to judgment debtor justified his return of property levied on under execution, though made within five days after filing of bond to stay execution (Pol. Code, § 4168; Code Civ. Proc. §§ 942, 946).

10. Sheriffs and constables 🔑98(1).

Sheriff need not search records to dispute specific statements in court order directing him to perform ministerial duty.

Appeal from Superior Court, Yuba County; H. D. Gregory, Judge.

Petition by the First National Bank of Marysville, a corporation, for a writ of mandamus to Chas. J. McCoy, Sheriff of the County of Yuba, State of California. From a judgment granting a peremptory writ, respondent appeals.

Reversed.

Rich & Weis, of Marysville, for appellant.

Frank A. Duryea, of Marysville, for respondent.

R. L. THOMPSON, J.

This is an appeal from a writ of mandamus directed against the appellant as sheriff of Yuba county to compel him to pay to the assignee of a judgment creditor an amount of money recovered upon the levy of an execution, but which was subsequently returned to the judgment debtor under order of the court.

In an action of assumpsit which was tried in Yuba county, entitled Duryea v. Johnson, the plaintiff recovered judgment in July, 1929. A notice of appeal to the District Court of Appeal was duly filed. No bond staying execution was then filed. An execution was issued and placed in the hands of the appellant for satisfaction. The sheriff promptly levied upon property belonging to the judgment debtor. This property, after due notice, was sold October 23, 1929, for $182. At the same time, the sheriff seized a certain bean-rake belonging to the judgment debtor, which was also noticed for sale to be held on October 31st. On the last-mentioned date, before the sale of the rake, the judgment debtor filed a purported bond for the purpose of staying execution. The bond erroneously recited that, "The defendants in the above-entitled action have appealed to the Supreme Court of the State of California." The court thereupon signed and filed an order in that action staying execution and directing the sheriff to return to the judgment debtor all money and property recovered by the officer under execution. This order contains the following language:

"It appearing to the Court that the defendant has appealed from the decision rendered herein in favor of the plaintiff and after filing a good and sufficient bond upon appeal, and also to stay the writ of execution, now,

"It Is Therefore Ordered, and the Sheriff of the County of Yuba, State of California, is hereby directed to stay all proceedings under and by virtue of the execution now in his hands and to return any and all property to the judgment debtor which he may have in his custody by virtue of any process hereunto issued out of the above entitled Court and cause."

Pursuant to the foregoing order, the sheriff promptly delivered to the judgment debtor the said sum of money which he had obtained on sale of personal property, together with the bean-rake held pursuant to the authority conferred by the execution. On the day following the filing of this undertaking to stay execution, and following the making of the foregoing court order and return of the property by the sheriff, the judgment creditor served and filed a notice excepting to the sufficiency of the sureties on this stay bond. The sheriff was also served with a copy of this notice. The sureties failed to justify. Upon default of the sureties, the court made an order, November 19, 1929, setting the stay bond aside and directing the sheriff to proceed to enforce the satisfaction of the judgment by execution. The sheriff, however, was unable to recover the money or property delivered by him to the judgment debtor. After demand and failure to recover this money or property, this petition for a writ of mandamus was filed. The foregoing facts appear in the pleadings without substantial dispute.

At the trial upon this petition for writ of mandamus the court found that the sheriff had duly levied upon the property of the judgment debtor in the action entitled Duryea v. Johnson and had recovered the sum of $182 and one bean-rake of the reasonable value of $70; and that this property was wrongfully withheld from the judgment creditor. Thereupon a peremptory writ of mandamus was issued directing the sheriff to forthwith pay to the judgment creditor in that action said sum of $182 and deliver to him said bean-rake, or, in lieu thereof, the further sum of $70 as the reasonable value thereof. From this judgment an appeal was perfected.

The appellant contends that even though the court order directing him to return the money and property to the judgment debtor was unauthorized, it appears to have been duly and regularly made by a court having jurisdiction of the subject-matter, and therefore justifies his delivery of the property.

[1] It is immaterial that the bond may have been void from its inception on account of an erroneous recital therein that the appeal had been taken to the "Supreme Court," instead of to the District Court of Appeal. It has been held this error invalidates the bond. McAulay v. Tahoe Ice Co., 3 Cal. App. 642, 86 P. 912; Bergevin v. Wood, 11 Cal. App. 643, 105 P. 935. This error, however, did not appear upon the court order directing the sheriff to return the property. There is no evidence the sheriff was aware of this error. The court recited in its order that "a good and sufficient bond upon appeal, and also to stay the writ of execution," had been filed.

[2, 3] It is true that the satisfaction of a money judgment is not stayed on appeal except upon the filing of an undertaking for that purpose as provided by section 942 of the Code of Civil Procedure. Even when this bond to stay execution has been filed, the sheriff is not authorized to release property in his possession upon which he has regularly levied on execution unless the judgment creditor fails for a period of five days after the filing thereof to object to the sufficiency of the sureties thereon. Section 946 of the Code of Civil Procedure provides, in part: "Whenever an appeal is perfected, as provided in the preceding sections of this chapter, it stays all further proceedings * * * and releases from levy property which has been levied upon under execution issued upon such judgment; provided, however, said property shall not be released from the levy, if the respondent excepts to the sufficiency of the sureties within five days after the giving of the undertaking staying execution until such sureties, or others, justify in the manner prescribed by law. * * *"

The case of Sam Yuen v. McMann, 99 Cal. 497, 34 P. 80, is not in conflict with the foregoing construction of section 946 of the Code of Civil Procedure. It is true that case held that it was the duty of a sheriff to return property recovered from a judgment debtor pursuant to an execution when a stay bond is filed regardless of the right of the judgment creditor to except to the sufficiency of the sureties within five days thereafter. But the Code did not then contain the proviso with relation to the privilege of excepting to the sufficiency of the sureties within five days after the filing of the bond. Section 946 of the Code of Civil Procedure was subsequently amended by adding the above proviso (Stats. 1913, p. 216).

[4, 5] Pursuant to the statute last quoted it is apparent the foregoing order of court directing the sheriff to return the property to the judgment debtor was premature and unauthorized. But the court did have jurisdiction of the subject-matter. Donegan v. City of Los Angeles (Dorsey v. City of Los Angeles) (Cal. App.) 293 P. 912. Although the order was based upon an erroneous assumption of the law and an incorrect statement of facts, it nevertheless furnishes a complete justification for the sheriff to return the property since no evidence of its invalidity appears upon the face of the order. Section 4168 of the Political Code provides: "A sheriff or other ministerial officer is justified in the execution of, and must execute, all process and orders regular on their face and issued by competent authority, whatever may be the defect in the proceedings upon which they were issued."

[6-8] It is ordinarily the duty of a sheriff to retain the custody of property acquired by levy, until he may dispose of it in satisfaction of the judgment pursuant to law. He may become civilly liable for an illegal or unauthorized disposition of the property. 23 Cal. Jur. 305, § 17; 23 Cal. Jur. 311, § 20. The powers and duties of a sheriff, however, are ministerial in their nature. He is an officer of the court and should render obedience to the mandates of court unless the process or order appears upon its face to be illegal or that it was issued without jurisdiction. 23 Cal. Jur. 294, § 7. When the order or process appears to be regular and valid upon its face and to have been executed by competent authority, it is the duty of a sheriff to execute it. Section 4168, Pol. Code; 23 Cal. Jur. 300, § 13; Burlingame v. Traeger, 101 Cal. App. 365, 369, 281 P. 1051, 1052; 1 Freeman on Executions (3d Ed.) p. 362, § 101. In the authority last cited, it is said: "The sheriff may limit his inquiries to an inspection of the writ. If the writ is issued by the proper officer, in due form, and appears to proceed from a court competent to exercise jurisdiction over the subject-matter of the suit, to grant the relief granted and enforce it by the writ issued, and there is nothing on the face of the writ showing a want of jurisdiction over the person of the defendant, or showing the writ to be clearly illegal from some other cause, the officer may safely proceed. * * * Officers are also protected where, though the court had jurisdiction, the writ is void as between the parties thereto on account of something not appearing on the face thereof. * * * The rule that an officer may justify under a writ valid on its face is one of protection. * * * An officer may limit his inquiries to an inspection of the face of the writ, and * * * he is not to be held responsible for anything of which the writ gives no notice, and of which he has no actual knowledge."

To the same effect, it is said in the case of Burlingame v. Traeger, supra: "An officer to whom an order or a warrant of arrest has been delivered for execution is not required at his peril to look behind the order if it appears to be regular on its face and issued by a court of competent jurisdiction. * * * As said in Magnaud v. Traeger, 66 Cal. App. 526, 226 P. 990, 992: 'Without doubt, if a writ or an order commanding a sheriff to do or to refrain from doing an act be legal upon its face and show an apparent jurisdiction, and if the court issuing the writ or making the order has jurisdiction of the subject matter, the officer will be protected when in good faith he acts in obedience to the writ or to the order.'"

[9, 10] In the present case the sheriff appears to have acted in perfect good faith. Since the order of the court stated that "a good and sufficient bond * * * to stay the writ of execution" had been filed, and since the order fails to state when the undertaking was filed, the sheriff was justified in assuming that the bond conformed in every way to the requirements of the law, and that the five days allowed by statute for excepting to the sufficiency of the sureties had elapsed. The order also specifically directed the sheriff "to return any and all property to the judgment debtor which he may have in his custody." This order was valid on its face. The sheriff is a mere ministerial officer. He is not required, at his peril, to search the records to dispute specific statements which are recited in a court order directing him to perform a ministerial duty. The sheriff is fully protected by the court order directing him to return the property. The writ of mandate was therefore erroneously issued in the present case.

The judgment is reversed.

112 Cal. App. 553

KLEEM v. CHAPOT.

Civ. 7402.

District Court of Appeal, First District, Division 1, California.

March 16, 1931.

Rehearing Denied April 15, 1931. Hearing Denied by Supreme Court May 14, 1931.

1. Limitation of actions 🔑127(5).

Amended complaint, alleging disturbed menstrual function, in addition to back and other injuries, recited in original complaint, *held* not to state new cause of action barred by limitations.

2. Limitation of actions 🔑127(2).

Where amended complaint does not change cause of action, limitations run to filing of original complaint.

3. Damages 🔑158(3).

Evidence of disturbed menstrual function, alleged in amended complaint filed after statutory period, *held* admissible under general averment of bodily injury in original complaint.

4. Damages 🔑158(2).

Under general averments of injuries proximately caused by defendant's negligence, plaintiff may prove any specific injury traceable to, and naturally resulting from, occurrence complained of.

5. Trial 🔑140(1), 143.

It is jury's province to pass on conflicting evidence, inconsistent statements, and witnesses' credibility.

6. Appeal and error 🔑1001(1).

Jury's verdict, supported by substantial evidence, cannot be disturbed by appellate court for insufficiency of evidence.

7. New trial 🔑70.

It is trial court's province to grant new trial, where evidence is insufficient to sustain verdict.

8. Damages 🔑131(4).

Verdict awarding woman $6,695 damages for back injuries, consisting of contusions and strained ligaments, nervous shock, kidney adhesions, and disturbed menstrual function, *held* not excessive.

9. Appeal and error 🔑1004(1).

Question of excessive damages is first addressed to trial court, and appellate court can interfere only when damages are so excessive as to suggest jury's passion, prejudice, or corruption at first blush.

Appeal from Superior Court, City and County of San Francisco; Louis H. Ward, Judge.

Action by Esther Kleem against J. P. Chapot, individually and as doing business under the firm name and style of New Modern French Bakery. Judgment for plaintiff, and defendant appeals.

Affirmed.

Barry J. Colding, Theodore Hale, and Carroll B. Crawford, all of San Francisco, for appellant.

Edmund J. Holl, of San Francisco, for respondent.

TYLER, P. J.

Action for damages for personal injuries.

The complaint in substance alleged that on the 19th day of February, 1928, plaintiff was a passenger on a street car and at that time defendant negligently backed a truck which he was driving into said car, thereby throwing the plaintiff against a certain stanchion, inflicting injuries to her back consisting of contusions and strained ligaments; she also alleged that she suffered a shock to her nervous system. She further claimed that in consequence of these injuries, she suffered adhesions of her kidneys and such injuries were permanent in character. Damages were prayed for in the sum of $20,000. Trial was had before a jury which resulted in a disagreement.

Thereafter plaintiff filed an amended complaint, alleging that in addition to the injuries recited in her original complaint she suffered a disturbed menstrual function. A demurrer was filed to this complaint, but it was overruled. A second trial was had and the jury found for plaintiff in the sum of $6,695. Motion for new trial was made and denied.

[1-9] This is an appeal from the judgment. As ground for reversal it is first argued that the trial court erred in overruling the demurrer to the amended complaint, for the reason that the amendment included an alleged injury which was barred by the statute of limitations. The amendment was made more than a year after the accident happened. It is claimed that the amendment states a new cause of action not found in the original complaint. We cannot agree to this contention as we are of the opinion that the amendment did not state a new cause of action, but on the contrary merely set forth more fully the cause of action alleged in the original complaint, and related back to the time of the commencement of the action. Where a cause of action is not changed, the time to which the statute of limitations runs is the filing of the original complaint. Then again evidence

of the injury as set forth in the amended complaint could have been offered under the averments contained in the original complaint, as such evidence was admissible under the general averment of bodily injury and resulting damages. Samuels v. California St., etc., Ry. Co., 124 Cal. 294, 56 P. 1115. Under general averments as to injuries suffered, which are alleged to have been proximately caused by defendant's negligence, it is proper and competent for plaintiff to prove any specific injury which she might have sustained. It is sufficient if such injuries can be traced to the occurrence complained of and are such as might naturally result from the injury. Latky v. Wolfe, 85 Cal. App. 332, 333, 259 P. 470. Appellant next contends that the verdict was contrary to the evidence, as there was a failure to prove the damages alleged in the complaint as the proximate result of appellant's alleged negligence. It is also claimed that plaintiff's own testimony was inconsistent and contradictory concerning the injuries she claimed to have suffered. From a reading of the statement of plaintiff's evidence, we cannot escape the conclusion that it seems far from satisfactory, still there is ample evidence which if believed by the jury sustains the verdict. This being so, it is not our province to review or weigh the evidence in determining its character. It was the province of the jury to pass upon all questions of conflicting evidence or inconsistent statements, or the credibility of witnesses, and its verdict cannot be disturbed for insufficiency of the evidence where there is any evidence to support it. Zipperlen v. Southern Pacific Co., 7 Cal. App. 206, 93 P. 1049. Where a verdict is attacked for insufficiency of evidence, the power of the appellate court begins and ends with the inquiry whether there is substantial evidence, contradicted or uncontradicted, which in and of itself will support the conclusion reached by the jury. Treadwell v. Nickel, 194 Cal. 243, 260, 228 P. 25; Hatzakorzian v. Rucker-Fuller Desk Co., 197 Cal. 82, 239 P. 709, 41 A. L. R. 1027. It is the province of the trial court to grant a new trial where there is an insufficiency of evidence to sustain a verdict. Here a motion was made for a new trial and it was denied. Nor do we think, considering the nature of plaintiff's alleged injuries, that the verdict is excessive. If such injuries were the result of the accident, as the jury determined they were, the verdict is certainly not excessive. The question of excessive damages is one which is first addressed to the trial court, and appellate courts can interfere only when the damages are so exorbitant as to suggest, at first blush, passion, prejudice or corruption on the part of the jury. Complaint is next made that the court erred in instructing the jury as to the maximum damages they might award plaintiff under the law as to the reasonableness of damages. In this connection it is claimed that the instructions upon this subject taken together justified the jury in concluding the court's meaning to be that any award even to the full amount claimed would be reasonable. We have read the instructions and they admit of no such construction. Ellis v. Central California Trac. Co., 37 Cal. App. 390, 174 P. 407.

For the reasons given, the judgment is affirmed.

We concur: KNIGHT, J.; CASHIN, J.

112 Cal. App. 697

DE TRAY et al. v. CHAMBERS.

Civ. 352.

District Court of Appeal, Fourth District, California.

March 19, 1931.

1. Judgment ⟹461(4).

As regards setting aside default judgment, finding notice of overruling demurrer to amended cross-complaint was served *held* supported by evidence.

2. Judgment ⟹435.

In action in equity to set aside final judgment, mere showing of mistake is insufficient.

3. Judgment ⟹461(5).

In action in equity to set aside judgment, evidence supported finding of absence of fraud or collusion.

4. Judgment ⟹429.

In action in equity to set aside judgment for cross-complainant in another action in superior court, that plaintiffs previously recovered judgment in municipal court, arising out of same accident, was not ground for relief.

> Such fact, if having any bearing, was defense to be set up in superior court in original action.

5. Judgment ⟹408.

That judgment purported to be upon amended cross-complaint, though default order was upon cross-complaint, and that judgment was defective, did not entitle cross-defendant to relief in action in equity to set aside judgment; there being adequate remedy at law.

6. Judgment ⟹429.

Party is not entitled to relief in equity against judgment upon grounds which would have been defense or should have been set up in original action.

7. Judgment ⚿437.

That attorney was suspended after default judgment against clients *held* insufficient to set judgment aside.

> Default complained of was entered April 7, 1927, but judgment based thereon was not entered until February 3, 1928, and attorney in question was admitted by pleadings to have been suspended on March 1, 1928. It appeared that attorney was in good standing at time events complained of took place. Hence, under established rules, circumstances were not sufficient to set aside final judgment by bringing action in equity, as against contention that, since attorney was suspended from practice of law shortly after proceeding complained of, fact was sufficient circumstance to entitle clients to relief in equity; it appearing that same attorney had previously neglected their business.

Appeal from Superior Court, Los Angeles County; Harry W. Falk, Judge.

Action by Frank T. De Tray and another against R. C. Chambers. From a judgment in favor of defendant, plaintiffs appeal.

Affirmed.

Law & Overholt and R. E. Hobbs, all of Los Angeles, for appellants.

Delmar W. Doddridge and Harry D. Parker, both of Los Angeles, for respondent.

BARNARD, P. J.

This is an action in equity, brought for the purpose of setting aside a judgment obtained by the defendant herein against these plaintiffs in another action now pending in the superior court of Los Angeles county. In that other action, Frank T. De Tray and Ethel B. De Tray were suing R. C. Chambers and his wife for damages growing out of an automobile accident. Chambers and his wife answered, and at the same time R. C. Chambers filed a cross-complaint naming Frank R. De Tray and Ethel B. De Tray as cross-defendants. A general demurrer to this cross-complaint was sustained as to the cross-defendant Ethel B. De Tray. Later, an amended cross-complaint was filed by R. C. Chambers, and a demurrer thereto was overruled on March 16, 1927. On April 8, 1927, there was filed a notice of the overruling of this demurrer, which bore upon it an admission of service of the same. No answer was filed to the amended cross-complaint, and on April 21, 1927, an order was filed asking that the default of the cross-defendants be entered. Such a default was entered by the clerk on that day, and on February 3, 1928, a judgment for $800 and costs was entered on the cross-complaint. The court having refused relief under section 473 of the Code of Civil Procedure upon the ground that application therefor was made too late, this action in equity was brought for the purpose of setting aside the judgment referred to. From a judgment in favor of the defendant, the plaintiffs have appealed.

[1] Appellants' first contention is that certain findings, to the effect that notice of the overruling of the demurrer to the amended cross-complaint was served, are not supported by the evidence. The evidence shows that there was filed a notice of the overruling of this demurrer which had upon it the following:

"Service of the within notice is hereby admitted this 7 day of April, 1927. R. C. W. Friday & Ira A. Gwin, Attorneys for Plaintiff."

It appears from the evidence that while appellants had employed Friday as their attorney in that action, Gwin was at that time associated with Friday and in his offices; that they had an arrangement between them for dividing fees on matters that Gwin handled; that Friday depended upon Gwin to handle cases which he turned over to him; that Gwin prepared the pleadings in that action and was handling these demurrers; that Gwin frequently consulted with these appellants about that case, sometimes in the presence of Friday and sometimes alone; that a record of the service of this notice of overruling the demurrer was made by Gwin in his daybook; and that Gwin was in the habit of accepting service on documents on behalf of Friday, with Friday's knowledge and consent. This evidence is ample to sustain the findings complained of.

[2, 3] The court found that the attorney for the cross-defendants believed the amended cross-complaint to be a counterclaim, and for that reason failed to file an answer thereto. Appellants' next contention is that since the court thus found that a mistake had been made by the lawyer, equity has jurisdiction to give relief. In this connection may be considered another contention to the effect that equity will always give relief when there is no remedy at law. However, something more is required in an action in equity to set aside a judgment which has become final, than a mere showing of mistake. In Frost v. Hanscome, 198 Cal. 550, 246 P. 53, 57, the court said: "Equity will not afford relief against a final judgment unless extrinsic fraud and a meritorious defense be both alleged and proved. * * * Assuming that the allegations of the complaint herein were sufficient, the proof fell far short of establishing either requirement."

The last sentence might well have been used in the instant case. The court found that there was no fraud or collusion on the part of the cross-complainant and that no deception was practiced upon the court or upon these appellants. Not only does the evidence support this finding, but there is no evidence to the contrary. In Amestoy Estate Co. v. City of Los Angeles, 5 Cal App. 273, 90 P. 42, 44, the court said:

> "That a former judgment may be set aside by a court of equity on the ground of fraud, it must be fraud extrinsic or collateral to the questions examined and determined in the action. * * *
>
> "A different rule obtains when the proceedings are under section 473, Code Civ. Proc. That section is broad enough to justify the action of the court in relieving a party from a mistake of law upon the part of his attorney when from reliance thereon he was prevented from making a defense. Douglass v. Todd, 96 Cal. 657, 31 Am. St. Rep. 247, 31 P. 623. The broad provisions of that section are available, however, only to those seeking relief thereunder. It cannot be construed as an attempt to broaden the powers of a court of equity in determining its jurisdiction in an independent proceeding. The reason for applying different rules is obvious. In the one case, the motion is directed to the discretion of a trial court within a limited time and before the judgment has become final; in the other, it is the exercise of equitable powers by an independent court based upon established rules. The restricted power of equity is founded upon the proposition that the verity of a judgment should under all circumstances be maintained when the attack is only upon those matters considered by the court upon the original hearing, without which rule there would be no end to litigation, and no permanent rights could be established by judgments and decrees."

[4-6] Appellants urge that they had previously recovered a judgment in still another case in the municipal court, in an action arising out of the same automobile collision, If that had any bearing at all, it was a matter of defense which should have been set up in the original action. They also urge that the judgment in the original action purported to have been entered upon an amended cross-complaint, while the order to enter default was upon a cross-complaint; and also that the judgment in the original action was not in proper form and was defective. In the two last-mentioned respects, appellants had an adequate remedy, including an appeal. A plaintiff is not entitled to relief in equity upon grounds which would have been a defense, or which should have been set up in the original action. McPhee v. Reclamation District, 161 Cal. 566, 119 P. 1077. In Brum v. Ivins, 154 Cal. 17, 96 P. 876, 878, 129 Am. St. Rep. 137, the court said: "A court of equity is asked to interfere on behalf of a judgment debtor who claims that he had a meritorious defense to the original action, but failed to set up that defense. His neglect to appear in the justice's court and deny the averments of the complaint which had been served upon him was not due to any imposition or fraud on the part of the adverse party, nor is there a showing of mistake, surprise, or other equitable ground excusing the failure to defend. Nothing is better settled than the rule that a defendant who, under such circumstances, fails to defend against an action at law, cannot have relief in equity against the judgment in the action, on grounds which would have been a defense to the original suit."

[7] While appellants admit that they were unable to prove fraud, they contend that since their attorney was suspended from the practice of the law shortly after the proceedings complained of, that fact is a sufficient circumstance to entitle them to relief in equity, since it now appears that this same attorney had previously neglected their business. The default complained of was entered on April 7, 1927. The judgment based thereon was not entered until February 3, 1928, and the attorney in question is admitted by the pleadings to have been suspended on March 1, 1928. It appears that the attorney was in good standing at the time the events complained of took place. Irrespective of any sympathy we may have for the appellants, they are themselves responsible for the selection of an attorney and no fault, in that respect, is even charged to the respondent. While the circumstances may be unfortunate, under established rules, they are not sufficient to set aside a final judgment. Not only is it necessary that a certain security and permanence attach to a judgment which has been allowed to become final, but parties are given a very considerable time and opportunity to protect their interests before a judgment becomes final, and while the established rules may occasionally work a hardship, it cannot be questioned that, in general, they are wise and beneficial.

Appellants further contend that the original judgment which this action sought to set aside is absolutely void and therefore may be attacked anywhere, directly or collaterally. So far as our attention has been called to the facts, the judgment would appear to have been only voidable, at most, and the matters alleged called for action in the original case. Had such action been taken, all errors alleged could have there been cured.

The trial court having upon sufficient evidence found against the contentions of appellants on all of the essential matters, and no grounds for equitable relief being here shown, the findings and conclusions complained of cannot be here disturbed.

The judgment is affirmed.

We concur: MARKS, J.; JENNINGS, J.

112 Cal. App. 709

SWIFT v. ZURICH GENERAL ACCIDENT & LIABILITY INS. CO., Limited.

Civ. 7522.

District Court of Appeal, First District, Division 2, California.

March 20, 1931.

Rehearing Denied April 18, 1931. Hearing Denied by Supreme Court May 18, 1931.

1. Insurance 🔑435.

In deciding whether automobile indemnity policy extends to particular operator of automobile, court will seek intention of parties.

2. Insurance 🔑435.

"Omnibus Coverage Endorsement," stated to be substitute for inconsistent provisions in automobile indemnity policy, extended coverage to any person legally operating automobile with insured's consent, leaving matter of operator's age to be determined by laws of state or subdivision, notwithstanding clause in policy excepting operator under 16.

While policy provided that it should not cover in respect to automobile driven by person under sixteen years of age, rider entitled "Omnibus Coverage Endorsement" extended policy to "any person" while "legally operating" automobile, and provided that indorsement was issued subject to provisos, conditions, and warranties contained in policy "if not inconsistent herewith."

3. Insurance 🔑150.

Rider must be read with every clause of policy as if set forth therein.

4. Insurance 🔑150.

Rider, expressly stated to be substitute for inconsistent provisions of policy, will control.

5. Insurance 🔑146(3).

Where ambiguity in policy was caused by insurer, policy will be interpreted most favorably to insured.

Appeal from Superior Court, City and County of San Francisco; H. S. Gans, Judge.

Action by Virginia Swift against the Zurich General Accident & Liability Insurance Company, Limited. From a judgment in favor of plaintiff, the defendant appeals.

Affirmed.

J. Hampton Hoge, of San Francisco (A. Dal Thomson, of San Francisco, of counsel), for appellant.

Jerome H. Bayer and George N. Crocker, both of San Francisco, for respondent.

NOURSE, P. J.

Plaintiff sued upon a policy of insurance providing indemnity in the operation of a certain automobile. The cause was tried by the court without a jury. Plaintiff had judgment, and defendant has appealed on typewritten transcripts.

While the automobile was being driven by plaintiff's minor son a collision occurred. Suit was commenced against plaintiff for damages. The matter was settled, and judgment was by consent entered against plaintiff for $1,887. Plaintiff then sued defendant on her policy for this sum and obtained judgment in that amount.

The policy undertook to indemnify the plaintiff against loss from the liability imposed by law respecting bodily injuries "by any person or persons (except those persons referred to in the proviso entitled 'Exclusions') as a result of the ownership, maintenance or use of" the automobile. The paragraph entitled "Exclusions" provided that the policy should not cover in respect to an automobile while driven by any person under sixteen years of age, or by any person under the age fixed by law, or while driven in any race or speed test, or elsewhere than within the limits of the United States and Canada. A rider was attached to the policy entitled "Omnibus Coverage Endorsement" and reading: "The policy * * * *is hereby extended* to apply to *any person* or persons * * * while riding in or *legally operating* any of the automobiles * * * and any person * * * legally responsible for the operation thereof. * * * This endorsement is issued subject to all the provisos, conditions and warranties contained in the policy * * * *if not inconsistent herewith.*" (Italics ours.)

[1] The single question of law involved on this appeal is whether this omnibus coverage rider supersedes the proviso in the body of the policy to the effect that the policy should not cover when the car was operated by one under sixteen years of age. In deciding a question of this character, the courts will always seek to find the intention of the parties. The trial court found and ruled

that this proviso was superseded by the omnibus clause, and we are satisfied that this judgment should be affirmed.

[2] In the original printed form of the policy the company agreed to indemnify the assured against damages suffered by any person or persons (except those persons mentioned in the proviso) as a result of the operation of the car. There was no limitation upon the right of the assured to permit another to operate the car, but there was an uncertainty in the policy as to the liability of the company for damages resulting while another operated the car with the owner's consent. The "persons" excepted from the policy by the proviso are those suffering injury through the operation of the car by one under legal age, by one under sixteen years of age, and by one engaged in a race or traveling outside the limits of the United States and Canada. By the terms of the rider the coverage of the policy was *extended* to apply to *any person* or *persons* legally operating the car with the consent of the assured. The rider is designated as "Omnibus Coverage Endorsement" and must be interpreted as a special provision of the policy relating to the subject of coverage of persons. When, by the express terms of the rider, it is declared to be a substitute for any inconsistent provision in the body of the policy it would seem that the intention of the parties was to treat the rider as extending the coverage to "any person or persons * * * legally operating the car" with the consent of the assured, leaving the matter of the age of the operator to be determined by the laws of the state or political subdivision where the car was operated.

[3-5] The only rules of law involved in the appeal are that the rider must be read with every clause of the policy as if it were set forth in the body of the policy (Burr v. Western States Life Ins. Co. [Cal. Sup.] 296 P. 273) that, when it is expressly stated in the rider that it is substituted for inconsistent provisions of the body of the policy, the rider will control (32 Cor. Jur., pp. 1159, 1160), and that, when there is any ambiguity in the policy caused by the insurer, the policy will be given an interpretation most favorable to the assured (Maryland C. Co. v. Industrial Acc. Com., 178 Cal. 491, 494, 173 P. 993; 14 Cal. Jur., p. 443, § 24).

Here the policy seems to have been written with the design to make it ambiguous, because, if the omnibus coverage indorsement contained in the rider was not intended to be "omnibus" in the matter of coverage, but was intended to be controlled by inconsistent exceptions in the body of the policy, it would have been a simple matter to have so declared that intention in the rider. If, therefore, we have misjudged the intention of the parties in the interpretation we have placed upon the contract, the respondent is nevertheless entitled to that interpretation under the rule stated in the section in California Jurisprudence cited above.

Judgment affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

112 Cal. App. 718

INTERSTATE LUMBER CO. v. RIGHTMAN et al.

Civ. 7663.

District Court of Appeal, First District, Division 1, California.
March 21, 1931.

1. Mechanics' liens 🔑281(1).

Materialman seeking to foreclose lien against lessor for materials furnished lessee must show what material was affixed to building, and its value.

2. Mechanics' liens 🔑281(1).

In materialman's action against lessor to foreclose lien for materials furnished lessee, evidence did not show what material was affixed to building.

> There was evidence that there were eight or ten tables which were not attached to the floor, and there was also evidence from which court could conclude that at least some of counters and shelves were not affixed to building.

Appeal from Superior Court, Los Angeles County; Charles C. Montgomery, Judge.

Action by the Interstate Lumber Company against Marcus Rightman and others to foreclose a materialman's lien. From a judgment in favor of named defendant, plaintiff appeals.

Affirmed.

John F. Poole, of Los Angeles, for appellant.

Wolfson & Swarthe, of Los Angeles, for respondent.

DOOLING, Justice pro tem.

This is an appeal from a judgment in favor of respondent, Rightman, in an action to establish and foreclose a materialman's lien.

[1, 2] Respondent, Rightman, is the owner of a certain store building, and let a store therein to L. C. Parslow Stores Co. The Parslow Company purchased lumber and similar

material from appellant of the value of $260.60, which was used to equip the store for use by it. Appellant claims that the judgment is erroneous because the evidence shows that the material was all affixed to the building. The evidence does not so show, however. The witness Morris, called by appellant, testified that there were eight or ten tables which were not attached to the floor in any way, and there is also evidence from which the court could conclude that at least some of the counters and shelves were not affixed to the building.

The burden was on plaintiff to show just what material was affixed to the building and its value. We have searched the record in vain for any evidence from which the trial court or this court could determine what part of the material furnished was affixed to the building or what was its value. Appellant "could not assert a lien for materials of uncertain value and amount." Hammond Lumber Co. v. Pile, 202 Cal. 624, 625, 262 P. 715; McClain v. Hutton, 131 Cal. 132, 141, 142, 61 P. 273, 63 P. 182, 622.

Judgment affirmed.

We concur: TYLER, P. J.; CASHIN, J.

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113 Cal. App. 25

MOORE v. BISHOP et al.

Civ. 6581.

District Court of Appeal, Second District,
Division 2, California.
March 25, 1931.

1. Automobiles 🔑245(8, 74).

Whether truck driver was negligent, and whether nine year old girl injured while crossing intersection was contributorily negligent *held* for jury.

2. Appeal and error 🔑1001(1).

Verdict determining questions of fact, if supported by any substantial evidence, is conclusive.

3. Automobiles 🔑150.

Automobile driver has no right to assume that road is clear, but under all circumstances and at all times must be vigilant and anticipate presence of others.

4. Negligence 🔑85(1).

Contributory negligence will not ordinarily be attributed to young child.

5. Negligence 🔑136(29).

Minor child's contributory negligence is necessarily question of fact for jury, not question of law for court.

6. Negligence 🔑85(2).

Ordinary care which child of limited judgment and experience is required to exercise is not same quantum of care which adult would be required to use under same circumstances.

7. Negligence 🔑83.

Last clear chance doctrine applies equally where plaintiff is wholly unaware of danger and therefore unable to escape, and where plaintiff, being in position of danger, cannot escape by ordinary care.

8. Automobiles 🔑246(58).

Evidence showing that truck driver knew school children crossed intersection and saw injured child about 60 feet away *held* to justify instruction on last clear chance.

9. Appeal and error 🔑110.

Order denying new trial is reviewable only on appeal from judgment.

Appeal from Superior Court, Los Angeles County; John L. Fleming, Judge.

Action by Dorothy F. Moore, by Samuel W. Moore, her guardian ad litem, against Roland P. Bishop and others, copartners doing business under the firm name and style of Bishop & Company, and another. From a judgment for plaintiff and an order denying a new trial, defendants appeal.

Appeal from the order denying a new trial dismissed, and judgment affirmed.

Charles H. Goebel, of Los Angeles, for appellants.

W. Joseph Ford, J. F. Moroney, and Patrick F. Kirby, all of Los Angeles, for respondent.

CRAIG, Acting P. J.

The respondent, a minor of the age of about nine years, was injured by a truck of the appellant copartnership, which was being driven by appellant Swadener, while attempting to cross a public street in the city of Los Angeles. In an action by her guardian ad litem she was awarded judgment in the sum of $800, and the defendants appealed.

Respondent was walking with other children in an easterly direction on the sidewalk along the southerly side of Fourth street. The truck was traveling in a southerly direction on Soto street toward Fourth street. Both entered the intersection at about the time the street signals changed to direct traffic easterly and westerly. The respondent testified that when she stepped into Fourth street she looked in each direction, and that the only machines she saw seemed to be about one block away. There is a conflict of evidence as to whether one or both signals had sounded when the children left the curb. One of them swore that the second signal had sounded when the truck arrived at the southerly line of the street car tracks, and the driver testified that it was running at about 12 to 15 miles an hour. It could reasonably have been inferred by the jury that appellant Swadener drove into the intersection without slackening speed nor contemplating the possibility of a change of signals or the presence of school children on the street.

[1-6] Appellants' various contentions—that is, that there was no evidence of negligence, that the respondent was guilty of contributory negligence, and that an instruction as to the duty of the driver to foresee danger of children at the intersection and to control his truck accordingly was erroneous—present questions which under the circumstances of the case lay to a great extent within the province of the jury and the discretion of the trial court. As to whether or not the weight and speed of the vehicle, the importance and exigency of business as compared with safety, the proximity of a street crossing and imminence of stop signals, as well as the rights of pedestrians, were all considered and observed, remained for the jury to determine. They were questions of fact which, if supported by any substantial evidence, were conclusively ascertained at the trial and there finally decided. A city ordinance introduced by the defendants provides that when a bell of the traffic signal rings no traffic shall enter an intersection until the green or "go" signal is shown, that "it shall be unlawful for any pedestrian to cross the roadway other than with released traffic," and that the "green" signal "requires that the traffic shall move and remain in motion, except when stopped for the purpose of avoiding an accident or in case of other emergency," etc. The rule applicable to steam railroads, that an engineer need not stop his train, but might assume that one approaching the track would halt or leave the right of way, is stressed by the citation of numerous authorities appropriate to such cases. And it is insisted from the foregoing that if respondent entered the intersection contrary to the provisions of the ordinance, she would be guilty of a violation of law, and hence of contributory negligence. This would compel the inference that the driver of an automobile upon urban highways. in thickly populated centers, may proceed with an assurance and momentum commensurate with the independence and despatch of an interurban steam trunk line over a private right of way. In view of the record in this case, either proposition would be abhorrent to the law and to reason. Not alone is there evidence from which the jury might properly have concluded that the children did not violate the ordinance in this respect, but they would have been justified in finding, as doubtless they did, from the speed of the machine and the circumstances of the collision, that the truck entered the intersection after the signal had sounded, and that it was not under control, enabling the driver to comply with the exception, "for the purpose of avoiding an accident." It has repeatedly been held that the driver of an automobile has no right to assume that the road is clear, but under all circumstances, and at all times, he must be vigilant and must anticipate and expect the presence of others. Meyers v. Bradford, 54 Cal. App. 157, 201 P. 471; Rush v. Lagomarsino, 196 Cal. 308, 237 P. 1066; Morgan v. L. A. R. & G. Co., 105 Cal. App. 224, 287 P. 152. Further, contributory negligence will not ordinarily be attributed to a child of tender years. Seperman v. Lyon Fire Proof Storage Co., 97 Cal. App. 654, 275 P. 980. Contributory negligence of a minor must, in the nature of the case, be a question of fact for the jury rather than of law for the court; and it is their province to determine whether or not the child duly exercised such judgment as she possessed, taking into consideration her years, experience, and ability. The ordinary care which a child of limited judgment and experience is called upon to exercise in a given act is not the same quantum of care which an adult would be called upon to use under the same circumstances. Foley v. Cal. Horseshoe Co., 115 Cal. 184, 47 P. 42, 56 Am. St. Rep. 87; O'Connor v. Golden Gate W. M. Co., 135 Cal. 537, 67 P. 966, 87 Am. St. Rep. 127; Jenson v. Will & Finck, 150 Cal. 398, 89 P. 113.

[7, 8] It is contended that the doctrine of last clear chance involves an assumption of gross negligence on the part of the defendant, and that the trial court erred in instructing the jury that: "One having knowledge of the dangerous situation of another, and having a clear opportunity by the exercise of proper care to avoid injuring another, must do so, notwithstanding that the latter has placed himself or herself in such situation of danger by his or her own negligence. If, therefore, you should find from the evidence that the driver of the truck in question, which collided with the plaintiff, saw the plaintiff in the street and could have stopped his truck without injuring her, and by so stopping the truck within the shortest time and space possible under the circumstances could have avoided the collision, and neglected to do so, in consequence of which neglect to so stop said truck the plaintiff was injured, then the plaintiff is entitled to a verdict, provided, after discovering her peril, she used ordinary care to escape injury." It is contended that there is no evidence in the record tending to show that the driver had such opportunity and that he failed to avail himself thereof. Conflicting testimony of several witnesses placed the respondent at distances of from two to twenty-five feet from the westerly curb at the time of her injury by the truck. The driver's own version of the occurrence is far from con-

sistent. It appeared that thousands of children daily crowded the streets at this intersection from four schools in the immediate vicinity, and that the driver constantly traversed the same and was fully aware of such conditions. It also appeared from his testimony that he first saw the child about sixty feet away, and that he continued his course about the same distance before stopping after the impact. The street was about sixty feet in width. When asked where he was when the bell rang, he testified, "I was just entering the intersection," and that when the plaintiff started to cross he "was just crossing the second car tracks." "The doctrine of last clear chance applies equally to the case of where the plaintiff is wholly unaware of the danger and for that reason unable to escape it as to the case of being in a position of danger from which he cannot escape by the exercise of ordinary care." Hoy v. Tornich, 199 Cal. 545, 250 P. 565. From the evidence as disclosed to the jury, we do not deem the instruction in question unwarranted or prejudicial.

[9] The defendants appealed from an order denying a new trial. Such order being reviewable only upon appeal from the judgment, the appeal therefrom is dismissed.

The judgment is affirmed.

We concur: IRA F. THOMPSON, J.; ARCHBALD, Justice pro tem.

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112 Cal. App. 542

SHERRATT v. HELLMAN COMMERCIAL TRUST & SAVINGS BANK et al.

Civ. 349.

District Court of Appeal, Fourth District, California.

March 14, 1931.

1. Pleading 🔑34(1).

Complaint was not insufficient on theory that one paragraph alleged fraud only upon information and belief where another paragraph definitely and positively alleged fraud in particulars clearly set forth.

2. Estoppel 🔑78(1).

Clause in land contract that purchaser is not induced to buy by vendor's representations is not controlling, when entire contract is induced by fraud.

The contract in question contained a clause to the effect that the property had been inspected by the purchaser, and was being purchased as a result of that inspection, and not because of any representation made by the vendor or any selling agent of the vendor.

3. Vendor and purchaser 🔑44.

Conflicting evidence did not conclusively show that stakes showed number of lot purchased.

Purchaser suing for rescission of land contract contended that he was not able to determine the correct number of the lot from an inspection of the property, and there was conflict in testimony as to whether numbered stakes were on lots at time lots were inspected by plaintiff.

4. Contracts 🔑270(1).

General rule is, person desiring to rescind must do so promptly.

5. Contracts 🔑97(1).

One retaining benefits of contract and continuing to treat it as binding is deemed to have waived fraud and elected to affirm contract.

6. Appeal and error 🔑1010(1).
Contracts 🔑270(3).

Whether party has rescinded contract promptly on discovering fraud is ordinarily question for trial court, and, if its conclusion is reasonably supported, appellate court will not interfere.

7. Vendor and purchaser 🔑119.

Purchaser's right to rescind land contract *held* not barred by laches.

The contract was dated November 10, 1924, and the complaint alleged that the plaintiff on October 8, 1925, first discovered that he had been given contract for different lot than he had inspected; that he immediately notified vendor's agents, and demanded agreement be corrected; that he had numerous conferences from that day until October 28, 1926, in attempting to adjust matter, and, upon conclusion of such negotiations, vendor's agents refused to correct agreement or return amount paid, and plaintiff served written notice of rescission, after which action was filed January 14, 1927.

8. Vendor and purchaser 🔑44.

Substantial damage to purchaser was shown, where he received different lot than he agreed to buy and lot received required more excavation.

A great deal more excavation would be required upon the lot received than upon that which purchaser agreed to buy in order to build thereon, and lot he agreed to buy had frontage upon two streets, which fact was mainly responsible for his entering into the agreement.

Appeal from Superior Court, Los Angeles County; W. Cloyd Snyder, Judge.

Suit by Harry I. Sherratt against the Hellman Commercial Trust & Savings Bank and others. Judgment for plaintiff, and defendants appeal.

Affirmed.

L. E. Dadmun, of Los Angeles, for appellants.

Youngworth, McClean & Hartman, of Los Angeles, for respondent.

BARNARD, P. J.

This is an action for rescission of a contract to purchase real estate and to recover the portion of the purchase price paid. The action is based upon the claim that the plaintiff was fraudulently shown a particular lot in a subdivision by certain of the defendants acting as agents for certain other defendants, and that, after agreeing to purchase the property upon which they then stood, the plaintiff was given a contract for a different lot, being one that he had particularly refused to buy. This contract was dated November 10, 1924. There were no buildings on the lot, and the complaint alleges that the plaintiff first discovered he had been given a contract for a different lot on or about the 8th day of October, 1925; that he immediately notified the agents who had sold him the property, and demanded that the agreement be corrected to describe the lot he had agreed to buy; and that from that day until the 28th day of October, 1926, the plaintiff and the defendant agents held numerous conferences in attempting to settle and adjust the matter, but, upon the conclusion of these negotiations, the defendant agents refused to correct the agreement or to return the amount paid. Thereupon the plaintiff served a written notice of rescission and offered to restore everything of value which he had received. This action was filed on January 14, 1927, and, from a judgment in favor of the plaintiff, the defendants have appealed.

[1, 2] Appellants first attack the sufficiency of the complaint. A number of suggestions are made, which are obviously without merit, and only two grounds of attack are sufficiently set forth to call for attention. It is first insisted that the complaint does not allege fraud definitely, but only upon information and belief. This is apparently addressed to paragraph VI of the complaint, in which an allegation, upon information and belief, is intended to apply to the knowledge of the defendants. Aside from any other consideration, paragraph V of the complaint definitely and positively alleges fraud in particulars which are clearly set forth. Another alleged reason why the complaint is not sufficient is, that the contract contains a clause to the effect that the property had been inspected by the buyer, and was being purchased as a result of that inspection, and not because of any representation made by the seller or any selling agent of the seller. Not only does this clause of the contract not appear in the complaint, but, in any event, the clause is not controlling when the entire contract has been induced by fraud. As was said in Palladine v. Imperial Valley Farm Lands Ass'n, 65 Cal. App. 727, 225 P. 291, 299: "The fraud which was the inducing cause of the execution of the contract renders the whole instrument vulnerable—the clause in question as well as all the other provisions."

[3] A number of other points are raised which all go to the effect that the plaintiff personally inspected the property and did not rely upon any representations made, and a particular finding to the effect that the plaintiff was not able to determine the correct number of the lot from an inspection of the property is attacked as not supported by the evidence. It is insisted that the evidence conclusively shows that four stakes on each lot were so numbered as to plainly and clearly show the number of the lot. While there is much evidence in the record to show that such numbered stakes were on the lots at some time, and while there is some evidence that they were on the lots at the time they were inspected by the respondent, there is other evidence to the contrary, and the most that can be said in regard to these points is that they relate to a conflict in the evidence, which has been resolved by the trial court in favor of the respondent.

[4-7] The main ground relied upon as necessitating a reversal is that the respondent was guilty of laches, and that his right to recover is therefore barred. The court found that, on the same day he discovered he had been sold the wrong lot, the respondent went to the selling agents, and demanded that his agreement be corrected to cover the land he had actually bought, or that the money he had paid be refunded to him, and this finding is not attacked. The court also found that from October 8, 1925, to and including October 28, 1926, conferences and negotiations were pending and held between the parties in attempting to settle and adjust this matter, and that, when the selling agents refused to correct the agreement or repay the amount paid, the respondent then promptly gave notice of rescission and offered to return all he had received. The notice of rescission appears in the record. While these negotiations were pending, and early in January, 1926, the respondent went to see the head of the John A. Evans Corporation and told him he either wanted the lot he bought or his money back. He was told that the other lot was sold and that his money would not be returned. He was further told that he

would be foolish to take the matter to court, because he would lose anyway, since they had four or five lawyers to take care of things of that sort. However, John A. Evans told him to go to the office of the John A. Evans Corporation. When he went there, he was told that, if he would give them a "60-day exclusive" on the property, he would get his money. He did this, but did not receive his money. The various findings of the court upon this subject are not attacked by appellants, but their argument is confined to the proposition that laches is shown as a matter of law. It is the general rule that a person desiring to rescind must do so promptly. Civ. Code, § 1691. If a person retains the benefits of a contract and continues to treat it as binding, he will be deemed to have waived any fraud and to have elected to affirm the contract. Cross v. Mayo, 167 Cal. 594, 140 P. 283. In this case, the respondent did not retain any benefits of the contract and did not treat the same as binding, but merely gave to the defendants, in reliance upon their own suggestions, time and opportunity in which to adjust the matter. This is especially suggestive in view of the youth and inexperience of the respondent. Whether or not a party to a contract has rescinded promptly upon the discovery of fraud is ordinarily a question to be decided by the trial court, and, if its conclusion is reasonably supported by the evidence, an appellate court will not interfere therewith. Suhr v. Lauterbach, 164 Cal. 591, 130 P. 2; Davis v. Butler, 154 Cal. 623, 98 P. 1047. In the case of Powell v. Oak Ridge Orchards Co., 84 Cal. App. 714, 258 P. 636, 638, the court said:

"The claim of laches in rescinding the contract is also without merit. In September, 1922, which was the month following the discovery of the soil conditions, Powell went to Orange county, the residence of the defendant corporation, seeking a rescission of the contract. There, in conversation with the officers of said corporation, he offered to return everything he had received by virtue of the contract and demanded repayment to him of the money he had expended thereunder. His offer of rescission was not acted upon at that time, however, said officers informing him that his proposition would be brought before the directors of the company at its next meeting, and that as soon as a decision was reached he would be notified. After waiting vainly for a reply until February 15, 1923, he served formal notice of rescission, and, as already stated, on April 21, 1923, commenced this action. 'Where a party protests promptly on discovering that he has been defrauded in making a contract, and then enters into negotiations for a peaceable settlement, which fail, a bill for cancellation of the contract, filed within a reasonable time after such failure, is not barred by laches.' 2 Black on Rescission and Cancellation, § 544.

"Moreover, 'there is no artificial rule as to the lapse of time or circumstances which will justify the application of the doctrine' of laches (Kleinclaus v. Dutard, 147 Cal. 245, 81 P. 516), the question of whether or not a party defrauded has rescinded promptly depending upon all the circumstances of the particular case and being primarily one for the trial court to determine (French v. Freeman [191 Cal. 579, 217 P. 515], supra); and if its conclusions thereon find reasonable support in the evidence the reviewing court will not interfere therewith (Suhr v. Lauterbach, 164 Cal. 591, 130 P. 2)."

Under the circumstances here existing, we are unable to say that the respondent did not use reasonable diligence in giving notice of rescission, and in beginning this action. He gave verbal notice to appellants the day discovery was made. In view of the fact that the pending negotiations, which were based upon representations that by giving them time they would get his money for him, continued until October 28, 1926, and that, when it appeared there was no use in waiting longer, a formal notice of rescission was given, we cannot say that the trial court was not justified in holding that there was no laches. The time between the formal notice of rescission and the filing of the action was not unreasonable, as has been held in many cases. Not only do the appellants appear to have been more responsible than respondent for any existing delay, but prejudice from such delay in no manner appears.

[8] It is next urged that the respondent has shown no damage, and that it does not appear that the lot referred to in the contract was not as valuable as the lot he agreed to buy. Not only is a purchaser entitled to get what he agrees to buy, but the evidence shows a marked difference between the two lots, in that a great deal more excavation would be required upon one lot than on the other, in order to build thereon, and the lot he agreed to buy had a frontage upon two streets, which fact was mainly responsible for his entering into the agreement. We think a substantial damage was shown. Spreckels v. Gorrill, 152 Cal. 383, 92 P. 1011; Taber v. Piedmont Heights Building Co., 25 Cal. App. 222, 143 P. 319.

The judgment appealed from is amply sustained by the evidence, and we find nothing in the record that would have justified a different conclusion, except certain evidence which merely raises a conflict and which apparently was not accepted as true by the trial court.

The judgment is affirmed.

We concur: MARKS, J.; JENNINGS, J.

112 Cal. App. 653

KRAFT v. ACME STEVEDORE CO. et al.

Civ. 6997.

District Court of Appeal, First District, Division 2, California.

March 18, 1931.

Rehearing Denied April 17, 1931. Hearing Denied by Supreme Court May 14, 1931.

1. Damages 🔑173(2).

In personal injury action, evidence that plaintiff was semiprofessional baseball player was admissible.

2. Trial 🔑296(11).

Error, if any, in authorizing jury to consider "probabilities" of plaintiff's future earnings if he had not been injured, *held* cured by other instructions (Civ. Code, § 3283).

Court in other instructions stated that, in fixing damages for permanent injury, jury should consider whether it would impair future earning capacity of plaintiff; that plaintiff was entitled only to pecuniary damage actually suffered; that measure of plaintiff's recovery was what is denominated compensatory damages; and that jury should allow plaintiff only such sum as would compensate him for damages suffered from injuries which were proximately caused by defendant's negligence.

3. Statutes 🔑231.

Title of Code section in Code must be read with body of section.

4. Trial 🔑296(3).

Instruction persons must so use their property so as not to cause injury and failure to perform such duty constitutes negligence *held* not prejudicially erroneous when read with another instruction.

The instruction complained of was preceded by instruction to effect that in case presented, which was action for injuries sustained in collision between trucks used for transporting freight about pier, defendants were required to use ordinary care, by which was meant that degree of care which would be used by person of ordinary prudence under same or similar circumstances.

5. Damages 🔑132(6).

$20,000 to 24 year old stevedore, hoisting engineer, and baseball player *held* not excessive for injury to foot, necessitating operations and leaving bone protruding from heel.

Evidence showed that doctor and other bills amounted to $770; that before trial and following accident plaintiff's loss in wages amounted to $5,500; that he had undergone five operations and taken 190 treatments, and had been and was suffering pain; and that plaintiff was compelled to wear padded shoe to protect his heel and to walk on ball of his right foot, and that any improvement in conditions was problematical.

SPENCE, J., dissenting.

Appeal from Superior Court, City and County of San Francisco; Louis H. Ward, Judge.

Action by Milton Kraft against the Acme Stevedore Company and others. From a judgment for plaintiff, defendants appeal.

Affirmed.

See, also, 290 P. 57.

Gillogley, Crofton & Payne and Hadsell, Sweet & Ingalls, all of San Francisco, for appellants.

Melvyn I. Cronin and William Denman, both of San Francisco, for respondent.

STURTEVANT, J.

This appeal is taken from a judgment in favor of plaintiff and against the defendants Acme Stevedore Company, a corporation, and Jack Bishop in the sum of $20,000 for personal injuries received by plaintiff.

The accident happened on June 28, 1927, near a cafeteria at the west end of pier 32 on the San Francisco water front. This pier runs in an easterly and westerly direction. Both Kraft and Bishop were employed as operators of small trucks used for transporting freight and towing small flat cars about the pier. Kraft was operating an electric truck for the Matson Navigation Company, while Bishop was operating a gasoline truck for the Acme Stevedore Company. The injuries to Kraft resulted from a collision between these trucks. On the southerly side of the pier and along the center portion thereof there was an aisle down the pier formed by piles of cased pineapple. Bishop operated his truck at a low rate of speed in a westerly direction along the pier toward the cafeteria, towing three small flat cars. He then made a horseshoe turn near the cafeteria to proceed back in an easterly direction down the pier. Prior to the accident, Kraft had been unloading cases of pineapple from his truck to a pile on the southerly side of the pier. There is a conflict in the evidence concerning the position of Kraft's truck just before the accident occurred. Bishop testified that he saw Kraft's truck just prior to making the turn, and that it was not projecting into the main aisle running down the pier. He further testified that the position of the truck was changed as he made the turn so that it projected into the main aisle. Kraft was on his truck in a position to operate it, but testified that he did not move the truck while Bishop was making the turn. Shortly before the collision, Bishop looked back to see that the small flat cars he was towing did not come in contact with persons on the pier near the cafeteria as he made the turn. At the time of the collision, Kraft's right foot was jammed between the pedals of his truck, causing his injuries.

[1] During the presentation of his case, Kraft testified that he was a baseball player. As he stated it, he was a semiprofessional. That evidence was admissible. Scally v. W. T. Garratt & Co., 11 Cal. App. 139, 145, 104 P. 325. In no place did he testify that he had a firm offer of a high salary as a baseball player.

[2] The defendants make three points, all of which attack the verdict as being excessive. They claim that one instruction given at plaintiff's request authorized the jury to go into the realm of guessing and speculating. We think not. It was one of several instructions given on cognate subjects. Reading all of them together, we cannot say the error was prejudicial. First, we quote that part of the instruction complained of, and then we set forth some other passages. "You are instructed that in determining the extent to which the earning capacity of plaintiff has been impaired by his injuries, you may take into consideration if you see fit what he has been earning in the immediate past and the probabilities of what his earnings would have been in the future if he had not received his injury." (Tr. 299.)

"* * * In fixing damages for said permanent injury, you should consider * * * whether or not it will impair the future earning capacity of the plaintiff. If you find * * * the plaintiff's injury will cease to cause pain and suffering and will not impair his earning capacity then plaintiff will be entitled to a smaller measure of damages. * * * In either case plaintiff is only entitled to the pecuniary damage actually suffered." (Tr. 298, 299.)

"The court instructs the jury that if you find that the plaintiff is entitled to recover, the measure of his recovery is what is denominated compensatory damages; that is, such sum as will compensate him for the injury he has sustained." (Tr. 296, 297.)

"* * * You should allow the plaintiff only such sum as will compensate him for the damage suffered from the injuries which were proximately caused by the negligence of the defendant. And in this regard you are instructed that you are not permitted to speculate, or surmise, as to whether or not the plaintiff has suffered any injuries as the proximate result of said accident, but that the plaintiff must establish by a preponderance of the evidence that he did actually, as the proximate result of said accident, suffer certain injuries, and it is only as to such injuries, if any, that the plaintiff proves by a preponderance of the evidence that he suffered as a proximate result of said accident that you may award him damages." (Tr. 298.) The error, claimed to be in the first instruction, is that it uses the expression "probabilities" instead of using the words "certain to result." Civ. Code, § 3283. That section is worded as follows: "*Injuries Resulting or Probable After Suit Brought.* Damages may be awarded, in a judicial proceeding, for detriment resulting after the commencement thereof, or certain to result in the future." But we think the error, if any, was cured by the other instructions from which we have quoted. Norton v. Houlette, 85 Cal. App. 233, 235, 258 P. 1104; Brown v. Beck, 63 Cal. App. 686, 697, 220 P. 14; Rouse v. Pac. Elec. Ry. Co., 27 Cal. App. 772, 774, 151 P. 164; Hersperger v. Pac. Lumber Co., 4 Cal. App. 460, 467, 88 P. 587, 591; Lonnergan v. Stansbury, 164 Cal. 488, 129 P. 770. For these reasons we do not think the case at bar is to be ruled by Richman v. S. F., etc., Ry., 180 Cal. 454, 460, 181 P. 769. In making this attack the defendants, in their last brief, earnestly contend that there is a great difference between the words challenged and the expression if it had read, "* * * what he has been earning in the immediate past and what his earnings would probably have been in the future. * * *" It does not so impress us. We think the same principles which we have adverted to would apply.

[3] It will be noted that hereinabove we used the expression "the error, if any. * * *" We did so advisedly. The subject to which the instruction was addressed in the instant case was future earnings, not to bodily injuries. Now it is settled law that in this state the title of a Code section as printed in the Code is to be read with the body of the section when the section is being construed. Bettencourt v. Sheehy, 157 Cal. 698, 701, 702, 109 P. 89. When the body and title of Civil Code section 3283 are read together, and applied to future earnings as the same may be based on legal evidence theretofore introduced, the mind naturally considers the probable length of the injured man's probable life, the continuance of his health, and probable continuance of the wage rate. The Code section, title and all would seem to authorize that manner of reasoning. But we express no opinion on the point. We rest our ruling on the cases cited above.

[4] On the request of the plaintiff, the trial court instructed the jury "It is the duty of all persons *so* to use their property *so* as not

to cause injury to others, and a failure to perform said duty constitutes negligence." It is not an apt expression of the law. The two words which we have italicized are small, but they limit the rest of the expression. The instruction was preceded almost immediately by another instruction worded as follows: "The court instructs you that in the case presented defendants were required to use ordinary care, by which is meant that degree of care that would be used by a person of ordinary prudence under the same or similar circumstances." Reading both instructions together, we think it can reasonably be claimed that the first one stated to the jury that the operator of property must use some care, and that the second instruction informed the jury that in the case on trial the operator was bound to use ordinary care. As so construed, the challenged instruction did not contain prejudicial error.

[5] The defendants further claim that the verdict was excessive. The verdict was high, it will be conceded; but, under the facts, it cannot at first blush be said that the verdict, in part, rests on passion or prejudice. Campanella v. Campanella, 204 Cal. 515, 523, 269 P. 433. Doctor bills, etc., amounted to $770. Before the trial and following the accident, his loss in wages amounted to $5,500. He experienced the accident, and down to the date of the trial he had undergone five operations and 190 treatments, and had been and was suffering pain, at times intense. Proper damages for the foregoing elements would greatly reduce the verdict which was in the sum of $20,000. By reason of the accident and the necessary operations, the plaintiff's right heel has been so torn or cut away that the bone protrudes, and there is no flesh to support his heel. He is compelled to wear a padded shoe to protect his heel and to walk on the ball of his right foot. Any improvement in the conditions is problematical. At the time of the trial he was twenty-four, and his expectancy was over thirty-eight years. He weighed 186 pounds, and by occupation was at times a stevedore, hoisting engineer, and baseball player. In these occupations he had the capacity to earn $3,000 a year. Sometimes he was out of work, and then his earnings were reduced. But the evidence showed that sometimes he had continuous employment for six months. The defendant asserts that the jury estimated the plaintiff's loss of earnings by assuming that he was a high-salaried baseball player. The record does not contain such evidence, and, furthermore, the record does not show that the jury based its verdict, in whole or in part, thereon.

We find no prejudicial error in the record. The judgment is affirmed.

I concur: NOURSE, P. J.

SPENCE, J.

I dissent. The trial court gave the following instruction: "It is the duty of all persons so to use their property so as not to cause injury to others and a failure to perform said duty constitutes negligence." This is more than an inapt expression of the law. It is an entirely erroneous definition of negligence. It was the duty of defendants to exercise ordinary care in the use of their property so as to avoid injury to plaintiff. If they failed to exercise ordinary care under the circumstances, they were chargeable with negligence; otherwise they were not. The foregoing instruction was bound to be misleading, and would obviously tend to confirm the erroneous impression of many laymen that liability in personal injury cases is predicated upon any use of one's property causing injury to another. It not only warranted the jury in basing a finding of negligence merely upon the happening of the accident without regard to the amount of care exercised, but in effect directed such a finding, thus making the rule of negligence absolute and not relative. The fact that another instruction imposed upon defendants the duty to exercise ordinary care does not cure the error complained of. Defendants were still negligent under the foregoing instruction if they used their property in any manner so as to cause the injury.

Counsel for respondent does not attempt to justify the giving of this instruction, but cites section 4½ of article 6 of the Constitution, and quotes from 19 Cal. Juris. p. 747, as follows: "Thus even though an erroneous instruction is given it is not prejudicial error if there is evidence which amply supports the verdict, and it is apparent that the jury disregarded the instruction." It is not at all apparent in the present case that this instruction was disregarded. There was a conflict in the evidence relating to the issues of negligence and contributory negligence. In the instructions, the jury was given two definitions of negligence, one correct and the other incorrect. The general instructions relating to liability used the term "negligence," and it is impossible to determine upon which of the conflicting definitions of negligence the jury relied in applying these general instructions. Under these circumstances, it cannot be said that the error was not prejudicial. Starr v. Los Angeles Ry. Corp., 187 Cal. 270, 201 P. 599; Hesler v. California Hospital Co., 178 Cal. 764, 174 P. 654; Quint v. Dimond, 147 Cal. 707, 82 P. 310; White v. Davis, 103 Cal. App. 531, 284 P. 1086; Alcamisi v. Market St. Ry. Co., 67 Cal. App. 710, 228 P. 410.

Aside from the other points raised by appellant, in my opinion the giving of the abovementioned instruction in itself requires a reversal.

112 Cal. App. 633

VILLEGAS v. STROHM.

Civ. 4084.

District Court of Appeal, Third District, California.

March 17, 1931.

1. Automobiles 🔑238(1).

Bicyclist's complaint *held* not demurrable because not alleging that collision with motortruck occurred on public highway.

> The complaint contained the allegation that the plaintiff was riding his bicycle on a certain street which was a public highway and thoroughfare dedicated and used for travel and traffic of various kinds and nature, including the right to ride a bicycle thereon.

2. Automobiles 🔑244(1).

Evidence established that collision between truck and bicycle occurred on public highway (St. 1923, p. 519, § 21).

> It appeared, notwithstanding truck owner's evidence that his property line extended 10 feet out into traveled portion of street, that the portion of the street on which the accident occurred was at the time of the accident, and for more than 20 years prior thereto had been, used by the general public, and that the street at the point of accident had the same appearance with respect to user and travel as the remainder thereof, so that St. 1923, p. 519, § 21, defining what constitutes a "public highway," was applicable.

3. Evidence 🔑123(11).

In bicyclist's personal injury action against truck owner, truck driver's statements made after accident *held* inadmissible; being no part of res gestæ.

> After the accident, the truck driver made the statement that it was his fault, that he backed out of alley too fast and did not blow his horn.

4. Appeal and error 🔑1051(1).

Erroneous admission in action against truck owner of driver's statements *held* not prejudicial; there being other evidence tending to establish facts stated by driver.

5. Appeal and error 🔑1050(1).

In action against truck owner, erroneous admission of driver's statement that "I know it was my fault" *held* not prejudicial, where owner made no contention on appeal that driver was not negligent.

Appeal from Superior Court, Calaveras County; J. A. Smith, Judge.

Action by Victor Villegas, a minor, by Dollie Villegas, his guardian ad litem, against John Strohm. Judgment for plaintiff, and defendant appeals.

Affirmed.

William G. Snyder, of Jackson, and Charles P. Snyder, of San Andreas, for appellant.

Joseph R. Huberty, of San Andreas, for respondent.

Mr. Justice pro tem. TUTTLE delivered the opinion of the court.

This is an action for damages arising out of a collision between plaintiff, a bicyclist, and defendant's motortruck. A verdict in the sum of $3,000 was rendered for plaintiff by the jury, and the appeal is prosecuted from the judgment.

Plaintiff, a minor, was riding his bicycle along Main street, in the town of Campo Seco. The driver of defendant's truck backed out of an alley which intersected Main street, and struck plaintiff, who was severely injured.

[1] Appellant contends that the complaint does not state a cause of action, in that it is not alleged therein that the accident occurred upon a public highway. The objection is untenable. The second paragraph of the complaint alleges:

"That on the 16th day of February, 1929, at or about the hour of 2:15 o'clock p. m. of said day said plaintiff, Victor Villegas, was riding a bicycle in a southwesterly direction on Main Street, in the Town of Campo Seco, County of Calaveras, State of California, which said roadway and street is and then was a public highway and thoroughfare in the said County of Calaveras, dedicated and used for travel and traffic of various kinds and nature, including the right to ride a bicycle thereon."

The third paragraph alleges that at said time and place the driver of the truck negligently drove his truck so that it was caused to strike plaintiff, setting forth all the details.

The only possible inference which could be drawn from the pleading is that the accident occurred upon Main street.

[2] It is next contended by appellant that the evidence shows that the accident occurred upon the property of defendant, and not upon a public highway. He introduced evidence of a very unsatisfactory character, which tended to prove that defendant's property line extended ten feet out into the traveled portion of Main street; defendant being an abutting owner. It appears that the accident occurred upon the strip of property mentioned. This being the fact, it is argued that

plaintiff was a trespasser, and not entitled to the benefit of the California Vehicle Act. This act, at the time of the accident and also at present, contains the following provision:

"Sec. 21. '*Public Highway.*' Every highway, road, street, alley, lane, court, place, trail, drive, bridge, viaduct or trestle laid out or erected as such by the public or dedicated or abandoned to the public, or intended or used by or for the general public, except such portions thereof as are used or prepared for use by pedestrians as sidewalks. The term 'public highway' shall apply to and include driveways upon the grounds of universities, colleges, schools and institutions. The term 'public highway' shall not be deemed to include private driveways, roads or places used by the owner, his guests and those having business with the owner and not intended to be otherwise used, or otherwise used by the general public." St. 1923, p. 519.

The accident happened at a point on Main street, which was from four to ten feet out from the westerly boundary of that street, as such boundary is defined by the buildings on that side of the street. The street at this point had the same appearance, with respect to user and travel, as the remainder thereof. There was testimony that this particular portion of the street had been used in general by the public for the past twenty years, and that it was so being used at the time of the accident.

Our conclusion is that the point where the accident occurred was located in a public highway, as defined by the California Vehicle Act. All that is required by said act is that the highway be used by the general public. There was ample proof that the portion of Main street, upon which the accident occurred was, at the time of the accident, and had for some twenty years prior thereto, been used by the general public. We therefore hold that the provisions of the act in question are applicable to this case.

[3-5] The court admitted in evidence certain declarations of the employee of defendant, made after the accident, which were as follows: "I know it was my fault. I know I backed out too fast and I didn't blow a horn." Such statements constituted no part of the res gestæ, and they were incompetent and inadmissible. Kimic v. San Jose-Los Gatos Ry. Co., 156 Cal. 379, 104 P. 986.

A portion of the foregoing statement was merely cumulative. There is evidence in the record from other witnesses to the effect that the driver backed out of the alley at an excessive rate of speed, and that he failed to blow his horn. As to those portions of the statement, we take the view that no prejudice resulted to defendant by reason of their erroneous admission. As to the remainder of the statement, where the driver said, "I know it was my fault," we also hold that no prejudice resulted therefrom. This is due to the fact that appellant makes no contention whatever in his briefs, nor did he contend in his oral argument before this court, that defendant's driver was not guilty of negligence. Neither is it anywhere intimated that plaintiff was guilty of contributory negligence. The only discussion of the question of negligence is that which is based upon the theory and assumption that the California Vehicle Act does not apply to the facts in this case. It is virtually conceded by appellant, and not disputed, that, if the law respecting negligence, as laid down in the Vehicle Act, is applicable, defendant's driver was negligent. This is probably due to the fact that the evidence upon this issue preponderates so strongly in favor of respondent. This ground of lack of prejudice would apply also to the entire declaration.

Other points are urged as ground for reversal, but they all involve the point which we have discussed.

The judgment is affirmed.

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112 Cal. App. 691

GREENWOOD v. GREENWOOD.

Civ. 4276.

District Court of Appeal, Third District, California.

March 19, 1931.

Rehearing Denied April 18, 1931. Hearing Denied by Supreme Court May 18, 1931.

1. Divorce ⚷167.

Where defendant's counsel obtained leave to amend cross-complaint and seek divorce, defendant could not, in action to annul divorce decree, contend that cross-complaint was not amended.

It appeared that all parties considered amendment in question as having actually been made, and, since courts have taken liberal view in matter of granting trial amendments, it would be inconsistent to take narrow view with reference to methods by which amendments can be made.

2. Divorce ⚷167.

Averments rather than prayer of cross-complaint determine jurisdiction to grant divorce, and, where allegation of desertion and other allegations gave jurisdiction, divorce decree was not void (Civ. Code, § 107).

3. Divorce ⚷167.

That cross-complaint for divorce fails to state cause of action for desertion does not render divorce decree thereon void (Civ. Code, § 107).

4. Divorce ⚿167.

That interlocutory divorce decree was void, and that defendant's counsel negligently failed to utilize available remedies, could be raised and reviewed in attack only on interlocutory, not final, decree (Code Civ. Proc. § 473).

5. Judgment ⚿437.

Equity will not annul judgment at law merely for attorney's neglect or mistake, unless caused by opposite party.

6. Divorce ⚿167.

If court rendered divorce decree without having further evidence by depositions showing value of community property, decree at most was erroneous but not void, since court had jurisdiction.

7. Judgment ⚿470.

Presumption is in favor of validity of judgment.

Appeal from Superior Court, Los Angeles County; Thomas L. Ambrose, Judge.

Proceeding in equity by Victoria R. Greenwood against S. J. Greenwood to set aside interlocutory and final decrees of divorce. Judgment for defendant, and plaintiff appeals.

Affirmed.

See, also, 101 Cal. App. 736, 282 P. 433.

George W. Rochester and L. W. Burdick, both of Los Angeles, for appellant.

Andreani, Haines, Bisher & Carrey, of Los Angeles, for respondent.

Mr. Justice pro tem. TUTTLE delivered the opinion of the court.

This is a proceeding in equity which is brought for the purpose of setting aside, vacating, and annulling interlocutory and final decrees of divorce which were entered in an action wherein appellant was defendant and respondent plaintiff. The trial court found for respondent upon all issues, holding that both of said judgments were valid. The appeal is taken from the judgment entered upon said findings.

The entire attack of appellant is directed upon the findings; it being contended that they are not supported by the evidence.

On March 4, 1924, respondent filed a complaint for divorce from appellant upon the ground of desertion. He alleged that there was no community property. On March 13, 1924, appellant filed her answer in said cause, denying all the allegations of the complaint and praying for maintenance, counsel fees, and general relief. Thereafter appellant filed a cross-complaint, alleging desertion upon the part of respondent, and praying for maintenance and a disposition of the community property. Respondent filed an answer to the cross-complaint, denying the allegations thereof.

The divorce action came on regularly for trial, and evidence was submitted by both parties. During the trial on July 2, 1925, the following discussion took place:

"Mr. Greer (Attorney for Appellant): We ask leave to amend the prayer of our first cross-complaint on this only, that where we pray for separate maintenance we pray for a decree dissolving the bonds of matrimony and an interlocutory decree of divorce. The rest of the prayer with reference to the division of the property, we do not care to amend.

"The Court: The amendment may be made.

"Mr. Bishler (Attorney for Respondent): Yes, I have no objection."

At the conclusion of the case, the following colloquy took place between court and counsel:

"The Court: Then the case stands submitted on the coming of these depositions (relating to the value of the community property), which will be within 30 days, will it?

"Mr. Greer (for Appellant): Your Honor, don't see now any reason for taking the depositions as to the value of any land in Oregon. At the time this contract (for property settlement) was made, the land then held was the Tulare property.

"Mr. Neff: All right.

"Mr. Greer: And that the property will be appraised as of that date.

"Mr. Neff: That is agreeable to us."

The chief contention at said trial was the dispute over community property. Prior to the said trial the parties had entered into and signed a contract which purported to settle such dispute. Appellant attempted to show that this contract should be set aside as being unfair to her.

No further evidence was furnished the court with respect to the value of the property, within the 30 days designated, and upon October 19, 1925, the court rendered its opinion, granting a divorce to appellant. Thereafter, on October 26, 1925, the court made and entered its findings of fact and conclusions of law. The court found that the property settlement was fair, just, and equitable, and not made by or through any undue influence or false or fraudulent representations. It also found facts which constituted desertion upon the part of appellant, and that there was no community property. The prop-

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erty settlement was also approved, and an interlocutory decree of divorce was entered. On the 20th day of December, 1926, final judgment of divorce was made and entered.

No appeal or attack upon either of said decrees was ever made, nor any action taken by appellant, until within three days after the expiration of six months from the entry of the final decree. At that time appellant moved to set aside the final judgment under the provisions of section 473, Code of Civil Procedure. This motion was denied. The court finds, in the instant case and upon sufficient evidence, that the proposed findings in the divorce action were served upon the attorney for appellant on October 19, 1925.

During the trial of the instant case there was considerable testimony relating to the property settlement and the value of the property involved therein. The court found that this settlement was fair, just, and equitable, and that no fraud was practiced upon appellant in the procuring thereof. Each of these cases was tried by a different judge, and thus we have the findings of two different judges upholding the settlement. The findings in this case upon that issue are amply supported by the evidence, and this is not seriously questioned by appellant.

[1] The contention of appellant is that the interlocutory judgment was coram non judice and void. She argues that the court had no jurisdiction to grant a divorce to her; that the amendment to her pleading praying for a divorce was never actually made; that the cross-complaint did not state a cause of action on the ground of desertion, in that it did not allege desertion for the statutory period of one year; and that there was not sufficient evidence to justify a finding of desertion.

We do not believe that appellant can now be heard to say that her cross-complaint was not amended so as to pray for a divorce. Her own counsel asked leave to make the amendment, and the motion was granted by the court. No subsequent conduct of either counsel is inconsistent with the view that the amendment was made then and there. Our courts have taken a very liberal view in the matter of granting trial amendments, and it would be extremely inconsistent if we were to take a narrow and strained view with reference to methods by which such amendments can be made. The case of Kimball v. Gearhart, 12 Cal. 27, seems to hold that it is necessary to write out the amendment and attach it to the pleading. That case was decided in 1859. Since the adoption of our Codes in 1872, a much more liberal construction has been given to pleadings. The act of drafting the proposed amendment, and attaching such draft to the pleading is simply exemplifying what actually took place. In any event, we are satisfied that the facts and circumstances here clearly indicate that the amendment was deemed and considered by all parties as having actually been made.

[2, 3] There is another reason why the judgment of divorce is not void. The averments of the cross-complaint, not the prayer, decide the question of jurisdiction. Miller v. Superior Court, 59 Cal. App. 334, 210 P. 832. The cross-complaint alleges that respondent "willfully and without cause deserted and abandoned defendant and cross-complainant, and still continues to willfully and without cause desert and abandon defendant and cross-complainant." This, with the other allegations of the cross-complaint, gave jurisdiction to the trial court to grant the divorce to appellant. It is contended that the pleading does not state a cause of action because it is not alleged that the desertion continued for one year. Section 107, Civ. Code. But the failure of the cross-complaint to state a cause of action does not render a judgment rendered thereon void. Gillespie v. Fender, 180 Cal. 202, 180 P. 332.

[4, 5] The complaint in the instant case seeks equitable relief upon two grounds. One is based on the theory that the judgment is void. That question we have decided adversely to appellant's contention. The other ground is simply that the attorney for appellant was negligent in failing to avail himself of legal remedies which were at all times open to appellant. No claim is made, nor is it intimated, that the neglect of appellant's counsel was due to any act of respondent or his counsel. The interlocutory decree, though service of the same was made upon appellant's counsel, was not attacked in any manner. It is true that a motion was made to set aside the final judgment of divorce under section 473, Code of Civil Procedure, but matters of the character complained of by appellant here could only be raised and reviewed in an attack upon the interlocutory decree. 9 Cal. Jur. 779. Equity will not grant relief against a judgment at law, where such judgment was obtained in consequence of the neglect, inattention, mistake, or incompetence of the attorney, unless caused by the opposite party. 34 C. J. 465. If the party seeking to set aside the judgment had a complete and adequate remedy in the same proceeding, he cannot appeal to equity for relief, where his sole ground is the neglect of his attorney, and it is not contended that the act of his opponent in any manner contributed to his predicament. Cal. Beet Sugar Co. v. Porter, 68 Cal. 369, 9 P. 313.

Appellant, as it appears from her briefs, is concerned with the granting of the decree of divorce to her, only to the extent that it interferes with her attack upon the property settlement. But, as we have pointed out, the trial court found that such settlement was fair and equitable, and she is bound by that finding. After she has had two fair trials upon this issue, she now demands a third trial. It is not difficult to explain one of the causes of the congestion of litigation in Los Angeles county.

[6] Considerable complaint is made by appellant because the court in the original case rendered a judgment without having before it further evidence in the shape of depositions relating to the value of the community property. At the most the act of the court was erroneous. It still had jurisdiction to enter the judgment. Furthermore, if appellant was prejudiced in any manner under such circumstances, the neglect and incompetence of her counsel was the sole cause thereof. We might observe that in this case appellant has changed counsel three times, and her counsel on appeal had nothing to do with the trial of the action.

[7] The case presented by appellant is absolutely devoid of equity. She cannot be permitted to charge respondent with the neglect and incompetence of her own counsel. If every judgment could be attacked upon this ground alone, the intendment and presumption in favor of the validity of a judgment would become a mere fiction.

The judgment is affirmed.

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112 Cal. App. 688

ADLER v. GRANELLI.

Civ. 7491.

District Court of Appeal, First District, Division 2, California.

March 19, 1931.

1. Appeal and error ⚷931(1), 1011(1).

Findings on conflicting evidence are conclusive, and all reasonable inferences will be indulged in support of findings.

2. Account stated ⚷6(2).

Where debtor receives account without making seasonable objections, account becomes account stated.

3. Account stated ⚷20(1).

What was reasonable time within which debtor receiving account must make objections to prevent account from becoming account stated was fact question.

Appeal from the Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by F. Adler against Charles Granelli. Judgment for plaintiff, and defendant appeals.

Affirmed.

Spencer G. Prime and C. K. Bonestell, both of San Francisco, for appellant.

Walter McGovern, of San Francisco, for respondent.

PRESTON, Justice pro tem.

This is an appeal by defendant, Charles Granelli, from a judgment entered against him in the sum of $534 upon an account stated. The action was brought to recover attorney's fees for services rendered to defendant, and moneys expended for his use and benefit, by the law firm of Hubbard & Hubbard, the plaintiff's assignors. The case was tried before the court without a jury.

The complaint, among other things, alleges, and the court found: That H. R. Hubbard and Leslie L. Hubbard were attorneys and counselors at law, duly and regularly licensed to practice in all the courts of California, and were engaged in the practice of law in the city and county of San Francisco under the name and style of Hubbard & Hubbard; that they performed certain legal services for defendant at his special instance and request and for his use and benefit, and that they also expended certain moneys for the use and benefit of defendant and at his special instance and request; that on the 30th of April, 1928, the said H. R. Hubbard and Leslie L. Hubbard, as such copartners, and the said defendant, accounted together concerning the said services so rendered and the money so expended, and that on said last-mentioned date it was found and ascertained between H. R. Hubbard and Leslie L. Hubbard and defendant that there was due, owing, and payable to said H. R. Hubbard and Leslie L. Hubbard, from said defendant, Charles Granelli, the sum of $534, which said sum the said defendant then and there agreed to pay; that said defendant has not paid the same nor any part thereof, and the whole thereof is now due, owing, and payable from said defendant to this plaintiff.

[1] The sole contention made by appellant is this: "There was no acquiescence such as is required to establish an account stated by reason of failure to object within a reasonable time to the correctness of the statement sent by mail."

This contention is based upon the testimony of defendant and appellant, which was that he only received one statement through the mail from Hubbard & Hubbard, and that he objected to that statement through his then attorney, Mr. Prime. On the other hand, Mr. H. R. Hubbard testified that defendant came to his office and asked for his papers, and was told by Mr. Hubbard that the firm had a bill against him; thereupon defendant requested that the bill be sent to him and that he would pay it; that thereafter, between November 16, 1927, and April 30, 1928, eight statements of the account were sent by mail, both to defendant's home and business address, but that no communication was ever received from Mr. Granelli or his attorney, Mr. Prime, relative thereto.

Thus it will be seen that the testimony given by Mr. Hubbard is in direct conflict with that given by the defendant.

The court accepted the testimony of Mr. Hubbard as true, and found in favor of the plaintiff upon every material issue made by the pleadings. These findings of the trial court, made upon conflicting evidence, are conclusive, and all reasonable inferences are to be indulged in support of the findings. Wilbur v. Wilbur, 197 Cal. 1, 239 P. 332.

[2, 3] It was appellant's duty, when he received the account from Hubbard & Hubbard, to have made seasonable objections thereto, if he had any. Having failed to do so, the account became an account stated and the foundation of an independent cause of action, which arose thereon whenever a reasonable time elapsed without any objection being made thereto. What was a reasonable time was a question of fact for the court to determine from all the facts and circumstances in the case. Mayberry v. Cook, 121 Cal. 588, 54 P. 95; Atkinson v. Golden Gate Tile Co., 21 Cal. App. 168, 131 P. 107; Schneider v. Oakman Consolidated Mining Co., 38 Cal. App. 338, 176 P. 177; California Bean Growers' Association v. Williams, 82 Cal. App. 434, 255 P. 751.

We find no merit whatever in the appeal.

The judgment should be affirmed, and it is so ordered.

We concur: NOURSE, P. J.; STURTEVANT, J.

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112 Cal. App. 744

In re COOLMAN'S ESTATE.
Civ. 7772.

District Court of Appeal, Second District, Division 2, California.

March 23, 1931.

Rehearing Denied April 22, 1931. Hearing Denied by Supreme Court May 21, 1931.

1. Wills ⟹290.

That will is not discovered after testator's death raises inference that testator revoked will.

2. Wills ⟹290.

Evidence *held* sufficient to exclude inference that testator had revoked will, justifying probate of will as lost or destroyed will (Code Civ. Proc. § 1339).

> Uncontradicted testimony was to the effect that testator had will in his pocket but one week before his decease, and a contestant made admissions under oath that testator's clothing was transferred to contestant's house, but that the will which testator discussed one hour previous to his final unconsciousness was not among his effects.

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

Petition by Edward T. Sherer and others for the probate of the will of John H. Coolman, deceased. From a decree for Lloyd J. Taylor and others, contestants, denying probate of an alleged lost or destroyed will, proponents appeal.

Reversed.

Welburn Maycock and Edward T. Sherer, both of Los Angeles, for appellants.

Marshall Stimson, Noel S. Edwards, and Evans, Pearce & Campbell, all of Los Angeles, for respondents.

CRAIG, J.

The proponents of an alleged lost or destroyed last will and testament of John H. Coolman, deceased, appeal from an order and decree denying probate of the same and directing the issuance of letters of administration.

The facts of the case are not controverted. It appears that the testator called at the offices of his counsel on November 14, 1928, and discussed the matter of altering his will, which he then had in his possession; that on the following day he again visited said offices, at which time counsel observed the will in his possession. He then suggested that he desired making "some little amendments" thereof. Two days later he contracted illness which on November 22d proved fatal. At some time between 2 o'clock p. m. and 6 o'clock p. m. of November 20th, the deceased had stated to a relative that he intended making changes in his will, and "that he was not satisfied with his will," that "he intended to make some more changes and they were to be beneficial to me." At about 7 o'clock p. m. of the same day he had passed into a coma from which he did not revive. Following his demise certain of the decedent's clothing, and his will, were missed, and subsequent search failed to reveal them. Dr. Lloyd J. Taylor, one of the three contestants, was unable to recall a conversation in

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⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

which he had admitted that the clothing was taken to his home. This testimony, however, was later retracted in part by the admission that they were removed to his residence without his knowledge, and there was positive testimony from other sources that he had admitted having them in his possession and had stated "that there was nothing in the pockets." Nevertheless, it is conceded that seven days prior to his death the deceased exhibited his will, and that within a few hours before unconsciousness overcame him he appeared rational, and spoke of making alterations therein.

The trial court found: "That from the facts that the will was last seen in the possession of deceased; that he intended to make changes therein; and that said will was not in existence at the time of his death, the court finds that it is true that the alleged last will and testament was by deceased destroyed prior to his death, with the intent on his part to revoke the same." This finding is founded solely upon the presumption which arises from the fact that the will was not discovered. The court further found that it was not shown to have been fraudulently or by public calamity destroyed in the lifetime of the testator. Coolman had frequently expressed an intention to die testate, had made various wills and alterations thereof, and one week preceding his death took from his pocket the will in question. He then stated that he did not desire to change its full testamentary plan, that he "did not want to change the original document if he could help it," but would like to make "just some little amendments." For personal reasons he carried it away, intending to return it to his counsel. We think Estate of Sweetman, 185 Cal. 27, 195 P. 918, 921, decisive of the right of appellants to probate the last will and testament of John H. Coolman by introduction of the offered copy and proof of its provisions by two credible witnesses. Code Civ. Proc. § 1339. In the cited case it appeared that the testatrix had made several wills and alterations thereof; two weeks preceding her death she expressed an intention to make a different one; shortly thereafter she stated that she intended making a new will "and drop the Johnsons out"; arrangements were made to prepare a new will on the 29th of January, and on February 3d she died; unlike the facts here presented, the testatrix remarked immediately preceding her demise that she had destroyed the Johnson will. But there was no other evidence of its destruction, the witnesses had not seen it for some months, and it was not found; yet she had assured other witnesses who testified that the will would be found. Affirming a decree admitting the will to probate, our Supreme Court said: "We have therefore the simple question as to whether or not the declarations of the deceased that the will was in existence, repeated in the most solemn fashion only 3 days before her death, was sufficient to support the finding of the trial court that the will was in existence at the time of her death. It seems clear that these declarations of the testatrix at least had the effect of overcoming the presumption that the will had been destroyed by her with the intention of revoking the same. With this presumption thus eliminated we have then the fact that the will was in existence 2½ months before her death. The law presumes that a thing once shown to be in existence continues in existence as long as things of that nature usually exist. * * * If we apply that presumption to the will under consideration, it is evident that without the intervention of some unusual agency it would not cease to exist in 75 days. There was no proof that any such agency destroyed the will. The trial court was therefore justified in its finding to that effect."

[1, 2] Coupled with positive denials of the testator that he intended changing the original document here in question, the record presents strong evidence which tends to exclude any fair conclusion that he intended to destroy his will or to revoke it. The uncontradicted testimony that he had it in his pocket but one week before his passing, and the admissions of a contestant under oath that the decedent's clothing was promptly transferred to his house, but that the will which Coolman discussed one hour previously to his final unconsciousness was not among his effects, must present rebuttal evidence as substantial as is usually available in such a case. In the instant case there is no evidence of any nature, aside from mere inference which has at times been dignified as a "presumption," that the offered will was not the last solemn testamentary intention and act of John H. Coolman, excepting only some slight undisclosed alteration. It has been held that "disputable inferences and presumptions, while evidence, are the weakest and most unsatisfactory evidence. They are allowed to stand not as against the facts they represent, but in lieu of proof of them. The facts being proven contrary to the presumption, no conflict arises; the presumption is simply overcome and dispelled." Savings & Loan Society v. Burnett, 106 Cal. 514, 39 P. 922. To the same effect are Mar Shee v. Maryland Assurance Corp., 190 Cal. 1, 210 P. 269; Landsrath v. Indus. Acc. Comm., 77 Cal. App. 509, 247 P. 227, and Mellor v. Rideout, 83 Cal. App. 621, 257 P. 173.

The decree is reversed.

We concur: WORKS, P. J.; ARCHBALD, Justice pro tem.

112 Cal. App. 588

STOCKEL v. ELICH et al. (HAIGHT et al., Interveners).

Civ. 4193.

District Court of Appeal, Third District. California.

March 16, 1931.

Rehearing Denied April 15, 1931.

1. Mortgages 🔑32(2).

Deed absolute on its face, but intended merely as security for indebtedness, constitutes mortgage, and does not actually convey title.

2. Mortgages 🔑1.

"Mortgage" is merely written contract hypothecating specific property and creating lien for security of debt (Civ. Code, § 2920).

[Ed. Note.—For other definitions of "Mortgage," see Words and Phrases.]

3. Mortgages 🔑10.

"Mortgage" is not necessarily grant of real property (Civ. Code, § 2920).

4. Logs and logging 🔑5.

Woods and forests 🔑1.

Timber, while growing, is part of realty, but, when cut, it becomes personalty, although title is not changed.

5. Mortgages 🔑132.

Under terms of mortgages covering timber land and contract for cutting such timber into ties, mortgagee *held* to have lien on timber and ties manufactured therefrom, and was entitled to proceeds as against attaching creditor of mortgagor (Civ. Code, §§ 2920, 2972).

> Deed of conveyance was duly executed transferring "all timber of every kind and character" as security for indebtedness, and, as part of same transaction, mortgagees executed written contract authorizing mortgagor to enter on premises and cut and manufacture timber situated thereon into ties. Contract provided that timber products manufactured should be sold or disposed of only through mortgagees, and that net proceeds received from sale should be applied to payment of outstanding indebtedness. Subsequently, mortgagees acquired another tract of timber land, and executed contract for sale of land and manufacturing of ties from timber to mortgagor. Terms of such contract were substantially similar to original contract in matter of cutting ties and right to proceeds.

6. Attachment 🔑175.

Attaching creditor can acquire no greater title than debtor possessed.

Appeal from Superior Court, Humboldt County; Harry W. Falk, Judge.

Action by Catherine Stockel against Matt Elich and another, copartners, wherein E. W. Haight and another intervened. From part of judgment adverse to them, interveners appeal.

Reversed.

H. C. Nelson, of Eureka, for appellants.

E. S. Mitchell, of Eureka, for respondent.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

This is an appeal on the part of the interveners from that portion of a judgment in favor of plaintiff which declares that the defendant Elich was the owner of $1,493.36, the proceeds of the sale of 2,000 ties, and that plaintiff's attachment on said proceeds is valid.

For several years the interveners had been financing the defendant Elich in the manufacturing and sale of ties. The defendant Elich owned 40 acres of timber land in Humboldt county upon which he had been manufacturing ties. Elich was indebted to the interveners in the sum of $3,908.91 on account of ties previously manufactured on the said 40-acre tract. By a deed of conveyance duly executed and recorded June 4, 1928, Elich and his wife transferred to the interveners "all timber of every kind and character" which was situated on that tract of land. On that date, and as a part of the same transaction, Elich and the interveners executed a written contract authorizing Elich to enter upon the premises and cut and manufacture into ties the timber situated thereon. This contract recited that the foregoing deed of conveyance was executed as "security for the payment of the said sum of $3,908.91," together with such other sums of money as were advanced for the manufacturing of ties. The contract further provides that "all timber products manufactured from timber situated upon above described premises shall be sold or disposed of only through said first parties [interveners]; that the net proceeds received from the sale of any of the timber products from said premises shall be applied to the payment of the above-mentioned sums; * * * that this agreement shall terminate when the said sum of $3,908.91 and the interest thereon, together with such other sums as may be advanced by first parties shall have been fully paid." It was then provided that, when such sums had been fully repaid, the grantees would reconvey the property to Elich.

Lawrence L. Chapman was the owner of 80 acres of timber land in the vicinity of the above-mentioned tract. The defendant Elich had been manufacturing ties on this last-mentioned land. May 3, 1928, this 80-acre tract of land was conveyed from Chapman and wife to Haight and Mitchell. On June 4, 1928, another contract for the sale of land and the manufacturing of ties from timber on this 80-acre tract was executed by Elich and the interveners. This contract provided for sale of the 80-acre tract to Elich for the sum of $5,500 and 7 per cent. interest thereon, together with all money advanced by the interveners for the cost of manufacturing ties from the timber thereon. The contract further provides: "The party of the second part [Elich] shall cut, manufacture and remove the products with due diligence and * * * the said products shall only be sold through the parties of the first part [interveners]; * * * that the net proceeds from the sale of all timber products from above lands shall be applied to the payment of the full purchase price as stated above, together with interest thereon and all other sums advanced," for manufacturing ties. It was then provided that, upon payment of all said sums of money, the interveners would convey said 80-acre tract of land to Elich.

Pursuant to these agreements, the defendant Elich entered upon the above-mentioned tracts of land and manufactured ties. Up to the time of the transaction which is involved in this action, all ties were sold by the interveners in their own names. The proceeds of such sales were remitted to them and applied pursuant to the terms of the foregoing contracts. Mr. Haight, who personally attended to these transactions, was going away for a temporary visit. He left on April 28, 1928. Prior to this he wrote to Elich, telling him of the prospective trip and asking him to make a shipment of ties to the Southern Pacific Company. During the month of June, in the absence of Haight, Mr. Elich shipped to the Southern Pacific Company, in his own name, 3,000 ties; 1,000 of these ties belonged to another party by the name of Flickenstein; 2,000 of these ties came from the premises covered by the above-mentioned deeds and contracts. While the proceeds of the sale of these 2,000 ties, amounting to the sum of $1,493.36, remained in the possession of the Southern Pacific Company, the plaintiff brought a suit in assumpsit against Elich based on another claim, and thereupon attached the said sum of money. A third party claim to this sum of money was duly served upon the Southern Pacific Company by Haight and Mitchell. Upon proceedings duly had, a complaint in intervention was filed in the last-mentioned suit, in which pleading Haight and Mitchell claimed to be the owners and entitled to said 2,000 ties and the proceeds of sale thereof. Upon trial of the cause, the court held that the interveners were not owners or entitled to the proceeds of sale of the 2,000 ties; that the attachment on said sum of money was valid, and thereupon rendered judgment for the plaintiff for the sum of $1,493.36.

It seems quite evident from a construction of the foregoing deeds and contracts that the interveners held a lien upon the property, including the ties manufactured thereon, in trust for the payment of the several specified sums of money, together with all additional sums advanced to Elich for the cost of manufacturing the timber into ties. Mr. Elich testified in this regard:

"Q. Now this stuff that was shipped out, who was the bill of lading sent to? A. To Mr. Haight and Mitchell.

"Q. And to whom was the money paid? A. Mr. Haight and Mitchell.

"Q. No matter whether they placed the order or you placed the order, as a matter of selling it, the proceeds went to Haight and Mitchell? A. Yes.

"Q. Who did the money belong to? A. Them. * * *

"Q. Now those ties that were shipped, two thousand, I believe, came off out of the camp you were working? A. Yes sir.

"Q. Had you * * * paid up Haight and Mitchell everything that was owing them for money that they had advanced in those operations of yours? A. No sir.

"Q. And to whom was the proceeds from the sale of the two thousand ties that came off your claim, to be paid, who was to get the money for them? A. Mr. Mitchell and Haight.

"Q. Haight and Mitchell? A. Yes sir.

"Q. The bills of lading were sent down to them? A. Yes. * * *

"Q. Were any of the ties, the two thousand ties that were shipped in June, taken off the Chapman timber? A. Yes sir. Well I am not sure, between five and six hundred ties. * * *

"Q. Did any of these ties come off of land to which the Stockels claimed ownership? A. No sir.

"Q. No question about that, is there? A. No sir. * * *

"Q. Now with reference to any ties that were on the ground out there at the time these agreements were drawn up on June 4, 1928, what arrangement if any did you have with Haight, with respect to such ties? A. No arrangements made of any kind. They bought whatever there was on the ground before we made out the agreement.

They paid for everything and it was not specified in the agreement; just our understanding, between me and Mr. Haight that everything there was * * * in the camp would belong to them.

"Q. They had paid for it all before? A. Yes sir. * * *

"Q. Who is entitled to the money from the two thousand ties from your camp? A. Mr. Haight and Mitchell." The foregoing testimony is uncontradicted.

[1-4] The respondent asserts that the foregoing instruments constitute mere mortgages upon the real property described in the deeds, and that the liens created thereby were forfeited and lost to the interveners when the timber was cut and manufactured into ties. Halleck v. Mixer, 16 Cal. 574; Herriter v. Porter, 23 Cal. 385; Moisant v. McPhee, 92 Cal. 76, 28 P. 46; 17 Cal. Jur. 735, § 41. It is claimed that, since the real owner of the land was lawfully in possession, when he cut the standing timber and manufactured it into ties, he thereby converted the timber into personal property, destroyed the interveners' lien thereon, and became the owner of the ties. 17 Cal. Jur. 869, § 157. It is true that a deed which is absolute on its face, but which is intended merely to secure an indebtedness of the grantor, is a mortgage, and does not actually convey title to the land. Moisant v. McPhee, supra. It is also true that a mortgage is merely a written contract hypothecating specific property and creating a lien for the security of a debt. Section 2920, Civ. Code; 17 Cal. Jur. 696, § 5; Pacific Fruit Exchange v. Duke, 103 Cal. App. 340, 284 P. 729. A mortgage is not necessarily a grant of real property. Adler v. Sargent, 109 Cal. 42, 49, 41 P. 799. In the case of Halleck v. Mixer, supra, Mr. Justice Field says: "Whilst the timber is growing it is a part of the realty. * * * When once cut, the character of the property is changed; it has ceased to be a part of the realty, and has become personalty, but its title is not changed. It belongs to the owner of the land as much afterwards as previously, and he may pursue it in whosoever hands it goes."

The foregoing language is used in a case involving the title to timber which had been cut from land without any contract with relation thereto. In the case of Herriter v. Porter, supra, it is said: "It is urged by the appellants, that the timber out of which the posts were made was cut on the land of Hihn and others—therefore, the posts were their property under the rule laid down in the case of Halleck v. Mixer, 16 Cal. 574. That is true, unless they were cut under some contract or agreement with the owners of the land, or with their consent—a fact which does not appear in the statement of facts agreed on."

In the case of Moisant v. McPhee, supra, the facts differ from those of the present case. In that case the title to land was conveyed to McPhee and Markle to secure the payment of a debt due from the owner, Warren, to the grantees. By consent, the owner, Warren, cut from the premises a quantity of tan bark. There was no agreement that this bark was to be sold by the grantees. Warren sold it to the plaintiff Moisant for $1,404. The grantee, McPhee, however, appropriated the bark "and converted it to his own use." The court there properly held that under such circumstances the real owner of the land held title to the bark and had a right to sell it. Judgment was rendered accordingly. It must be remembered that the tan bark in the Moisant Case was not cut pursuant to contract between the real owner of the land and the grantees upon terms which retained the absolute control of the commodity in the hands of the grantee. The present case differs from the Moisant Case in that regard. The present case comes within the suggestion quoted from the Herriter Case, supra.

[5] Assuming that the interveners in the present case merely held title to the two parcels of land in trust to secure the payment of certain specified sums, and that the deeds of conveyance were mere mortgages, still Elich acquired no title to the manufactured ties, for he cut them under a specific contract which entitled the interveners to the proceeds therefrom. Even though Elich be conceded to be the real owner of the land, he does not claim any title to the ties. He frankly admits they belonged to the interveners. The two deeds and the accompanying contracts must be construed together to determine the right to the proceeds from the sale of the ties. The ties were not cut by the owner with a claim of title thereto. They were cut pursuant to the terms of the contracts which became a part of the instruments of conveyance of title to the land, which the law construes to be mere mortgages. The contracts were then a part of the terms and conditions of the mortgage. These instruments created a lien upon both the standing timber and the manufactured ties. By the terms of these contracts, the title to the proceeds from the sale of ties was retained by the interveners. Moreover, it does not appear that Elich ever did own the Chapman 80-acre tract from which at least 500 of the ties in controversy were cut. Certainly Elich could acquire no title to ties cut from this tract under any circumstances. He claims no such right or title.

Assuming that the deeds alone were mere mortgages, and that severance of the timber from the freehold removed the lien upon the realty (17 Cal. Jur. 869, § 157), still a lien upon the ties which were manufactured from the timber was retained by virtue of the terms of the contracts accompanying the deeds. This was the evident intent of the contracting parties. Nor is the lien lost by virtue of converting the timber into ties. Section 2972 of the Civil Code provides: "The lien of a mortgage on a growing crop continues on the crop after severance, whether remaining in its original state or converted into another product, so long as the same remains on the land of mortgagor."

Evidently the combined instruments which were executed in the present case were intended to create a lien upon the ties and the proceeds of sale thereof by express contract.

"A party may, by manifest intent and agreement, create a security, charge or claim in the nature of a lien on real as well as on personal property whereof he is the owner or in possession, which a court of equity will enforce against him, and volunteers or claimants under him with notice of the agreement. * * * If a transaction resolve itself into a security, whatever may be its form, and whatever name the parties may choose to give it, it is in equity, a lien." 17 R. C. L. 604, § 13.

In 37 C. J. p. 315, § 19, it is said: "As a general rule any express executory contract in writing, based upon a valuable and adequate consideration, whereby one party clearly indicates an intention to charge or appropriate some particular property, real or personal, therein described or identified, as security for a debt or other obligation, * * * creates an equitable lien upon the property * * * in the hands, not only of the original contractor, but also of his heirs, personal representatives, assigns, or purchasers or encumbrancers with notice."

Section 28, page 321, of the last-mentioned authority further says: "An equitable lien for advances may exist where advancements of money or funds are made on the faith of certain property, real or personal, under an agreement or circumstances showing that it was the intention of the parties to pledge such property as security for the advancements, provided the specific property or its proceeds on which the advancements were invested can be traced or identified."

[**6**] The defendant Elich had divested himself of all title to the ties in question by the express provisions of the contracts with the interveners. The deeds of conveyance were sufficient notice that he was not the owner. In the shipment of this particular consignment of ties to the Southern Pacific Company, Elich became a mere agent for the interveners. He shipped them at the written request of Mr. Haight. This vested him with no title to the ties. The attaching creditor could acquire no greater title than Elich possessed. It follows that the findings and judgment of the court, to the effect that Elich was the owner of the ties and the proceeds of sale thereof, is erroneous.

The judgment is reversed.

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112 Cal. App. 562

BARNES v. COCKE.

Civ. 6557.

District Court of Appeal, Second District,
Division 2, California.
March 16, 1931.

1. Appeal and error 🔑548(1).

On appeal from judgment roll only, court cannot consider sufficiency of evidence to support findings.

2. Appeal and error 🔑548(5).

On appeal from judgment roll only, court cannot determine whether errors were committed in admission or rejection of testimony.

3. Appeal and error 🔑907(3).

On appeal from judgment roll only, court indulged presumption that evidence was sufficient to warrant findings.

4. Money paid 🔑9.

In cross-action for money expended for cross-defendant at his special instance and request, findings *held* to support judgment for cross-complainant.

Appeal from Superior Court, Los Angeles County; Arthur P. Will, Referee.

Action by Peter Barnes against R. V. Cocke in which the defendant filed cross-complaint. From judgment for cross-complainant, cross-defendant appeals.

Affirmed.

See, also, 99 Cal. App. 700, 279 P. 190; 101 Cal. App. 170, 281 P. 503.

M. W. Conkling, of San Diego, for appellant.

W. A. Alderson, of Los Angeles, for respondent.

IRA F. THOMPSON, J.

Plaintiff commenced an action against defendant, the nature of which is not disclosed by the record. (Cal. App.) 296 P. 909. The defendant responded by a cross-complaint, the second cause of action in which is involved in this appeal; it having been stipulated by the parties that the issues thereof should be tried and determined separately and independently of all other issues and judgment entered accordingly, which judgment it was further agreed should "be subject to motion and appeal as though entered in an independent action between the parties." By stipulation the cause thus framed was referred to a referee, whose findings were adopted by the court and judgment rendered in favor of cross-complainant in the sum of $2,470.21 and costs amounting to $80. The appeal is from the judgment and comes to us upon the judgment roll alone.

[1-4] But one ground is urged by appellant as a reason for reversal. It is that "the judgment is contrary to the findings in that it is apparent that $986.00 of the judgment is for and on account of an alleged oral contract in derogation of the written contract of the parties." In our consideration of an appeal from the judgment roll only, we cannot consider either the sufficiency of the evidence to support the findings or whether errors were committed in the admission or rejection of testimony. Dalton v. Gore, 88 Cal. App. 554, 263 P. 844. The cross-complaint (second cause of action) alleged that cross-complainant advanced and paid out for cross-defendant at his request the sum of $4,484, and that, under the provisions of a contract pleaded in the first cause of action, the cross-complainant had become indebted to cross-defendant in the sum of $1,744, all of which was itemized by a bill of particulars attached to the cross-complaint, and that the difference between the two amounts, or $2,740, was due and owing the cross-complainant. In effect, then, the cross-action is one for money laid out and expended for cross-defendant at his special instance and request. The contract which it is said was varied by an oral contract was a lease of land for agricultural purposes, the rental thereof to be paid by a share of the crop, and which provided for the planting of the entire tract to trees and the maintenance thereof for five years, and provided further that the land might be sold and the proceeds divided. There are further allegations in the second cause of action incorporated by reference to paragraphs in the preceding count to the effect that the contract did not completely and fully cover the entire agreement between the parties, but was silent concerning certain features, and also it was set forth in substance that the contract was in fact altered by an executed oral agreement. We have no way of determining without the complete record before us whether the testimony supporting the items of account related to an executed oral agreement or were outside of and different from the original contract. We must indulge the presumption that the evidence is sufficient to warrant their allowance in the findings. Dalton v. Gore, supra. The findings establish a stipulation by the parties for the allowance to cross-complainant of all of the items of his account except the sum of $988.50 and the allowance to cross-defendant of the sum of $2,013.79. It is then found that as to the items constituting the amount of $988.50, that they "were and are proper charges against the plaintiff and cross-defendant, and the defendant and cross-complainant is entitled to credit therefor and to recover the same in this action." The report of the referee also says that the written contract was entirely silent upon the subject comprehended by a collateral agreement, and that the parties themselves put such construction upon the contract in practice. While it is true that the findings should have been more definite and specific to the effect that the sum of $988.50 had been laid out and expended by the cross-complainant for the cross-defendant, nevertheless, following the stipulation of the parties as they do, we think the only just construction to put upon them is that this sum was also laid out for defendant's benefit, and, as thus read, the findings clearly support the judgment.

Judgment affirmed.

We concur: WORKS, P. J.; CRAIG, J.

PEOPLE v. BLACKBURN. *

Cr. 1956.

District Court of Appeal, Second District,
Division 1, California.
March 23, 1931.

Rehearing Denied April 6, 1931.

Hearing Granted by Supreme Court April 20, 1931.

1. Larceny ⚷65.

Evidence *held* sufficient to sustain conviction for grand theft.

2. Criminal law ⚷1144(14).

Refused instructions referred to in brief by description only, without quotation therefrom, will be assumed to have been covered in instructions given.

3. Larceny ⚷71(1).

Refusal, in prosecution for grand theft, of instruction relative to defendant's intent to defraud, *held* erroneous.

Requested instruction was to effect that evidence having been offered tending to prove that money or property contributed by complaining witness was used to pay living expenses of various members of

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Hearing granted 5 P.2d 600.

certain association; that jury, if finding such to be a fact, could consider such facts in determining whether or not there was intent to defraud complaining witness on part of defendant; and that if complaining witness knew purpose for which contributions were to be used and that they were actually used for that purpose, it would be their duty to find defendant not guilty.

4. Criminal law ⚷369(5).

Admission, in prosecution for grand theft, of evidence respecting defendant's attempt to procure poison several years before transaction involved and before acquaintance with complaining witness, *held* erroneous.

Testimony was to effect that defendant had attempted to procure poison from witness for purpose of killing husband of complaining witness' daughter; the conversation, however, taking place several months before defendant became acquainted with complaining witness, and approximately three years before alleged offense.

5. Criminal law ⚷43.

Evidence, respecting defendant charged with grand theft having instructed follower as to preparation of daughter's body to keep it for resurrection, was erroneously admitted.

Appeal from Superior Court, Los Angeles County; Charles W. Fricke, Judge.

May Otis Blackburn was convicted of grand theft, and she appeals.

Reversed.

Thomas Wade Cochran, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and John L. Flynn, Deputy Atty. Gen., for the People.

CONREY, P. J.

By information containing twelve separate counts, defendant was charged with the crime of grand theft, committed at various times, of which the first date is July 1, 1927, and the latest is October 28, 1928. While the case was on trial counts 6 and 7 were dismissed by the court. On counts 4 and 12 there was a verdict of not guilty. The convictions are on the remaining eight counts. The defendant appeals from the judgment of conviction, and from an order denying her motion for a new trial.

The first count of the information charges that on July 1, 1927, the defendant unlawfully took away $2,700 of the personal property of one Clifford R. Dabney. (The other counts on which the defendant was convicted are of like tenor except as to dates and amounts of money taken.)

According to the testimony of the witness Dabney, he became acquainted with the defendant at the city of Los Angeles about December 1, 1924. Between that time and the times of the several payments of money made by him to the defendant, sundry representations of fact were made to him by the defendant in a series of conversations. In those conversations she informed him that she had written a book entitled "The Great Sixth Seal," or "The Lamb's Book of Life"; that this book contained various mysteries of science and secrets of life and death; the secret of how to raise the dead; the secret of locating gold and precious jewels and all the hidden treasures of the earth; that it contained the lost measurements of Solomon and Noah, by which all precious minerals of the earth could be located; that it contained the secret of radioing from planet to planet and from this earth to other planets; that she and her daughter Ruth Wieland knew all these secrets and that they had been revealed to her by the angel Gabriel and the angel Michael; that the work would be finished in February, 1925; and that it took a certain amount of money, around $5,000, to get everything in readiness so that the Sixth Seal could be printed. There are many further details of these representations, which we need not set forth at length. The witness testified that the defendant asked him for money to complete this work and that he gave her sums of money, varying in amounts, over an extended period of time; that in contributing these moneys he had relied upon and believed these various representations made to him by the defendant; that from time to time she had set the dates when "The Great Sixth Seal" would be completed, but they did not come about and defendant represented that this would require more time and would require more money; that he gave the defendant $2,700 on the first day of July, 1927; that he was commanded to pay the money "to make a concord" for Bessie Mosier; that "Bessie Mosier was to make a concord, which concord was to be the finished concord before another date was set for the finished work, for everything to come about—for another date to be set so everything could come about so the Sixth Seal could be published." Other witnesses testified to similar representations made by the defendant, and payments made by said Clifford R. Dabney to the defendant, as well as payments of money made by some of said witnesses to the defendant. Evidence was introduced showing that said book, The Great Sixth Seal, was never published. Other circumstances were shown in evidence, from which an inference might fairly be drawn not only that the representations made by the defendant to the plaintiff were untrue, but also that in fact she knew that they were untrue, and that she knowingly made such false representations for the purpose of imposing upon the credulity of Dabney in order to obtain his money.

During the progress of these affairs an association of the followers of the defendant was formed, under the name of The Divine Order of the Royal Arms of the Great Eleven; during the year 1926 land was purchased at a place referred to as the Santa Susanna hills, in Ventura county; buildings were erected, and the association established there a community home occupied by the members of the order. A considerable amount of the money furnished by Dabney went into the improvement of this property and for other expenses of the community. It was the theory of the defendant, in support of which she introduced evidence, that the defendant in good faith was establishing two religious societies ("The Divine Order of the Royal Arms of the Great Eleven" and "The Church of the Divine Science of Joshua, the Branch, the Headstone of the Corner"), of which Dabney and others became members, and that the moneys paid by Dabney were merely contributions to the funds of these associations in which the defendant and said Dabney and the other members of the societies were alike and in good faith believers.

The grounds of appeal on which appellant relies are stated in seventeen propositions. We shall use the numbers as given in the brief for appellant, but shall consider them in a different order.

[1] Point XVIII. That the verdict is not supported by the evidence. The evidence is sufficient to sustain the verdict of conviction on each of the several counts. The representations made, and Dabney's reliance thereon in paying money to defendant, are not seriously controverted facts. The real defense was that defendant in good faith believed in those representations, and did not make them with intent to deceive and defraud. The jury having determined that branch of the inquiry against defendant, and there being evidence of a substantial nature to justify that decision, the conviction must be sustained unless there were, in the trial, prejudicial errors which deprived defendant of a fair trial and so caused a miscarriage of justice.

Point XXI. That the offenses were not proved to have been committed within the county of Los Angeles. This contention is without merit. Pen. Code, § 781; People v. Bocchio, 80 Cal. App. 138, 144, 251 P. 672.

[2] Points II to XV. These are assignments of error by the court in refusing to give to the jury instructions requested by the defendant. In the brief of appellant, these several refused instructions are referred to by description, without quotation of them and (except under point II), without stating where they may be found in the record. In only two instances (points II and III) is it asserted that the law on the same subject was not properly covered in other instructions which were given to the jury. Therefore, we shall assume that these matters were so covered, by correct statements of law in the instructions given to the jury. This assumption is reenforced by the facts concerning these instructions as set forth in the brief for respondent, and also by the fact that on reading the entire record of instructions given they appear to constitute a very complete and fair statement of the law applicable to the case.

[3] As to points II and III it is asserted by appellant that the court did not in its other instructions give any correct statement of the law on the subjects of those instructions. The requested instruction discussed under point II is shown at page 78 of the clerk's transcript. The same language, with unimportant variations, was used in other instructions given to the jury. Clerk's Transcript, pp. 99 and 109.

The requested instruction discussed under point III reads as follows:

"Evidence has been offered tending to prove that the money or property contributed by the complaining witnesses was used to pay living expenses of the various members of the so-called Divine Order Of The Royal Arms Of The Great Eleven, including the personal expenses of the complaining witnesses as members thereof. You are instructed that if you find this to be a fact and that such money or property was not used to enrich the defendant or diverted to her personal gain, you are to consider such facts in determining whether or not there was an intent to defraud the complaining witnesses on the part of defendant and if you further find that the complaining witnesses knew the purpose for which their contributions were to be used and that they were actually used for that purpose, then no offense is shown to have been committed and it will be your duty to find the defendant not guilty as to each and every count of the information."

We are of the opinion that this requested instruction is correct, and in view of the evidence referred to therein the defendant was entitled to have such instruction given to the jury. It follows that the refusal of the court to give this instruction was an error, unless an equivalent of the requested instruction was given. Appellant asserts that this was not done. In reply the Attorney General has quoted certain instructions given, but they do not appear to give the defendant the full benefit of the rule stated in the requested instruction.

[4] Point XVI. That the court erred in permitting the introduction of evidence of a conversation between the defendant and one Eleanor Sandrosky, concerning one

Sammy Rizzio. Mrs. Sandrosky testified that she and her husband conducted a drug store in the city of Los Angeles; that in July, 1924, the defendant came to her drug store and asked her to come to Mrs. Blackburn's residence in Los Angeles; that the witness complied with this request; that the defendant at her residence had a large number of manuscripts which she said were a part of the Great Sixth Seal. Among other things, the witness said: "She told me to raise up my right hand and repeat after her, 'I swear to the living God and by all that is holy and the Holy Ghost that I will not reveal what is told me,' so I did. Then Mrs. Blackburn stated, she says, 'Now, prepare yourself, as this is going to be terrible.' She says, 'The angel commanded that I kill Sammy Rizzio and you supply me with poison.'" The testimony further shows that Rizzio was the husband of Ruth Wieland, the defendant's daughter. The witness further testified that in the month of August, 1924, and at the same place, the defendant renewed her request for a poison and told her "To be sure it is the real thing." The witness said that she did not give Mrs. Blackburn any poison, but gave her some colored water.

"Q. When was the date of the last conversation you had with Mrs. Blackburn about Sammy Rizzio? A. It was on a Sunday, the last time I ever seen Sammy Rizzio.

"Q. That was the last time you ever saw him? A. Yes, sir. The first Sunday in August of 1924."

It will be noted that these conversations with the druggist took place several months before defendant became acquainted with Clifford R. Dabney. In so far as this evidence related to the proposed use of poison, we agree with counsel for appellant when in his brief he says: "It was not germane to any issue in this case; did not tend to prove or disprove any material issues; it was not shown to have ever been connected in any way with the complaining witness, Clifford R. Dabney, or that he ever heard or knew of any such conversation; it was far too remote to have had any causal connection with any act or omission of the defendant May Otis Blackburn in the summer of 1927, three years later, that was the cause or a cause of the complaining witness' parting with any money or property, it did not constitute a representation and was clearly incompetent for any purpose in the case on trial."

It is urged by respondent that the objections made to the admission of the foregoing testimony, with reference to poison to be used to bring about the death of Rizzio, were not made in sufficient form or substance to authorize appellant now to complain of the admission of such testimony. We have examined the objections and the rulings thereon, and we think that they were sufficient and were made at a proper time to advise the court of the objections and the grounds thereof.

[5] Point XVII. One W. P. Rhoades was among the followers of defendant and with him was his daughter Willa Rhoades, a sixteen year old girl. This daughter died on the 1st day of January, 1925, at the home of Rhoades in Los Angeles. He testified that the defendant instructed him to prepare the body and to keep it for the resurrection, and that in accordance with these instructions the body was kept in salt packs and ice. Again the witness said:

"Q. Did she say that she was going to raise the body? A. Well, if I remember right she said she could."

And further on he said:

"Q. Well, she never at any time stated to you that she then had the power to raise the dead or resurrect the dead, did she? A. No.

"Q. But she did state that after the Passover and the resurrection that they would then be able to raise the dead; is that what she said? A. Yes, sir."

It was further shown by the evidence that after fourteen months the body was finally buried in a cemetery and that surrounding it the bodies of seven dogs were buried; that said dogs were to have some part in the work of resurrection. It is not denied that sufficient and timely objections were made to the testimony concerning these transactions. The death of Miss Rhoades occurred at a date near the time when Dabney first became acquainted with the defendant, but there is no evidence that the statements made by the defendant concerning Miss Rhoades were made to Dabney, or in his presence, or that he ever heard of them. Dabney testified that he did not know when Willa Rhoades died or what was done with her body after her death, and that he could not remember that he had ever had any conversation with the defendant concerning the body of that young woman. All of the testimony on that subject was improperly admitted.

The issue concerning the guilt or innocence of the defendant of the crime of grand larceny in obtaining said sums of money from Dabney, and appellant's defense thereto, turned largely upon the question of good faith and actual belief of the defendant in the truth of the representations made to Dabney, and which induced Dabney to pay over the money. There was substantial evidence in favor of the prosecution, but also there was substantial evidence in favor of the defendant upon that issue. Under this condition of the case it becomes clear that the evidence in relation to Rizzio, and concerning the death of Miss Rhoades and the subsequent transactions in that connection, was extremely prejudicial to the defendant. There is a reasonable probability that without the creation of such prejudice in the minds of the jury as was likely to be created by this evidence, the jury would not have been satisfied beyond a reasonable doubt that the defendant was guilty of willful fraud and deception in making the representations to Dabney upon which he relied in paying money to defendant. It matters not how absurd the faith of the defendant and her followers may seem to be, if in good faith she believed in the cult or creed upon which she was founding this new society, and in the truth of the said representations. Defendant had the same right to organize a society based upon that faith, that her followers had to join with her in creating the society and establishing the community, provided only that they did not conspire together for some purpose prohibited by law. And if for the purposes of such society they chose to invest their money, that was no crime against the state. In presenting her defense to the charge that by willfully false representations she had obtained the moneys received by her from Clifford R. Dabney, the defendant was entitled to the benefit of an unprejudiced jury. Such right is not secure, where evidence tending to degrade the defendant, but not tending to prove the facts relied upon to establish her guilt, has been placed before the jury. And when, as here, it is reasonably probable that the erroneous admission of evidence has created a prejudice which led to a verdict which otherwise might not have been rendered, the judgment of conviction should not be allowed to stand.

The judgment, and the order denying motion for new trial, are reversed.

We concur: HOUSER, J.; YORK, J.

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112 Cal. App. 576

ROWE v. RENNICK.

Civ. 4189.

District Court of Appeal, Third District, California.

March 16, 1931.

Rehearing Denied April 15, 1931. Hearing Denied by Supreme Court May 14, 1931.

1. Pleading ⚷376.

Admission of liability for automobile accident did not preclude plaintiff from introducing testimony to substantiate allegations of complaint.

> The admission was only in the language of counsel "what we call admitting liability in this action; we are admitting responsibility for the accident itself," without any admission in respect to the facts and circumstances resulting in the collision.

2. Appeal and error ⚷1053(1).

Eliciting answers from defendant in personal injury action showing fact of insurance *held* not prejudicial error, in view of order striking answer out.

3. Trial ⚷127.

Where answer of defendant in personal injury action disclosing insurance is inextricably coupled with acknowledgment of liability, answer is admissible.

4. Appeal and error ⚷1060(1).

Admission of testimony relative to insurance is not alone sufficient to require reversal of judgment in personal injury action, where verdict could not have been rendered for defendant.

5. Appeal and error ⚷1004(1).

That jury may have awarded damages in greater sum than would have been fixed by appellate court furnishes no legal reason for reversal of judgment.

6. Damages ⚷96.

Damages to be awarded injured person rests primarily on everyday experience and common judgment of jury subject to revision of trial judge.

7. Damages ⚷127.

Purchasing power of money at time verdict is rendered must be considered in determining damages.

8. Evidence ⚷18.

Difference in purchasing power of money at different times is common fact which court may properly notice.

9. Damages ⚷132(3).

$10,800 damages for injuries consisting of fractured coccyx and fracture of lamina of lower lumbar vertebra *held* not excessive.

Appeal from Superior Court, Solano County; W. T. O'Donnell, Judge.

Action by Anne Rowe against Leonard Rennick. Judgment for plaintiff, and defendant appeals.

Affirmed.

Joseph M. Raines, of Fairfield, and Theodore W. Chester, of Sacramento, for appellant.

Sapiro & Hayes, of San Francisco, for respondent.

Mr. Justice PLUMMER delivered the opinion of the court.

The plaintiff had judgment against the defendant in the sum of $10,800, for and on account of personal injuries suffered in an automobile collision alleged to be due to the negligence of the defendant. From this judgment the defendant appeals.

The complaint alleges that on or about the 17th day of March, 1929, the plaintiff was riding in a certain automobile which was being driven in a southerly direction along the state highway running between the towns of Fairfield and Cordelia, in the county of Solano; that on the same day the defendant was driving an automobile in a general northerly direction along the same highway; that the defendant so carelessly, negligently, and unlawfully drove and operated his automobile as to cause the same to collide with the automobile in which the plaintiff was riding, thereby causing the plaintiff serious personal injuries, which injuries were alleged to be as follows: A fracture and dislocation of the coccyx; a fracture of the fifth lumbar vertebra on the right side in the lamina; and severe bruises of the body and legs. The complaint further alleges that by reason of such injuries plaintiff has been unable to attend to her ordinary duties as housewife, etc., has employed doctors, has incurred expenses, etc. The complaint also contains a second cause of action wherein it is alleged that, at the time the defendant was driving his automobile in a general northerly direction along the highway referred to, the defendant was under the influence of intoxicating liquor, and so carelessly and negligently operated and drove his automobile as to cause the same to collide with the automobile in which the plaintiff was riding, causing the personal injuries set forth herein. The answer of the defendant denies that he carelessly, negligently, or unlawfully drove his automobile, or caused the same to collide with an automobile in which the plaintiff was riding; denies that the plaintiff has suffered the injuries alleged in her complaint, and likewise denies that at the time of the collision the defendant was under the influence of intoxicating liquor, in any degree whatsoever; and further denies the allegations set forth in plaintiff's second cause of action that he operated his automobile in a careless or negligent or unlawful manner.

Upon this appeal the appellant alleges three reasons why the judgment should be reversed: (1) That the court erred in permitting the plaintiff to prove the facts and circumstances surrounding and attendant upon the collision; (2) that the court erred in the admission of testimony, and that counsel for the plaintiff was guilty of misconduct prejudicial to the defendant; and (3) that the judgment is excessive.

After the jury had been impaneled, and, before any opening statement had been made, counsel for the defendant made the following statement: "Mr. Raines: Your Honor, before counsel proceeds, I think it is now in order for the defendant, under the conditions here, to make a statement as to his position, that is, as to the position of the defendant Rennick, so that it will expedite the matter and clarify the issues to be presented to the jury in this case. The defendant, of course, is charged with negligence; we are admitting, what we call admitting, liability in this action; we are admitting responsibility for the accident itself, which, under the conditions, will limit the question to go to the jury as to the amount of damages to be awarded the plaintiff. I make this statement at this time so that this may guide counsel and ourselves in making the statement and the conduct of the case itself." Following this admission on the part of the defendant, counsel for the plaintiff made an opening statement detailing the facts and circumstances of the collision, and then introduced testimony to prove the facts and circumstances as outlined in the opening statement. To all of these matters the defendant interposed timely and appropriate objections, which the court overruled.

While the argument of counsel for appellant is confined to the second error alleged, to wit, the admission of certain testimony, it is necessary, in the consideration thereof, to determine whether, under the state of the pleadings, the plaintiff in this case was entitled to introduce testimony as to the facts and circumstances constituting the grounds upon which it sought to charge the defendant with liability for the injuries suffered by the plaintiff.

[1] It will be noted that the defendant did not admit the facts and circumstances resulting in the collision. The admission is only, in the language of counsel, "what we call admitting liability in this action; we are admitting responsibility for the accident itself." This, under the settled law of this state, does not preclude the plaintiff from introducing testimony to substantiate the allegations in the complaint.

In the case of Martin v. Pacific Gas & Electric Co., 203 Cal. 291, 264 P. 246, 249, the defendant attempted, by an admission, to narrow the issues to the simple question of the amount of damages to be awarded, and made there, just as we have here, a limited admission of responsibility. The Martin Case, however, presented a much broader question than that tendered upon this appeal. This will appear by a reference to the Martin Case as reported in (Cal. App.) 255 P. 284, where the facts contained in the transcript are set forth at length. There, the court permitted the testimony to be admitted detailing the facts and circumstances of previous acts of negligence, extending over a considerable period of time. This court held the admission of such testimony to be erroneous. In the hearing had in the same case by the Supreme Court it appears that a majority of the court agreed with the holding of this court as to the error in the admission of such extraneous matters, but it also held that the admission of such testimony was not of such a prejudicial character as to warrant a reversal, as judgment only could, under the circumstances of the case, go in favor of the plaintiff. What is said by the Supreme Court in the Martin Case, supra, however, is directly in point in this case, where only the circumstances surrounding the immediate act of negligence were testified to by the witnesses. We quote from the opinion the following: "Indeed, it never has been the law that it was or could be error to prove even admitted allegations of the pleadings if the patience of the trial court would permit it. 'It does not lie in the power of one party, however, to prevent the introduction of relevant evidence by admitting in general terms the fact which such evidence tends to prove, if the Presiding Justice in his discretion deems it proper to receive it. Parties, as a general rule, are entitled to prove the essential facts, to present to the jury a picture of the events relied on. To substitute for such a picture a naked admission might have the effect to rob the evidence of much of its fair and legitimate weight. No exception lies to the admission of relevant evidence under such circumstances.' 26 R. C. L. § 40, p. 1036; Dunning v. Maine Cent. Ry. Co., 91 Me. 87, 64 Am. St. Rep. 208, 39 A. 352. The fact that the evidence admitted might, as an incidental feature thereof, be inflammatory or have a tendency to unduly arouse the jury does not render such evidence inadmissible. In Mohn v. Tingley 191 Cal. 470, 491, 217 P. 733, 742, it is said: 'The chief objection to all the evidence of which complaint is made is that it served to stir up the prejudice of the jury and arouse sympathy in respondent's favor. But the evidence being admissible, its effect upon the jury would furnish no reason for its rejection.' Likewise no prejudicial error can be committed by reading the pleadings to the jury, even though the legal effect of them has been admitted. Knight v. Russ, 77 Cal. 410, 414, 19 P. 698. We therefore hold that the said attempt of counsel to limit the proof was abortive and the trial court committed no error in its rulings in respect thereto." To the same effect we may cite the following: Jones v. Allen (C. C. A.) 85 F. 523; Wigmore on Evidence (2d Ed.) vol. 5, p. 607, § 2591; People v. Fredericks, 106 Cal. 554, 39 P. 944; Eesley Light & Power Co. v. Commonwealth Power Co., 172 Mich. 78, 137 N. W. 663; Thomson v. Carruth, 218 Mass. 524, 106 N. E. 159.

With the holding of these cases in view, we may now consider the testimony alleged to be prejudicial. A witness on the part of the plaintiff testified that he had a conversation with the defendant immediately after the collision, a considerable portion of which is confessedly immaterial, and we will quote only that portion to which appellant's argument is directed:

"I asked him his name (referring to the defendant); he said 'J. L. Doaks.'

"Q. Did you have any further conversation with him? A. Well, yes, I did.

"Q. Well, what else, if anything, was said if anything, between you and the occupant of the car (referring to the defendant)? A. He said, 'I'm in a hell of a hole'; and I said, 'I know you are.' A. He said, 'I'm drunk and I know I'm drunk; I don't care about anything. Is the baby all right?' (Defendant looking up and seeing the baby.) I said, 'The baby is all right'; and then I asked him where he lived, and got no answer.

"Q. Anything else said? A. He said, 'Don't worry, everything is all right. I got 100,000. or 200,000. dollars insurance, and you don't have to worry about insurance; I will take care of everything; but is the baby all right?' "

Upon motion of defendant the court struck out the answer in so far as it related to insurance, and directed the jury to disregard the same. The witness further testified as to the intoxicated condition of the defendant, which was corroborated by other witnesses. The admission of the answer of the defendant is assigned as prejudicial error, and the eliciting of the same as misconduct on the part of counsel for the plaintiff, necessitating a reversal of the judgment.

[2] A number of cases have had to do with testimony disclosing the fact of insurance. Before considering these cases we may call attention, very properly, to the character of the answer made by the defendant that he had $100,000 or $200,000 insurance, as being but the vaporings of a drunken mind, and not a statement of any facts whatever. Even if it be assumed, which seems to us incredible, that the defendant was insured to the amount of $100,000 or $200,000, as he stated, the question still remains whether his answer, elicited in the manner in which it was, constituted prejudicial error, irrespective of the order of the court striking it out and directing the jury to disregard the same.

This court has had to do recently with several cases involving reference to insurance. In Loggie v. Interstate Transit Co. (Cal. App.) 291 P. 618, 619, it appears that counsel for one of the parties, on cross-examination, asked the question relating to insurance. The objection thereto, being sustained by the court, was followed by this statement: "Then for the purpose of the record, if the court please, we desire to make the offer to prove that Mr. Loggie did carry a policy of collision insurance on his automobile, which policy was paid to him for the damage to his automobile, and we make the offer at this time to make that proof." The court sustained the objection to the statement of counsel, and, upon motion therefor, granted a new trial on the grounds of the misconduct of counsel in bringing before the jury the question of insurance. In the opinion written by Presiding Justice Finch, a number of cases are referred to where such testimony has been held inadmissible, and also where the efforts of counsel to introduce such matters before the jury were held misconduct and prejudicial error. The opinion just referred to also sets forth the fact that the measure of the influence of such conduct upon the jury was primarily for the trial court, and, if the trial court was of the opinion that the verdict had been influenced thereby, an appellate court would not hold to the contrary, and the order of the trial court granting a new trial was affirmed.

In the case of Squires v. Riffe et al. (Cal. Sup.) 295 P. 517, 519 (see, also, Id. [Cal. App.] 287 P. 360), this court, in an opinion written by Presiding Justice Finch, and later adopted by the Supreme Court, held that admitting testimony that an automobile owner stated that she had liability insurance constituted error. A significant portion of the opinion in that case is pertinent here, and controlling: "Referring to proof of a settlement disclosing 'the fact that the defendant was indemnified by a policy of insurance,' it is there said: 'The evidence of the settlement, alone, not connected up with any act or admission of the defendant, and concerning which he had nothing to do, was clearly inadmissible in evidence. The error in admitting it might not in and of itself require a reversal, but, coupled with the avowed purpose and successful attempt of plaintiff's counsel to get before the jury, not only the fact of the settlement, but also that the settlement was made by the insurance carrier of the defendant, puts the case in a position where section 4½ of article 6 of the Constitution will not save the judgment. The natural tendency of a line of examination that suggests to the jury that the defendant is indemnified against any judgment for damages against him is highly prejudicial to his rights, especially in a closely balanced case where the evidence otherwise would be easily sufficient on appeal to support a verdict either for the plaintiff or for the defendant. Such attempts on the part of counsel have frequently been held to be improper and prejudicial. * * * From an examination of the record in this case it is impossible for us to state that the jury would not have found a different verdict had the objectionable examination not taken place and the evidence not been admitted.'" This quotation was taken from the case of Citti v. Bava, 204 Cal. 136, 266 P. 954.

In the case at bar, from an examination of the record, we find that the jury could not, consistently with their oaths, have rendered any verdict for the defendant. It is not a question of where the testimony is evenly balanced, but one where it is only a question of how much.

In the case of Bach et al. v. C. Swanston & Son, 286 P. 1097, 1100, this court had under consideration an objection to testimony which disclosed the fact of liability insurance, and it was there said: "There is abundant authority to the effect that efforts of plaintiff's counsel to get before the jury the facts that defendant is insured against loss is prejudicial and where the evidence is closely balanced, justifies a reversal. However, in this case we do not feel that such a drastic result should follow, first, because the inference is not clear that the purpose in making said remarks was to get before the jury the fact that appellants were insured or that the jury so interpreted the said remarks, next, because the court promptly instructed the jury to disregard them, and, lastly, because the evidence in this case, upon the issues involved, is by no means equally balanced, but, on the contrary, largely preponderates in favor of respondents." This of course is true of the instant case.

In the case of Symons v. Wooden et al., 97 Cal. App. 39, 274 P. 987, it appears that, immediately after an automobile collision, the defendant made the following statement: "Don't pay any of the damages, we are carrying insurance, we are fully protected, don't pay the repair bill, present your bill to the surety company, it will be paid." This was stricken out by the court, and the jury directed not to consider the same. Further on, counsel in his argument claimed that this statement was material. We quote as follows from the opinion: "In his argument to the jury, counsel for plaintiffs stated that Hanby's statement was material as an admission against interest. The decisions support this contention." Lahti v. McMenamin, 204 Cal. 415, 268 P. 644; Dullanty v. Smith, 203 Cal. 621, 265 P. 814; McPhee v. Lavin, 183 Cal. 264, 191 P. 23, 25. In the case of McPhee v. Lavin, supra, the alleged error of disclosing the fact of insurance was before the Supreme Court, and there, as here, was connected with an admission of liability, and the court held the admission of such testimony proper. We quote from the opinion: "The errors of law assigned upon admission of testimony over defendant's objections and motions to strike, so far as in any way suggestive of prejudice, arise upon the admission in evidence, as part of a conversation had with defendant, of defendant's declaration to plaintiff, immediately after the collision that he carried accident insurance that would provide for plaintiff if he had suffered injury. As this was admitted as tending to show an acknowledgment of responsibility by defendant for the accident, we think it was proper evidence." See, also, the case of Potter v. Driver, 97 Cal. App. 311, 275 P. 526, 529, where this court held that testimony showing insurance, being connected with an answer tending to establish the defendant's acknowledgment of responsibility, was admissible.

[3, 4] A number of other cases cited by counsel for respondent might be reviewed showing that, where the fact of insurance is disclosed in an answer, coupled with an acknowledgment of liability, prejudicial error cannot be assigned, but the authorities which we have heretofore cited we think sufficient to establish the following rules: First, that where the answer disclosing the insurance is inextricably coupled with an acknowledgment of liability, the answer is admissible; second, that, where it appears from the testimony in the record that no verdict could have been rendered for the defendant, the admission of testimony relative to insurance is not alone sufficient to authorize a reversal of the judgment. It must further appear that the judgment returned was the result of passion or prejudice. This involves the third assignment of error, to wit, that the verdict is excessive.

In the case of Potter v. Driver, supra, this court quoted from Zibbell v. Southern Pacific Co., 160 Cal. 237, 116 P. 513, the rule to be followed in determining whether damages are excessive, to wit: "That it is only where the verdict is so grossly disproportionate to any reasonable limit of compensation warranted by the facts, as to shock the sense of justice, and raise at once a strong presumption that it is based on prejudice or passion rather than sober judgment, that the judge is at liberty to interpose his judgment as against that of the jury." Citing Martin v. Shea, 182 Cal. 130, 187 P. 23; Grant v. L. A. Transfer Co., 45 Cal. App. 731, 188 P. 294; Anderson v. S. F. Oakland Railways, 61 Cal. App. 21, 214 P. 289.

[5, 6] That the jury may have erred in judgment, or awarded damages in a greater sum than would have been fixed by an appellate court, furnishes no legal reason for a reversal of the judgment. The fixing of the amount of damages to be awarded an injured person rests primarily upon the everyday experience and common judgment of the jury, dependent upon the circumstances of the particular case involved, subject to the revision and determination of the trial judge who has had the opportunity, as well as the jury, to learn all the facts at firsthand, and the responsibility resting upon the trial judge cannot be shifted to an appellate court unless the award is so great and so disproportionate to the injuries suffered as to clearly show the verdict to be a result of something other than a proper consideration of the testimony in the case—there must be a showing of passion, prejudice, or other undue influence. As we have shown, the record contains no testimony that should not have been submitted to the jury. The rulings of the trial court appear to be wholly unobjectionable. We are presented, really, with the simple question of the amount of the verdict in a case where liability stands confessed.

Is the verdict so excessive as to shock the conscience and lead us to the conclusion that it is not fairly supported? The record shows that the plaintiff in this case was a married woman of about 26 years of age, the mother of one child; that at the time of the collision the plaintiff was hurled back and forth in the automobile, suffered a fractured coccyx (the coccyx being the last segment of the spine), a fracture of the lamina of the lower lumbar vertebra. As a result of the injuries, respondent suffered much pain, and continued to suffer pain up to the time of the trial. While the respondent did not spend much time in the hospital, she was confined to her bed for a considerable period. The testimony shows that the dislocated coccyx projected into the rectum so that its functions became very acute. The coccyx is the center of very sensitive terminal nerves of the spine, and a fracture thereof produces much pain. It also appears that the fractured vertebra resulted in much pain to the respondent; that these pains will continue unless the respondent undergoes a rather serious surgical operation; that it would be necessary to remove the coccyx or the broken portion thereof; that the respondent is compelled to wear a brace, and must continue to wear the same unless she undergoes what one of the doctors called "two surgical operations"; that the respondent, though a married woman, will have to forego motherhood in the future, unless she is willing to suffer abnormal pains. Besides these injuries, the respondent has been rendered nervous, and also is unable to sit in a normal position.

Some of these facts which we have related were disputed by testimony introduced on the part of the appellant, but what we have stated we think the jury was entitled to accept as true, as following from a clear preponderance of the testimony.

[7, 8] In an extended note covering approximately 196 pages appended to the case of Quinn v. Chicago, Mil. & St. Paul Ry. Co., 46 A. L. R. 1298, are collected a large number of cases dealing with verdicts in personal injury cases. A considerable number of these cases involve causes which were tried at a time when the purchasing power of money was much greater than at present, which fact must be taken into consideration when considering an award of damages, as an award of damages in the sum of $7,500 made prior to the World War would, in purchasing power, we think, equal the award in this case. The difference in the purchas-

ing power of money is a common fact of which we think we may properly take notice.

An examination of the cases quoted in the annotation to which we have referred, and which is so extensive that we cannot catalogue any of them, leads to the conclusion that the verdict in this case, based upon the injuries suffered by the plaintiff, is in no wise disproportionate to corresponding cases there quoted.

The recent case of Wulferdinger v. Pickwick Stages System, 293 P. 704, recently decided by this court, is pertinent here. In this case the plaintiff suffered an injury to the coccyx. There was no fracture of any portion of the vertebra. An award of $7,000 was approved. In Putnam v. Pickwick Stages, 98 Cal. App. 268, 276 P. 1055, the plaintiff suffered a shoving forward of the fifth lumbar vertebra, and an award of $7,500 was approved. In Perry v. McLaughlin (Cal. App.) 287 P. 354, an award of $12,500 was approved. The injuries suffered by the plaintiff in that case, as shown by the facts set forth in the record, were not more serious than the injuries suffered by the plaintiff in this action.

[9] A number of other cases have been cited by respondent, but their consideration appears to us unnecessary. We find nothing in the record justifying a conclusion that the verdict is excessive or that the amount thereof has been increased by reason of any improper conduct upon the part of counsel, or error of the court in the admission of testimony.

The judgment is affirmed.

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112 Cal. App. 734

ZUMWALT v. SCHWARZ et al.

Civ. 7242.

District Court of Appeal, First District,
Division 1, California.
March 23, 1931.

1. Physicians and surgeons ⚷13.

Physician, calling another physician with patient's approval, *held* merely patient's agent and not liable for assisting physician's fee.

2. Physicians and surgeons ⚷13.

Person requesting physician's services for another, to whom person making request is not legally obligated to furnish medical aid, does not impliedly promise to pay therefor.

3. Principal and agent ⚷136(2), 190(1).

Agent contracting for disclosed principal is presumed to have intended to bind principal and ordinarily will not be held personally liable, except on clear, explicit evidence of such intent.

4. Physicians and surgeons ⚷24(3).

Evidence *held* insufficient to charge physician with personal liability for payment of assisting physician's fee.

> There was evidence that physician, calling in other physician to assist in operating on former's patient, said he would see that assisting physician got good fee; that he afterward told assisting physician that he had been asked to get bills from all doctors, but forgot about such physician's bill; and that latter did not keep office records of his services because former said he would take care of fee.

5. Physicians and surgeons ⚷23.

Patient's financial condition may be considered as affecting reasonableness of physician's charges, especially where general custom is to graduate charges accordingly.

6. Customs and usages ⚷10.

General custom or usage must be considered in determining parties' intent, and is, in effect, part of contract, unless latter manifests contrary intent (Civ. Code, § 1655).

7. Physicians and surgeons ⚷24(3).

Testimony that physician's services were worth from $1,500 to $2,500 supported verdict for $1,500, irrespective of patient's financial condition.

8. Trial ⚷251(9).

Refusal of instruction, limiting physician's compensation to items stated in bill of particulars, *held* not error, where evidence did not extend beyond general scope thereof.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by Fred H. Zumwalt against Jacob Schwarz and others. Judgment for plaintiff, and defendants appeal.

Reversed as to defendant Schwarz, and affirmed as to the remaining defendants.

Goldman & Altman, of San Francisco, for appellants.

Dunne, Dunne & Cook, of San Francisco, for respondent.

KNIGHT, J.

The plaintiff, Fred H. Zumwalt, a physician and surgeon, brought this action against Jacob Schwarz, also a physician and surgeon, and the executors of the last will of Charles W. Haas, deceased, to recover the sum of $1,500 claimed to be due for medical services rendered by plaintiff to the deceased during his lifetime, and upon trial a jury awarded him a verdict against all of the defendants for the full amount claimed. Judgment was entered accordingly, and defendants have joined in taking this appeal therefrom.

[1] Haas had been under the medical care of Schwarz for some time, and when his condition became critical Schwarz, with the approval of his patient, called in Zumwalt to assist him. Thereafter Zumwalt continued to collaborate with Schwarz in the treatment of Haas up to the time of the latter's death, which occurred some four months later. It is contended on behalf of Schwarz as one of the grounds of appeal that in calling in Zumwalt he acted merely as the agent of his patient and consequently is not liable for the payment of any part of Zumwalt's fee. We are of the opinion that this contention must be sustained.

[2, 3] Ordinarily, of course, where a person requests another to perform certain services the law implies a promise on the part of such person to pay the reasonable value of the services performed; but the authorities hold uniformly that such rule has no application to a case where a person requests a physician to perform professional services for another to whom the person making the request is under no legal obligation to furnish medical aid (21 R. C. L. 412; McClenahan v. Keyes, 188 Cal. 574, 206 P. 454); and in the case last cited the Supreme Court of this state has declared that where no such legal obligation exists, one who calls a physician to attend another is not liable for the services performed in the absence of an express agreement to pay therefor. Furthermore, it is a general rule of agency that where an agent contracts on behalf of a disclosed principal the presumption is, in the absence of an agreement otherwise, that it was the agent's intention to bind the principal and not to incur a personal liability; and ordinarily the agent will not be held personally except upon clear and explicit evidence of an intention to substitute or superadd his personal liability for or to that of his principal. Heringer v. Schumacher, 88 Cal. App. 349, 263 P. 550.

[4] Briefly stated, the circumstances under which Zumwalt was employed were as follows: When Haas' condition failed to respond to the treatments Schwarz was administering, he concluded that certain major operations and extreme treatments were essential; and after talking the matter over with the members of Haas' family he consulted with Zumwalt. These consultations extended over a period of some five days, at the end of which time Schwarz phoned Zumwalt that he was very much alarmed about Haas' condition and that he had decided to operate at once; and he asked Zumwalt to be present and assist. Zumwalt informed him that at that particular time he was about to operate on a patient of his own, but Schwarz urged him to defer that operation if possible and to come at once to the hospital, as he was "very anxious" about Haas' case. Haas was a man of much wealth, his estate having been appraised at approximately $1,800,000; and in soliciting Zumwalt's services Schwarz further stated, according to Zumwalt's testimony, "This is not the usual case we have been working together, but I want you to send your bill and I will see you get paid for it, that you get a good fee." Zumwalt insisted on taking care of his own patient first, however, immediately following which he hastened to the hospital to assist Schwarz. Upon his arrival there Schwarz again said to him, so Zumwalt testified: "I am nervous about it (Haas' condition), and I want you, I am particularly glad you got up, that you could come. * * * I will see that you get a good fee for this."

As will be seen, in none of the conversations between the parties did Schwarz promise directly or by intimation that he would become personally responsible for the payment of Zumwalt's services. The strongest interpretation that can be placed upon his language is that he would see that Zumwalt was liberally compensated by Haas. And that such was the understanding of Zumwalt is clearly shown by a conversation he claimed to have had with Schwarz at a hospital about three weeks after Haas' death, the substance of which he related as follows: "I said, 'By the way Jake, what about my bill in the Haas matter, to whom shall I send it and when.' Dr. Schwarz's face colored a little and he said, 'To tell you the truth, I have already been paid in the Haas matter, and I forgot about your bill.' He said, 'The family asked me to get the bills from all the doctors,' and he said, 'I didn't think of yours.' I said, 'That is a very peculiar circumstance, because you are the one who suggested you would take care of my bill in this matter,' and I said, 'If that is the case, the estate has not been closed, and there is no reason why I still am not able to put in a bill against the estate.' He said, 'I would rather you would not do that, it might embarrass me,' and some other words to that effect." Zumwalt nevertheless presented his claim against the Haas estate, averring therein, among other things, that his services had been rendered at the special instance and request of the deceased and Schwarz; but the claim was rejected. And in further confirmation of such understanding Zumwalt testified that the reason he did not keep any office records of his services was that Schwarz said "he would take care of my fee and see that it was taken care of." It is evident, therefore, that construing the foregoing testimony most strongly in favor of plaintiff, it is as a whole legally insufficient, under the authorities above set forth, to charge Schwarz with a personal liability for the payment of said fee.

[5, 6] The further contention is made that the amount of the fee awarded by the jury was excessive, it being argued that the trial court erred in allowing plaintiff to show by the cross-examination of Schwarz that he received a fee of $15,000 for his services, and in refusing to give to the jury two instructions to the effect that in determining the value of Zumwalt's services the jury "was not to consider the financial condition" of Haas, and that it was limited in such determination to certain items of service specified in the instruction and which corresponded with the items set forth in the bill of particulars theretofore delivered by plaintiff to the defendants. We find no merit in any of the foregoing points. The testimony relating to the amount of Schwarz's fee was received without objection on the part of defendants, and the proof showing the value of the Haas estate was admitted under stipulation. It would seem, therefore, that defendants are not in a position to complain of the effect of such evidence. However, aside from the question of the admissibility of such proof, under the weight of authority it is held that the financial condition of a person receiving medical aid may be considered as affecting the reasonableness of the physician's charges; and even in those jurisdictions holding to the negative view it will be found that an exception is made in favor of the consideration of such proof where, as here, there is evidence of a recognized usage, which has grown into a custom, to graduate professional charges with reference to the financial condition of the patient, so that it may be considered that the services were rendered and accepted in contemplation of it. 48 Cor. Jur. 1168. In other words, general custom or usage must be considered in determining the intent of the parties, and is in effect a part of the contract unless the contract manifests a contrary intention. Civ. Code, § 1655. In the present case the several members of the medical profession who testified as to the value of Zumwalt's services, including Schwarz himself, all stated that it was the recognized usage and the established custom of the medical profession in fixing the amount of the medical fees to take into consideration, along with the other elements, the wealth or poverty of the patient. In applying such doctrine the courts of Pennsylvania have said: "This state of affairs the law must recognize, that physicians should not have their services valued, as you would commodities in trade, by a fixed standard; what would be a proper charge for the same service to a man fully able to pay would be excessive to a man of limited means, and what would be willingly done for the indigent, without thought of financial reward, should be compensated for by one who can afford to pay on the scale which doctors of repute measure as the proper one." Pfeiffer v. Dyer, 295 Pa. 306, 145 A. 284, 285. And in quoting approvingly from an earlier case (Succession of Levitan, 143 La. 1025, 79 So. 829, 3 A. L. R. 1646) the court goes on to say that it is "a matter of common information that physicians and surgeons do not regulate their charges by any fixed standard of pecuniary value, but, to a certain extent, base them on the ability of the patient to pay. * * *" In the state of New York, where the same rule is followed, the court said: "* * * The evidence as to the value of the deceased's estate was properly allowed and properly taken into consideration, and that, together with the experience of the physician as such, and the nature and difficulty or easiness of the case, and what is considered by him and by other physicians an ordinary or reasonable charge for the services, are the proper elements upon which a judge or jury may act in fixing the value of the services." Schoenberg v. Rose (Mun. Ct. N. Y.) 145 N. Y. S. 831, 833.

[7] Irrespective, however, of the question of the materiality of evidence showing the financial condition of the patient, there is ample testimony in the record here to support the full allowance made by the jury for the reason that several witnesses testified that regardless of the financial condition of Haas, Zumwalt's services were reasonably worth from $1,500 to $2,500.

[8] Nor was there any error in the trial court's refusal to give the second instruction proposed by defendants for even assuming, as defendants assert, that plaintiff in claiming compensation was limited to the items of service set forth in his bill of particulars, the evidence introduced by plaintiff in this behalf did not extend beyond the general scope of such items. The matter of consultations with Schwarz, which seems to be the sole ground of defendants' complaint, is adequately included in that part of the bill reading "and in addition thereto approximately six professional visits *and consultations.*" (Italics ours.)

For the reasons above stated, the judgment as to the defendant Schwarz is reversed, and as to the remaining defendants it is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

113 Cal. App. 30

DEBERRY v. CAVALIER.

Civ. 4316.

District Court of Appeal, Third District, California.

March 25, 1931.

1. Pleading 🔑229.

Courts in furtherance of justice are liberal in authorizing amendment of pleadings either before or at trial (Code Civ. Proc. § 473).

2. Jury 🔑28(17).

Permission to amend pleading, even though presenting new issue, does not have effect of restoring constitutional right to jury trial previously waived (Code Civ. Proc. § 473).

3. Jury 🔑9.

Constitutional right of jury trial should be preserved, but not used as means of delaying or obstructing regular course of litigation.

4. Jury 🔑25(6).

Failure of defendant to demand jury trial within five days after receiving notice that cause had been set for trial was waiver of right (Code Civ. Proc. § 631, subd. 4).

5. Jury 🔑26.

Right of trial by jury was waived by failure to deposit with clerk of court sum of money equal to one day's jury fees (Code Civ. Proc. § 631, subd. 5).

6. Jury 🔑25(6).

Jury trial was properly denied for failure to demand jury within five days after receiving notice cause had been set for trial, regardless of subsequent amendment and cross-complaint presenting new issue (Code Civ. Proc. §§ 437, 439, 473, and § 631, subds. 4, 5).

7. Jury 🔑26.

Deposit of personal bank check for one day's jury fees was not deposit of "money," as required by statute (Code Civ. Proc. § 631, subd. 5).

> [Ed. Note.—For other definitions of "Money," see Words and Phrases.]

8. Attorney and client 🔑140.

Reasonableness of attorney's fee recoverable depends on record of proceedings and circumstances of case.

9. Attorney and client 🔑140.

Court, in determining attorney's fee, may properly consider amount involved, intricacies of facts and law of case, and standing and skill of attorney.

10. Attorney and client 🔑141.

Allowance of $250 as attorney's fee in suit on conditional contract for sale of electric refrigerator, wherein cross-complaint was filed, *held* not excessive.

> Contract for sale of refrigerator provided for allowance of a reasonable sum for attorney's fee, and, although complaint first asked for $200 after the counterclaim was filed demanding $4,500 damages for loss by fire resulting from defective wiring in installing refrigerator, the plaintiff was allowed to amend prayer of his complaint so as to increase his demand for counsel fees to the sum of $500.

11. Appeal and error 🔑984(5).

Judgment of trial court allowing attorney's fee will not be disturbed, unless clearly erroneous.

Appeal from Superior Court, Tehama County; H. S. Gans, Judge.

Suit by Clifford A. Deberry, doing business under the name of the Service Electric Company, against John Cavalier, wherein defendant filed a cross-complaint. Judgment for plaintiff, and defendant appeals.

Affirmed.

J. Oscar Goldstein, of Chico, for appellant.

McCoy & Wetter, of Red Bluff, for respondent.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

This is an appeal from a judgment in a suit upon a conditional contract for sale of an electric refrigerator. It is contended that the defendant was denied his constitutional right to a trial by jury, and that the amount of attorney's fees which was allowed is excessive.

The complaint was filed February 8, 1930. An answer denying the material allegations of the complaint was filed March 25, 1930. May 6th of the same year the case was regularly set for trial for June 5th. The day following the setting of the case for trial the defendant was duly notified of the date of trial. No demand for a trial by jury was made, except as hereinafter stated. May 26, 1930, the defendant served and filed his notice of intention to move the court for permission to amend his answer and file a cross-complaint. This motion was duly made on the 31st day of May. June 2d the court made an order granting the motion to amend the answer and permitting the filing of a cross-complaint. The amended answer and the pleading which is termed a cross-complaint were filed June 5th, at the time the case came on for trial. The answer to the cross-complaint was filed the same day. At the request of the defendant, the cause was continued to June 7th to be reset for trial. For the first time, on June 7th, the defendant filed a demand for a jury. The payment of no jury fees accompanied this demand. This demand resulted in a continuance of the time of trial to June 26th. The demand for a trial by jury was denied on the ground that this privilege had been waived by the defendant by his failure to request a jury within the time and in the manner provided by section 631 of the Code of Civil Procedure. On the day of the trial, the defendant appeared by counsel, and again renewed his motion for a trial by jury, leaving with the clerk of court the personal bank check of J. Oscar Goldstein, one of the attorneys for the defendant, for the sum of $36 for the jury fees for the first day of trial pursuant to section 631, supra. This check was not accepted by the clerk as payment. It was objected to by the respondent on the ground that it was not legal tender for the payment of the fees. Thereupon the defendant's demand for a jury trial was again denied. The defendant then moved for a continuance, which was also denied. The foregoing facts are undisputed.

The plaintiff adduced its evidence before the court sitting without a jury. At the close of the plaintiff's case, the defendant announced that he would introduce no evidence in support of his cross-complaint or otherwise, but would rely upon the validity of his demand for a trial by jury. The court thereupon adopted findings favorable to the plaintiff and against the defendant upon all the material issues. A judgment was accordingly rendered in favor of the plaintiff for the sum of $543.40, together with 12 per cent. interest per annum thereon from February 8, 1930, at which time said sum became due, and the further sum of $250 as attorney's fees. From this judgment the defendant has appealed.

The defendant contends that the filing of his cross-complaint which raises a new issue automatically vacated the former order setting the case for trial, and that the case was then placed on the calendar for the first time on June 7th to be set for trial, upon the issues finally adopted, at which time he demanded a trial by jury; that a jury trial was therefore not waived by him.

[1-3] It is true that the cross-complaint presents a new issue. It alleges the defendant's place of business was destroyed by fire which resulted from defective wiring used by the plaintiff in installing the electric refrigerator, and that the defendant was damaged thereby in the sum of $4,500. If this claim lies against the plaintiff for damages resulting from defective wiring, it is because the contract for the purchase of the electric refrigerator imposes upon the plaintiff the responsibility of safely and efficiently installing the plant. The liability is then imposed as an incident to the same transaction. The liability is in the nature of a counterclaim rather than a cross-complaint. 21 Cal. Jur. 73, § 45. If it constitutes a counterclaim, the allegations of new matter properly become a part of the answer. Section 437, Code Civ. Proc. If the new matter is properly presented as a counterclaim, its omission from the answer would create a waiver of the claim. Section 439, Code Civ. Proc. This new matter, therefore, constitutes a mere amendment of the answer which was permitted by the court "in furtherance of justice" pursuant to the provisions of section 473 of the Code of Civil Procedure. In furtherance of justice, courts are very properly liberal in authorizing the amendment of pleadings either before or at the trial. The permission to amend a pleading, however, even though it may present a new issue, does not have the effect of restoring one's constitutional right to a trial by jury which has been previously waived. The constitutional right of a trial by jury is a valuable privilege derived from the wholesome influence of Magna Carta, and should be preserved and enforced in all its efficacy. This right, however, should not be used as a means of delaying or obstructing the regular course of litigation. This privilege should be exercised with due diligence. The Legislature has therefore wisely provided that:

> "Trial by jury may be waived, * * *
>
> "4. By failing to announce that a jury is required, at the time the cause is first set upon the trial calendar if it be set upon notice or stipulation, or within five days after notice of setting if it be set without notice or stipulation.
>
> "5. By failing to deposit with the clerk, within ten days prior to the date set for trial, a sum equal to the amount of one (1) day's jury fees payable under the law."

[4, 5] In the present case the right of trial by jury was waived by failure on the part of the defendant to demand a jury trial within five days from the receiving of notice that the cause had been duly set for trial. The right of trial by jury was also waived by failure to deposit with the clerk of court a sum of money equal to one day's jury fees.

[6] Under the circumstances of this case, it may not reasonably be said the cause was first placed on the court calendar June 7th to be set for trial. If the mere amending of a pleading were to have the effect of restoring the right to a trial by jury which had been previously waived, the privilege of amending pleadings might be resorted to as a means of delaying and obstructing the orderly course of procedure. At the trial of this case, no evidence was offered by the defendant in support of his counterclaim. Evidently he had little faith in the justice of this claim. Certainly an issue which is abandoned at the trial of a cause may not become the means of restoring the right of trial by jury which is

otherwise waived. There was no error in denying the defendant's application for a trial by jury under the circumstances of this case.

There is nothing in the cases of Ferrea v. Chabot, 121 Cal. 233, 53 P. 689, 1092; Wendling Lumber Co. v. Glenwood Lumber Co., 19 Cal. App. 1, 124 P. 734, or Reese v. Baum, 83 App. Div. 550, 82 N. Y. S. 157, 158, relied upon by the appellant, which is in conflict with the foregoing conclusion. In the Ferrea Case the propriety of relieving a litigant from a previous stipulation waiving the right of trial by jury is approved, when it appears that the stipulation was made through mistake, or procured by fraud. The court, however, affirmed the order of the trial court denying the application for a trial by jury, saying that the order would not be disturbed on appeal except for an abuse of discretion. In the Wendling Lumber Company Case, where a demand for trial by jury was originally made pursuant to statute, and a mistrial of the cause occurred, it was held a subsequent demand for a jury was unnecessary, for the reason that the original demand was presumed to be continuing, and therefore adequate. The decision in the New York case of Reese v. Baum is based upon a statute which is radically different from the California Code. The New York statute provides that: "At the time when an issue of fact is joined, either party may demand a trial by jury, and unless so demanded at the joining of issue, a jury trial is waived." Pursuant to this statute, it was there properly held that an amendment which authorized the plaintiff to change his cause of action from one of liability on a contract to that of a tort should not be allowed without granting the defendant the right of trial by jury. The statutory waiver of the right of trial by jury in New York state depends upon the making of a demand therefor "at the [time of] joining of issue." In that case the issues were not joined by the filing of a complaint which was based upon a false statement of the facts. The real issue in that case was one of tort, not liability on a contract. On the contrary, the statute of California bases the waiver of the right to trial by jury upon a failure to demand that privilege when the case is first placed upon the trial calendar to be set, or within five days after notice thereof, regardless of subsequent amendments which may be made to the pleadings.

[7] Moreover, the defendant failed to comply with the statute by depositing with the clerk of court, ten days before the date set for trial, a sum of money equal to one day's jury fees. All that he ever deposited was a personal bank check for $36. This check was not accepted by the clerk as payment. It was objected to on the ground that the check was not legal tender for the payment. In 21 Ruling Case Law, 37, § 34, it is said: "In the absence of any agreement to the contrary money is the sole medium of payment." At page 60, § 59, of the last-cited authority, it is further said: "With the exception of a few jurisdictions the authorities are unanimous in supporting the rule that the giving of a bank check by a debtor for the amount of his indebtedness to the payee is not, in the absence of an express or implied agreement to that effect, a payment or discharge of the debt."

[8-11] The allowance of an attorney's fee of $250 in this case does not appear to be excessive. The contract provides for an allowance of a reasonable sum for this purpose. The complaint first asked for $200. When the counterclaim was filed demanding $4,500 damages for loss by fire resulting from defective wiring in installing the refrigerator, the plaintiff was allowed to amend the prayer of his complaint so as to increase his demand for counsel fees to the sum of $500. Permission to amend the prayer of the complaint in this regard, under the circumstances, does not seem unreasonable. Preparation for a defense to the charge contained in the counterclaim would greatly increase the labor of plaintiff's attorney. The abandonment of this issue at the trial could not have been anticipated. The reasonableness of the amount of the fee which was allowed depends upon the record of the proceedings and the circumstances of the case. In determining what sum will adequately compensate an attorney for his services, the court may properly consider the amount which is involved in the litigation, the intricacies of the facts and the law of the case, the standing and skill of the attorney, and every other fact or circumstance which will enable the court to fix a sum which will fairly compensate the attorney for his services. 3 Cal. Jur. 698, § 96; 2 R. C. L. 1059, § 145. We are unable to say that the amount of $250 which was fixed by the court as an attorney fee in this case is not adequately supported by the record. The value of an attorney's fee is frequently difficult to estimate accurately. The judgment of a trial court in that regard will not be disturbed, unless it is clearly erroneous.

The judgment is affirmed.

112 Cal. App. 629

CHRISTENSEN et al. v. LOS ANGELES ELECTRIC SUPPLY CO. et al.

Civ. 6600.

District Court of Appeal, Second District, Division 2, California.
March 17, 1931.

Automobiles ⚷244(36).

Evidence respecting cause of death of pedestrian struck by truck *held* insufficient to warrant recovery against owner of truck.

> Testimony was to effect that driver of truck and passenger immediately after striking woman ran to place where she lay on pavement, and that before they could pick her up an approaching automobile disregarding their signal passed directly over woman and did not stop. There was no proof as to nature or extent of injuries or whether death was caused by collision of truck with her person or by wheels of automobile as they passed over her.

Appeal from Superior Court, Los Angeles County; Victor R. McLucas, Judge.

Action by R. B. Christensen and another against the Los Angeles Electric Supply Company and another. Judgment for plaintiffs, and defendant named appeals.

Reversed and remanded for a new trial.

F. A. Preston and Bailie, Turner & Lake, all of Los Angeles, for appellant.

McNeil & Cotter and Edgar H. Craddock, all of Los Angeles, for respondents.

WORKS, P. J.

This is an action to recover damages for the death of the mother of the plaintiff minor. The events because of which Mrs. La Paughl lost her life occurred upon a dark and very rainy night, on Twenty-Third street, near its intersection with Oak street, in Los Angeles. A truck driven by defendant Watkins was proceeding westward on the numbered street, the driver having with him as a passenger one Howeth. When the vehicle had gotten about fifteen feet west of the intersection its right front fender struck Mrs. La Paughl, who was seen by neither Watkins nor Howeth until the moment of the impact, and knocked her to the pavement.

The plaintiffs had judgment, and the corporation defendant, the employer of Watkins, appeals.

The following statement of a part of the testimony of Watkins appears in the brief of respondents, the italics being those of the brief: "I only saw the woman at the very instant of the impact between her and the right front fender of the truck. I do not know whether or not she had been walking on West 23rd street toward the truck, away from the truck, or had approached from the side. The truck traveled about twenty feet from the place of the accident to the place where I stopped it alongside of and parallel with the northerly curb of West 23rd street. Mr. Howeth left the truck first. He *ran immediately* to the woman. I *immediately* followed him. She lay on the pavement between the northerly rail of the westbound car track and the northerly curb of West 23rd street. Her head was toward the curb. She was dressed in dark clothing. She had a long coat on made of a dark material. The coat had a large collar. She had been carrying an umbrella. It was made of dark purple material it was wet. The umbrella was broken when we found it but it had the appearance of having been open at the time of the accident. After we arrived at the place where the woman was lying *and as we stooped* down to pick her up, a Ford automobile approached along West 23rd street from the east. It was about *twenty feet* away when I first saw it. It was going west on 23rd street between the northerly rail of the west-bound car track and the northerly curb of that street. The woman was lying on the pavement directly in the path of that automobile. The ford automobile was approaching at a speed of about twenty-five miles per hour. Mr. Howeth made an effort to signal that automobile. He had a flashlight and was flashing it toward the Ford automobile as it approached. It did not seem to me that the speed of the Ford automobile was slackened as it approached the place where the woman was lying. If it did slacken at all it was not to any appreciable extent. The lights on the Ford automobile were burning. Mr. Howeth had to jump back to avoid being struck. I also jumped back. The Ford automobile passed directly over the woman. It did not stop."

Immediately after Mrs. La Paughl was run over by the Ford car she was taken to a residence near at hand. She never recovered consciousness and died that same night. She was seen by several persons after the accidents and during her unconsciousness, and her body, of course, was seen by some persons after her death. A number of these various persons were called as witnesses by the plaintiffs, but none of them was asked a single question to bring forth proof as to the nature or extent of her injuries, or whether her death was caused by the collision of the truck with her person or by the wheels of the Ford as they passed over her. It was not shown that she bled. It was not shown that there were bruises, cuts, or lacerations on any part of her person, whether caused by a blow or by moving wheels. It was not shown whether bones were broken, either by a blow or by the rolling of wheels across her person. Indeed, respondents do not contend that it can be determined from the record whether the death of the unfortunate woman was caused by the one vehicle or by the other. And they say in their brief that "it is immaterial whether it was the truck or the Ford that caused Ellen La Paughl's death, and further that it does not lie in appellant's mouth to complain that the driver of the Ford may have been negligent, or may have actually killed Mrs. La Paughl, since the evidence amply supports the jury's implied finding that Watkins' negligence was the proximate cause of Mrs. La Paughl's death."

Respondents then quote from section 10 of Beach on Contributory Negligence, thus: "An act is the proximate cause of an event when, in the natural order of things and under the circumstances, it would necessarily produce that event, when it is the first and direct power producing the result, the causa causans of the schoolmen." Following this quotation respondents cite in support of their contention Carroll v. Central Counties Gas Co., 74 Cal. App. 303, 240 P. 53, 55; Oakland Bank v. Murfey, 68 Cal. 455, 9 P. 843; and Merrill v. L. A. Gas & Elec. Corp., 158 Cal. 499, 111 P. 534, 31 L. R. A. (N. S.) 559, 139 Am. St. Rep. 134.

There is no room for the application of these cases in aid of respondents. Indeed, the statement of the rule in the Merrill Case shows that it cannot help them. There was no connection between the alleged negligence of Watkins and the act of the driver of the Ford in running his car over Mrs. La Paughl. That act did not "follow from the original wrong in unbroken sequence." It did not follow from, that is, it was not caused by, "the original wrong" at all. Mrs. La Paughl was struck down by the truck. Watkins drove to the curb and stopped his vehicle twenty feet beyond the place where she lay. He and his passenger leaped from their seat, ran back to the recumbent form, and bent over it long enough to determine that the stricken woman was unconscious. The Ford car was seen approaching. Howeth endeavored to stop its onrush by flashing his electric torch, but in vain, and the Ford passed over the body of the unfortunate woman. We cannot but conclude that she was the unhappy victim of two independent and, in a legal sense, totally distinct casualties. Surely, the first cause did not set any other cause in motion or into activity. It is equally true that the second act was "disconnected in time and nature" (Carroll v. Central Counties Gas Co., supra) from the first. Suppose Watkins and Howeth had not discovered what object was struck by the fender of the truck and had driven on. Suppose the Ford came along an hour later and ran over the prostrate woman. Suppose some one appeared on the scene soon after and discovered that she was still unconscious, but that she died later. Suppose the nature of both catastrophies was afterward discovered, and that respondents then brought suit for damages against Watkins and his employer. It is certain that respondents must then have shown whether the victim's death was caused by the truck or by the Ford. There is no difference between such a situation and the one here actually presented.

Other points are made by appellant, but we find it unnecessary to decide them.

Judgment reversed, and cause remanded for a new trial.

We concur: CRAIG, J.; IRA F. THOMPSON, J.

112 Cal. App. 746

BOWKER v. ILLINOIS ELECTRIC CO. et al.

Civ. 6595.

District Court of Appeal, Second District,
Division 2, California.
March 23, 1931.

1. Negligence 🔑138(4).

Instruction that chauffeur's negligence cannot be imputed to guest unless he was her agent *held* not inapplicable, though she was automobile owner's guest.

2. Appeal and error 🔑216(2).

Appellant not asking additional instructions cannot complain that instructions were too indefinite.

3. Negligence 🔑138(4).

Instruction that chauffeur's negligence in operating "his car" cannot be imputed to guest *held* not erroneous, in view of uncontradicted testimony that another owned car.

4. Automobiles 🔑243(14).

Testimony as to marks, apparently made by automobile tires when brakes were applied, *held* admissible in action for injuries to guest in automobile crowded off highway.

5. Appeal and error 🔑1050(1).

Admission of testimony that automobile tire marks were those of car in which plaintiff was riding when injured *held* not prejudicial.

Appeal from Superior Court, Los Angeles County; Walton J. Wood, Judge.

Action by Sue Bowker against the Illinois Electric Company and another. Judgment for plaintiff, and defendants appeal.

Affirmed.

Joe Crider, Jr., of Los Angeles, for appellants.

Bertrand J. Wellman and Gretchen Wellman, both of Los Angeles, for respondent.

IRA F. THOMPSON, J.

This action was brought to recover damages for personal injuries to the plaintiff, resulting in a verdict in the sum of $5,600. The defendants prosecute this appeal from the judgment.

The injuries resulted from a collision of two automobiles on the Roosevelt highway in Los Angeles county, in one of which, a Cadillac, the plaintiff was riding as a guest. The Cadillac was owned by a man named Phillips, who was on the right-hand side of the front seat at the time of the accident, and was being driven by a person called Jenkins, and Mrs. Bowker was seated between them. The defendant Thornburgh was driving a Dodge car, and he was the agent and servant of the corporate defendant Illinois Electric Company. It was claimed by respondent that Thornburgh was driving on the left or wrong side of the road; that he crowded the Cadillac completely off the highway, where it was struck, overturned, and wrecked. It is conceded by appellants that upon the issue of negligence the evidence was conflicting, and that, when tested by the rules governing the determination of appeals, sustains the verdict.

[1-3] It is urged, however, that the court fell into error when the judge instructed the jury as follows: "Any negligence of which Jenkins may have been guilty in the operation of his car cannot be imputed to or charged against the plaintiff unless he was her agent, and he was not her agent unless she had full authority to direct, control and command him in the driving of said car, or unless you find they were engaged in a joint enterprise. It is not sufficient to make an enterprise joint that the persons were coming from or bound on a common mission, but it is necessary for each to have authority in the control, management and driving of said car." It is not disputed that the instruction substantially states the law of imputed negligence in the case of a passenger or guest in an automobile, but it is said that the respondent was not the guest of the driver of the automobile, but of the owner Phillips; hence the instruction was not applicable. It is also argued that the court inadvertently and erroneously used the expression "his car" as indicating that Jenkins was the owner of the automobile instead of Phillips. Assuming, for the moment that there was negligence on the part of the driver of the car and also negligence on the part of the owner thereof in not requiring the former to drive differently, it would still remain the immediate negligence of Jenkins which contributed to the injuries, and that negligence could not under the law be imputed to the respondent except under the conditions defined in the instruction. Whether the respondent was guilty of negligence herself was left to the jury by other instructions. The appellants cannot complain that these other instructions are not more definite upon the question. Evidently they were satisfied at the time of trial, because they asked for none in addition. So far as the expression "his car" is concerned, the testimony establishes without contradiction that the automobile belonged to Phillips. This fact was not in dispute. The words were then evidently and patently used to designate the car under his immediate control, the car which he was driving. Under the circumstances of the case, it is impossible for us to believe the jury understood them in any different light.

[4] The other question which requires discussion relates to the admission in evidence of testimony given by the husband of the respondent who visited the scene of the accident during the early morning following its occurrence. He was permitted over the objection of the defendants to testify to certain marks apparently made by automobile tires when the brakes were applied to the wheels. He testified that he was familiar with the Cadillac automobile which was wrecked; that it had been equipped with a California top; that he found the "wreckage of the cars, parts of the cars, mostly of the Cadillac top and pieces of upholstering and tin and such like, and also blood stains on the cement"; that two burned rubber marks started about 25 or 30 feet from where the wreckage was and about the width of a machine in from the outside of the pavement, and that "they varied from about four feet or the width of the car to begin with out to within, I should judge a foot of the outside of the paving"; that at that point they were "just as if the machine went just sidewise, just sweeped sidewise." In another answer the witness explained that the outside wheel went off in the sand and that the inside wheel tapered in until it came within about a foot of the edge. Evidence was introduced by the defendants to show that an officer who came to the scene of the accident skidded his wheels when stopping and that a number of cars were compelled to stop, as the witness put it, "awful quick to keep from hitting someone else." But we think the proximity of the marks leading as they did directly to the wreckage and apparently corroborating the testimony of some of the eyewitnesses, rendered the testimony sufficiently relevant to

go to the jury. In Meier v. Wagner, 27 Cal. App. 579, 150 P. 797, 798, it is said: "The testimony of witness Sontag, to the effect that on the next morning following the injury to plaintiff he visited the place where the collision occurred and found, alongside a trail of blood, the track or imprint of a wheel made under restraint of brakes applied thereto, was properly admitted as a circumstance corroborating the testimony of other witnesses that plaintiff, when struck by the fender of defendant's car, was dragged along the street for some distance, until defendant stopped his car." To same effect see Fong Lin v. Probert, 50 Cal. App. 340, 195 P. 437. Counsel's objection to this testimony is directed rather to its weight than its relevancy.

[5] It is true that in one of the witness' answers he said these marks were those of the Cadillac, but no motion was made to strike this particular part of the answer; the motion being based upon the same ground as the objection and running to the entire answer. The error, if any there was in this casual reference, was trivial and not prejudicial, and probably that is the reason for the lack of the particularized motion.

Judgment affirmed.

We concur: CRAIG, Acting P. J.; ARCHBALD, Justice pro tem.

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112 Cal. App. 648

GRAHAM v. CONSOLIDATED MOTOR TRANSPORT CO. et al.

Civ. 7539.

District Court of Appeal, First District, Division 2, California.

March 18, 1931.

1. Trial 🔑59(2).

Order of proof is in sound discretion of court (Code Civ. Proc. § 2042).

2. Appeal and error 🔑882(8).

In automobile accident case, permitting defendant to state plaintiff's father told defendant he did not blame defendant for plaintiff's injuries *held* harmless, where plaintiff in examining her own witness brought out same matter.

3. Appeal and error 🔑1003.

Where preponderance of evidence was with defendants, court would not interfere with jury's finding for defendants in automobile accident case.

4. Automobiles 🔑246(22).

Defendants were entitled to instructions on unavoidable or inevitable accident, where that was one of theories upon which they defended action for injuries to child by automobile.

5. Trial 🔑203(1).

Trial judge must instruct jury on every reasonable theory of either party finding support in evidence.

6. Negligence 🔑85(2), 136(29).

Negligence will not be imputed to child of tender years, but question of capacity of child to exercise care in avoiding particular danger is one for jury.

7. Automobiles 🔑223(2).

Child struck by automobile was required to exercise ordinary care which children of same age would, under similar circumstances, ordinarily exercise.

8. Trial 🔑295(1).

Criticized portion of charge must be read with entire charge.

9. Trial 🔑295(6).

Instruction that if truck driver, after discovering child's perilous position, exercised ordinary care to avoid injuring child, verdict must be for defendant, *held* unobjectionable when read with entire charge.

> The language preceding portion of charge complained of advised jury that, when either party without negligence on his or her part is suddenly confronted with imminent danger, he is not required to exercise that degree of care which is required in commission of an act after careful deliberation.

Appeal from Superior Court, Alameda County; Leon E. Gray, Judge.

Action by Marjorie Wanda Graham, by her guardian ad litem, Harold L. Graham, against the Consolidated Motor Transport Company, substituted in lieu of the Drayage Service Corporation, and another. From a judgment for defendants, plaintiff appeals.

Affirmed.

Lynn W. Culp, Sr., and Crozier C. Culp, both of Oakland, for appellant.

Myron Harris and John Jewett Earle, both of Oakland, for respondents.

NOURSE, P. J.

Defendants had a verdict in an action for damages for personal injuries. The plaintiff appeals from the judgment on the verdict upon typewritten transcripts.

The action grew out of an accident wherein the plaintiff, a child of 7 years, was struck by a truck driven by defendant Loney Rogers while in the employ of his codefendant. The plaintiff, accompanied by her brother of about 10 years of age and another girl of about 7, attempted to cross to the south side of Harmon street in the city of Berkeley at a point about midway between the street intersections. The little girl ran out from behind an automobile parked along the north curb, and, when she had reached a point beyond the center line of Harmon street, her brother called to her to warn her of the approaching truck. She then apparently became confused and turned to retrace her steps. When the driver of the truck saw her crossing, he swerved the truck from the right-hand side of the road and brought the truck to a stop at a point to the left of the center line of the street. The right front wheel of the truck struck the plaintiff on the heel and threw her to the ground, causing the injuries complained of. The defendants, in addition to their denials of negligence on their part, pleaded unavoidable accident and contributory negligence on the part of plaintiff.

[1] On this appeal the appellant assigns as error the action of the trial court in denying her the privilege of calling the defendant Rogers as a witness under section 2055, Code of Civil Procedure, until she had exhausted her own witnesses; but, as she assented to the procedure, there is nothing involved but the well-settled rule that the order of proof is to be regulated in the sound discretion of the court. Code Civ. Proc. § 2042.

[2] Error is predicated on the ruling permitting the defendant Rogers to state that the father of plaintiff had told him that he did not blame him (Rogers) for the injuries to the plaintiff. The answer was given on a redirect examination upon the theory that it was part of a conversation brought out on cross-examination. The ruling was error, and the answer was mere hearsay, elicited by an improperly suggestive and leading question. But the plaintiff, upon examination of her own witness, brought out the same matter; hence the ruling was not prejudicial.

[3] The appellant devotes considerable space in her brief to the argument that the evidence is insufficient to support the verdict. It would serve no purpose to recite the testimony of the various witnesses; it is sufficient to say that there is some conflict, and that, to our minds, the great preponderance of the evidence is with the respondents. Under such circumstances it is not the province of the appellate court to interfere with the finding of the jury. Bennett v. Chanslor & Lyon Co., 204 Cal. 101, 105, 266 P. 803.

[4, 5] The appellant assigns error in the instruction given on the element of unavoidable or inevitable accident. That was one of the theories upon which respondents defended the action, and they were entitled to have an instruction covering it (Niosi v. Empire Steam Laundry, 117 Cal. 257, 261, 49 P. 185), as it is the duty of the trial judge to instruct the jury upon every reasonable theory of either party finding support in the evidence (Raymond v. Hill, 168 Cal. 473, 479, 143 P. 743; Murero v. Reinhart Lumber Co., 85 Cal. App. 385, 387, 259 P. 494).

[6, 7] Appellant's criticism of the instructions relating to the plea of contributory negligence is difficult to understand. Her position seems to be that there is a presumption somewhere that a child of tender years lacks capacity to commit an act of negligence; hence the plea of contributory negligence is not available when a child of tender years is suing as plaintiff. We understand the rule to be that negligence will not be imputed to a child of tender years (Gonzales v. Davis, 197 Cal. 256, 260, 240 P. 16; Seperman v. Lyon Fire Proof Storage Co., 97 Cal. App. 654, 658, 275 P. 980), but that the question of the capacity of the particular child to exercise care in avoiding a particular danger is one of fact to be left to the jury (Cahill v. Stone & Co., 153 Cal. 571, 577, 96 P. 84, 19 L. R. A. (N. S.) 1094; Cahill v. E. B. & A. L. Stone Co., 167 Cal. 126, 139, 138 P. 712). The instruction complained of advised the jury that "a child is required to exercise only that measure of care which children of the same age and under similar circumstances ordinarily exercise," and it was left to the jury to determine the measure of care required of appellant under the circumstances of this case. The instruction as a whole was fair to appellant, and was well within the rule of the decisions. See Todd v. Orcutt, 42 Cal. App. 687, 690, 183 P. 963; Richmond v. Moore, 103 Cal. App. 173, 284 P. 681.

[8, 9] Finally error is assigned in giving the instruction reading: "If you find that the driver of the defendant's truck, after discovering the perilous position of Marjorie Wanda Graham, exercised ordinary care to avoid injuring Marjorie Wanda Graham, then your verdict must be for the defendants." Standing alone, the portion of the charge quoted is open to some of the criticisms made by the appellant, but this paragraph must be read with the entire charge, and, when so read, it is unobjectionable. The paragraph immediately follows the language of the charge which advised the jury that, when either party "without negligence upon his or her part" is suddenly confronted with imminent danger, he is not required to exercise that degree of care or skill which is required in the commission of an act after careful deliberation. The evidence showed that both parties were suddenly confronted with imminent danger, and it showed as well that the driver of the truck was in that position without negligence on his part. Herein lies the difference between this case and Vedder v. Bireley, 92 Cal. App. 52, 267 P. 724, cited by appellant, where the position of imminent danger was the direct result of the defendant's negligence. Taking the instructions as a whole, the law applicable to the issues involved was fully and fairly presented to the jury.

Judgment affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

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112 Cal. App. 558

SAN JOSE BRICK CO. v. RHODES-JAMIESON CO.

Civ. 7393.

District Court of Appeal, First District, Division 2, California.

March 16, 1931.

Rehearing Denied April 15, 1931. Hearing Denied by Supreme Court May 14, 1931.

1. Account stated ⚿6(2).

Account not objected to within reasonable time becomes account stated.

2. Sales ⚿190.

Amount of check, sent by buyer to seller with attached voucher reading "cash advanced," *held* advance payment, for which buyer was entitled to credit on goods sold, though seller used amount to cover its pay roll.

3. Account stated ⚿5.

Statement of account, showing credit of amount advanced to bill of goods sold and payment of stated balance, and treated by parties as correct for two years, *held* to constitute account stated.

4. Account stated ⚿18(1).

Stated account is not special defense which must be pleaded in those terms.

5. Account stated ⚿18(2).

Statement of account *held* admissible under special plea of payment in action on open book account.

6. Appeal and error ⚿1039(13).

Plaintiff in action on open account, defended vigorously on ground that account was stated, was not prejudiced by failure to plead such defense specifically in answer.

Appeal from Superior Court, Santa Clara County; F. B. Brown, Judge.

Action by the San Jose Brick Company, a corporation, against the Rhodes-Jamieson Company, a corporation. Judgment for plaintiff, and defendant appeals.

Reversed.

Clark & Heafey, of Oakland, for appellant.

Louis Oneal and Wm. F. James, both of San Jose, for respondent.

NOURSE, P. J.

Plaintiff sued on an open book account and recovered judgment for $3.000. The defendant appeals on a bill of exceptions.

For many years prior to January 9, 1926, the plaintiff had been in the business of selling brick to the defendant under an agreement whereby the defendant from time to time made cash advances on request of the plaintiff and the latter billed the brick to defendant at $1 less than market price. The accounts of the parties were evidenced by vouchers forwarded by the defendant with each check showing the advances made and the credits of such advances on purchases from plaintiff. This practice continued from November, 1923, to July, 1926. On January 9, 1926, defendant sent plaintiff a check for $1,500 attached to a voucher designating it as "cash advanced on account." On January 14, 1926, a similar check for $1,500 was sent attached to a voucher reading "cash advanced." Both checks were received by plaintiff and cashed by indorsement of the president and manager of plaintiff. The proceeds of the first check were used by the plaintiff corporation to cover its pay roll in the operation of its business. The proceeds of the second check were taken from the corporation by its president and manager and were used by him in the purchase of additional stock of the plaintiff corporation for his own account.

On February 17, 1926, the defendant forwarded to the plaintiff corporation four vouchers showing an itemized account of the purchases of brick from plaintiff down to February 13, 1926, crediting defendant with the $3,000 advanced, and showing a balance of $734.32. Attached to these vouchers and inclosed in the same envelope were the defendant's check covering the balance, and a letter of inclosure asking plaintiff to notify the defendant if any further amounts were due. The vouchers and the check were received by plaintiff, and the check was cashed in due course; but the plaintiff's president testified he had not seen the letter. No complaint was made by plaintiff, but the parties continued to do business as formerly, and the plaintiff billed the defendant upon the goods sold after February 13 only. Approximately two years after the statement of this account in February, 1926, plaintiff made demand on defendant for the payment of $3,000 for brick

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⚿For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

sold and delivered prior thereto and commenced this proceeding.

[1-3] On this appeal the defendant relies upon the well-settled rule that, when a party neglects to object to an account within a reasonable time it becomes an account stated between the parties. Adopting this rule to its plea of payment the appellant contends that the statement of the account in February, 1926, which shows a credit of the $3,000 advanced to the bill of goods sold and the payment of the balance then stated to be due, is an acknowledgment of payment in full for all the items contained in respondent's bill of particulars. Respondent's reply to this is twofold: That there is a conflict of evidence, and hence it must be inferred that the trial court found that no account was stated; and, second, that the answer did not specially plead the statement of the account.

The only conflict in the evidence is the wholly immaterial evidence that the president of the respondent corporation unlawfully took the proceeds of the second check for his own purposes and that the president of the appellant either urged or suggested that he should do so. There is no evidence that the statement of account and the letter of inclosure were not received by the respondent corporation and there is no conflict in the evidence that it was treated by both corporations as a correct statement of account between the parties for a period of approximately two years. As to the first check for $1,500, it is conceded that this amount was used by respondent to cover its "pay roll," and from this it is argued that it was not an advanced payment in the ordinary course of business. We cannot follow respondent. It does not appear that in any of the advances made over this three-year period the appellant specified the purpose for which respondent was to use the money. The payment of its pay roll is, of course, a corporate purpose, and the corporation having taken the money from appellant for that purpose the appellant is entitled to credit on the goods billed to it. This no doubt was the view which the corporation took when it failed for approximately two years to assert any claim to the contrary. The conceded and undisputed facts bring the case squarely within the rule that the account submitted February, 1926, is deemed accepted and constituted an account stated. Auzerais v. Naglee, 74 Cal. 60, 67, 15 P. 371; 1 R. C. L. 213; 1 Cal. Jur. 196, and cases cited.

[4-6] The question remains whether under the pleadings the appellant was entitled to rely on this defense. The plaintiff sued on an open book account. The defendant denied the allegations of the complaint and pleaded full payment of the amount claimed due. The defense of a stated account is not a special defense which must be pleaded in those terms. The statement of account upon which the defendant relied was evidence of payment of the account in full. Hence, under the special plea of "payment," the defendant might offer proof of the statement of the account, just as he might offer proof of an accord and satisfaction or of a receipt of payment. Respondent relies on Vaughan v. County of Tulare, 56 Cal. App. 261, 268, 205 P. 21, where the court held that, when the action was brought and defended on the original contract, the defendant could not raise the plea of account stated on appeal. The case is not in point. This cause was defended, and defended most vigorously, on the ground that the account was stated, and the respondent was not prejudiced by the failure to plead that defense specifically in the answer.

The judgment is reversed.

We concur: STURTEVANT, J.; SPENCE, J.

112 Cal. App. 758

In re KELLY'S ESTATE.

MACPHERSON v. STIRLING et al.

Civ. 7816.

District Court of Appeal, First District, Division 2, California.

March 24, 1931.

Rehearing Denied April 23, 1931. Hearing Denied by Supreme Court May 21, 1931.

1. Wills ⚷439.

Auxiliary rules of construction and presumptions should be subordinated to cardinal rule that will is to be construed according to testator's intention (Civ. Code, § 1317).

2. Wills ⚷627(1).

Under will requiring nieces to shake dice for diamond ring, trial court properly *held* that surviving niece was entitled to ring (Civ. Code, § 1317).

> Since testator obviously intended to make a bequest of ring to either one of nieces with further intention that chance should determine which should receive the ring, the trial court by its order granting partial distribution to surviving niece after death of other correctly construed will so that intention of testator would have effect as far as possible in accordance with Civ. Code, § 1317.

Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

In the matter of the estate of Thomas A. Kelly, deceased, wherein J. H. Lauder was executor, and wherein Iris Macpherson petitioned for partial distribution. From an order granting the petition, Mrs. D. Mc. F. Stirling and another, contestants, appeal.

Affirmed.

Clarence E. Todd and A. V. Dalrymple, both of San Francisco, for appellants.

J. H. Sapiro, of San Francisco, and Robert P. Cohen, for respondent.

SPENCE, J.

This is an appeal from an order granting the petition of respondent Iris Macpherson for partial distribution.

The property involved is a diamond ring. The argument for reversal of the order is based entirely upon appellants' construction of the terms of the will. The testator left an olographic will providing that his money was to be "divided between" his brothers and sisters; that his bonds were to be "divided between" his nieces, Hazel Stirling and Iris Macpherson, and then follows the provision in question, "Let Iris and Hazel shake dice for the diamond ring." Following the testator's death and before the dice had been shaken, Hazel died leaving an olographic will providing, "I want my half of the diamond ring * * * to go to my mother, Elizabeth A. Stirling" (one of the appellants herein). The court ordered the ring distributed to respondent Iris Macpherson upon her petition for partial distribution stating as follows: "The intention of the testator was that Iris or Hazel should have the ring. He had no intention to give each of the girls a share in the ring. The estate in the ring never passed to the two girls. Hazel died before the ring was disposed of and the only person to take the ring is Iris."

Appellants contend that upon the death of the testator the title to the ring became vested in Iris and Hazel as tenants in common and that the court erred in granting partial distribution of the ring to Iris as the interest of Hazel had not been divested. In support of their position appellants cite Estate of Hittell, 141 Cal. 432, 75 P. 53, and Estate of Murphy, 157 Cal. 63, 106 P. 230, 137 Am. St. Rep. 110, and argue that no right of survivorship existed as a tenancy in common and not a joint tenancy was created. Under the terms of the will in the present case we are of the opinion that the authorities cited are inapplicable and that there is no merit in appellants' contentions.

[1, 2] The provision of the will in question was rather novel. We have found no authorities directly in point and must rely upon general principles in determining its proper construction. It is a cardinal rule in the interpretation of a will that it is to be construed according to the intention of the testator (Civ. Code, § 1317), and to this rule, all auxiliary rules of construction and presumptions should be subordinated. Estate of Blake, 157 Cal. 448, 458, 108 P. 287. Section 1317 of the Civil Code provides: "A will is to be construed according to the intention of the testator. Where his intention cannot have effect to its full extent, it must have effect as far as possible." What was the intention of the testator here? He obviously intended to make a bequest of the ring to one person only, namely either Iris or Hazel, but not to both. It was his further intention that chance should determine which one of the two nieces should receive the ring. In our opinion the testator had no intention that Iris and Hazel should become vested at any time with undivided interests in the ring either as joint tenants or as tenants in common. His intention could not have effect to its fullest extent as the determination by chance had not been made prior to Hazel's death, but his primary intention that either one or the other of the two nieces should have the ring could still be given effect by distributing the ring to the survivor. By its order granting partial distribution to respondent, the trial court correctly construed the will so that the intention of the testator would "have effect as far as possible." Civ. Code, § 1317.

The order appealed from is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

In re BROOKS' ESTATE.*

Civ. 7817.

District Court of Appeal, First District, Division 2, California.

March 20, 1931.

Rehearing Denied April 18, 1931. Hearing Granted by Supreme Court May 18, 1931.

1. Wills ⚷130.

Instrument offered as holographic will must be complete and executed document.

2. Wills ⚷133.

Signature on holographic will found elsewhere than at end may be signature of execution, but evidence warranting this conclusion must be found in instrument itself.

3. Wills ⚷386.

Appellate court may set aside findings of court or jury on whether instrument pre-

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Hearing granted 4 P.2d 148.

sented is holographic will only when findings are not sustained by adequate evidence.

4. Wills ⚷384.

On appeal, evidence on whether instrument was intended as will must be regarded in light most favorable to support of judgment.

5. Wills ⚷130.

Trial court *held* warranted in finding instrument with testator's signature in first line and without period at end was holographic will.

> The will began, "This is my will—E. R. B.," and then followed provisions giving certain property to certain persons. There was no period at end, and after expression giving legacy to certain person the writer left two blank lines and there was no residuary legacy clause and no executor named.

Appeal from Superior Court, City and County of San Francisco; Frank H. Dunne, Judge.

Phil C. Katz, special administrator of the estate of Elizabeth Ryan Brooks, also called Elizabeth R. Brooks, deceased, and another, filed an application for the probate of the will of deceased, opposed by Joseph Ryan and another. From a judgment admitting the will to probate, contestants appeal.

Affirmed.

Charles S. Wheeler, Charles S. Wheeler, Jr., Walter Slack, and Brice Toole, all of San Francisco, for appellants.

Henry F. Boyen, of San Francisco, for respondents.

STURTEVANT, J.

The public administrator of San Francisco filed a petition asking that a purported will be admitted to probate and that he be appointed administrator with the will annexed. After due notice certain heirs appeared and filed a written opposition. To that pleading the administrator filed an answer and on the issues so made a trial was had before the trial court. It made findings of fact in favor of the public administrator, and in its conclusion of law it found that the purported will was the last will and testament of the deceased and that the public administrator was entitled to letters of administration with the will annexed. From a judgment entered thereon two of the heirs have appealed and have brought up a bill of exceptions. The bill of exceptions shows that the only evidence introduced in the trial court consisted of a showing as to the will being in the handwriting of the deceased and evidence as to the kith and kin of the deceased and evidence identifying the beneficiaries named in the will.

On this appeal there is but one point made. The contestants claim that the trial court erred in applying the law to the purported will and ordering it admitted to probate. The public administrator claims that the trial court made no error. A photographic copy of the purported will is contained in the transcript. It is as follows:

"Sept 12—1929

"This is my will—Elizabeth Ryan Brooks

"To my sister—Mrs. W L Perkins—857—Lincoln Ave. St. Paul Minesoto—I give five Shares of A. T. T. Stock—

"To Miss Alice Newman 641 O'Farrall St. S. F I give five Shares of A. T. T Stock—

"To Miss Elizabeth Susan O Brien 857—Lincoln Ave St-Paul Minn—five Shares of Great Western Power Stock—

"To Mrs Joseph Ryan, 2426 Howard N. Seattle Wash. Twenty Shares of Calif Edison Stock—

"To Mrs Mary Springer Allen 2100 Bay St —S. F four Shares of Paraffin Stock

"To my Sister Mary Elen Ryan Chicago I give $1.00

"To my brother T. A Ryan $1.00"

[1, 2] It will be noted that the writer did not end the instrument with a period. However, it will also be noted that with few exceptions numerous periods and punctuation marks are omitted. The will does not contain a residuary clause nor does it show that the decedent possessed any other properties than those mentioned in the will. On the face of the document between the expression giving a legacy to Mrs. Mary Springer Allen and the expression giving a legacy to Mary Ellen Ryan the writer left two blank lines. The ending is abrupt and without a period. The first line, "This is my will—Elizabeth Ryan Brooks," is quite out of the ordinary. If it had been the last expression instead of the first there would be no question remaining in the case to be determined. The respective counsel cite and rely on the decisions in recent cases. As to some points both counsel cite the same case. It is now well settled that in determining whether a certain writing is an holographic will the fact "must be established upon the face of the offered instrument that it is a complete and executed document; that notwithstanding that the usual place of signing and so of evidencing this execution and completeness is at the end of the instrument, the signature of the testator found elsewhere than at the end may be, if circumstances warrant it, a signature of execution, but that the only evidence which will warrant this conclusion must be found in and on the instrument itself. * * *" Estate of McMahon, 174 Cal. 423, 424, 163 P. 669, L. R. A. 1917D, 778. In applying the

rule in some cases the court found that the instrument before the court contained words showing that the writer had done everything that he intended to do. Estate of McMahon, supra; Estate of Morgan, 200 Cal. 400, 253 P. 702; Estate of England, 85 Cal. App. 486, 259 P. 956; Estate of Sullivan, 94 Cal. App. 674, 677, 271 P. 753. At least one of the cases turned on the fact that the signature was at the top and not at the end of the purported will, but there was no room on the paper for the writer to sign at the end. Estate of Streeton, 183 Cal. 284, 288, 191 P. 16. Some other cases turned on the fact that there was on the face of the instrument something showing affirmatively that the writer had not finished doing the things he intended to do. Estate of Manchester, 174 Cal. 417, 418, 163 P. 358, L. R. A. 1917D, 629, Ann. Cas. 1918B, 227; Estate of Devlin, 198 Cal. 721, 726, 247 P. 577. Again some cases turned on the fact that on the face of the instrument there was nothing showing affirmatively that the writing of his name by the writer in the exordium was by him intended as a signature. Estate of Bernard, 197 Cal. 36, 40, 239 P. 404; Estate of Hurley, 178 Cal. 713, 714, 174 P. 669.

[3-5] We think the instrument before us falls partly under each of the classes just enumerated. The first sentence, "This is my will—Elizabeth Ryan Brooks," has probative force to uphold the inference that the name of the decedent was written with the intention of evidencing the fact that the document was her fully executed completed will. The gap or unwritten space mentioned above, the absence of a period at the end, the omission of a residuary legacy clause, and the failure to name an executor are facts on which an inference may be founded that the document was not intended as a will. Now it will be conceded, as contended by the respondent, that "it is the peculiar and exclusive province of the trial court or trial jury in the first instance to make such finding of fact, and it is especially the right of every litigant to have all facts so determined by court or jury, this court sitting only to review the findings and being empowered to set them aside as matter of law only when not sustained by adequate evidence. Ryder v. Bamberger, 172 Cal. 791, 799, 158 P. 753. Estate of Streeton, 183 Cal. 284, 289, 191 P. 16, applies that rule to such cases as the one before us. Then in Mah See v. North American Acc. Ins. Co., 190 Cal. 421, 426, 213 P. 42, 44, 26 A. L. R. 123, the court said: "In so far as the evidence is subject to opposing inferences, it must upon a review thereof be regarded in the light most favorable to the support of the judgment." Under the circumstances mentioned we are unable, as a matter of law, to say the trial court erred by drawing the wrong inference.

The order is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

113 Cal. App. 15

RANNARD et ux. v. HARRIS et al.

Civ. 4201.

District Court of Appeal, Third District, California.

March 24, 1931.

Rehearing Denied April 23, 1931. Hearing Denied by Supreme Court May 21, 1931.

1. Appeal and error 🔑1004(1).

Duty of guarding against excessive verdicts necessarily rests to great extent on trial judge, who presumably will not allow excessive verdict to stand.

2. Appeal and error 🔑1004(1).

Appellate court may not interfere unless excessive recovery appears as matter of law, or recovery is so disproportionate as to shock sense of justice or raise presumption of prejudice or corruption.

3. Damages 🔑132(3).

$30,000 for woman, aged 59, receiving permanent nasal and other facial disfigurements, and losing nerve control over eyebrow and partial use of right arm, causing nervousness, *held* not excessive.

4. Damages 🔑133.

$2,000 to husband for loss of services of wife injured in automobile collision *held* not excessive.

5. Appeal and error 🔑1064(2).

Error, if any, in instruction regarding plaintiff's "serious injury," claimed to tell jury that injury was "serious," *held* harmless; defendants' counsel in argument having admitted seriousness thereof, conclusively shown by evidence.

6. Evidence 🔑194.

Clothing worn by injured plaintiff at time of automobile collision *held* admissible.

7. Appeal and error 🔑204(1).

Failure to object to introduction of evidence precluded complaint thereof on appeal.

Appeal from Superior Court, Shasta County; Walter E. Herzinger, Judge.

Action by A. B. Rannard and wife against Walter Harris and another. Judgment for plaintiffs, and defendants appeal.

Affirmed.

W. D. Tillotson, of Redding, and Redman, Alexander & Bacon, of San Francisco, for appellants.

Carr & Kennedy, of Redding, for respondents.

🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Mr. Justice pro tem. TUTTLE delivered the opinion of the court.

This is an action brought to recover damages for injuries received in an automobile collision. The jury brought in a general verdict for plaintiff in the sum of $30,000, and also a verdict in favor of the husband of plaintiff in the sum of $4,829.11. Of the latter sum, $2,000 was for loss of his wife's services.

Two questions are presented upon this appeal. The first is that of excessive damages, and the second is the correctness of one instruction.

The record shows, almost without dispute, that the driver of defendant's automobile was guilty of negligence. When asked by counsel for defendants as to how the accident occurred, he replied: "Well, I simply fell asleep." While in that condition he drove over to the left side of the highway and collided with plaintiffs' car.

A number of injuries were received by the wife, who was 59 years of age at the time of the accident, and in good health prior thereto. After the accident she was taken to the hospital at Redding and confined there six weeks. She returned to her home at Santa Monica, and was still undergoing medical treatment at the time of the trial, which was eight months after the injuries were received.

The doctor who treated Mrs. Rannard testified very fully respecting the character, extent, and duration of her injuries, as follows: The nose was broken at the septum, and was permanently angulated to the left, and this disfigurement was permanent; there was an internal injury to the nose, narrowing the left nostril thereof, and it was very doubtful if an operation would relieve this condition; the muscles of the scalp had lost their nerve supply, so that she was unable to raise one eyebrow; and it was very doubtful if this condition could ever be cured; there was a comminuted fracture of her arm, the bone being broken up into several pieces; there was injury around the whole shoulder, and pain and loss of function in the shoulder joint; there was some loss of extension and loss of power in the right hand, and as a result of this she was unable to comb her hair because she could not get her hand up, and she could not reach up to turn on an electric light; the witness did not think the injury to the shoulder would ever be cured, and he stated that he believed she would always have some disability; there were scars on her forehead and nose; the pain which she had suffered, and the way she was pulled down physically, led up to a condition of nervousness and lack of nerve force which is known as "asthenia," which means simply the lack of nerve power and inability to do the things that an ordinarily normal person can do, and this condition might exist for a long time, and possibly there might never be a recovery therefrom. The foregoing testimony related to her condition at the time of the trial. In addition to this testimony, there is evidence showing severe physical and mental suffering. Her body was bruised all over by the accident. By reason of the facial disfigurements, she doubtless has suffered, and will continue to suffer, mortification and humiliation such as naturally comes to one of her sex by reason of permanent scars and the disfigurement of her nose.

[1, 2] The rule which should govern an appellate court in passing upon a question of this character is well stated in the case of Horn v. Yellow Cab Co., 88 Cal. App. 678, 263 P. 1025, 1026: "No two cases exactly alike are to be found, and consequently no absolute rule is applicable to all cases. Morgan v. Southern Pacific Co., 95 Cal. 501, 30 P. 601. Therefore, the only method of determining whether a verdict is excessive is by comparing the amount of damages awarded thereby with the evidence (Zibbell v. Southern Pacific Co., 160 Cal. 237, 116 P. 513); and where the element of past and future pain is involved it is always difficult to fix the amount of damages which should be allowed therefor (Pedrow v. Federoff, 77 Cal. App. 164, 247 P. 212). The remedy for safeguarding against the danger of excessive verdicts is necessarily, to a great extent, committed to the judge who presides at the trial, because it is presumed that he will carefully weigh the evidence himself and not allow a verdict to stand if he believes that excessive damages have been awarded by the jury under the influence of passion or prejudice; and it is only in cases where the excess appears as a matter of law, or where the recovery is so grossly disproportionate to any compensation reasonably warranted by the facts as to shock the sense of justice or at first blush raises a presumption that it is the result of passion, prejudice, or corruption, rather than honest and sober judgment, that a reviewing court is justified in interfering. Bond v. United Railroads, 159 Cal. 270, 113 P. 366, 48 L. R. A. (N. S.) 687, Ann. Cas. 1912C, 50; Pedrow v. Federoff, supra; 8 Cal. Jur. 834."

The wisdom for the rule declared in the foregoing cases is instantly apparent in the case at bar. It may be said that we have all the evidence before us. This is not strictly correct. While our powers of visualization may be ever so keen, only the jury who saw Mrs. Rannard could adequately pass upon the extent, character, and effect of the disfigurement to her face—the angulated nose, the scars, and the eyebrow which was bereft of nerve control. A view of the person so afflicted would be of great evidentiary value to a court or jury in fixing the compensation to be awarded. This is also true of the effect of the injuries upon the general health of the wife. Her general appearance and the manner in which she moved about the courtroom—all such matters have no adequate presentation in the record. It is for such reasons as these that our appellate courts have committed to the trial court or jury the practically exclusive function of fixing the amount of damages.

[3] In view of the facts narrated, showing that the injuries received by Mrs. Rannard were of a distressing and serious character, and showing also that a great amount of pain and suffering and some permanent injuries, we cannot say, as a matter of law, that the verdict was excessive.

[4] It is contended by appellants that the award of $2,000 to the husband for loss of his wife's services is also excessive. The wife, the evidence shows, had been unable to perform her duties in the home since the accident, and it was reasonably certain that she would never be able to do the work which she had previously done. From the very nature of the case, the husband's loss is not susceptible of direct proof. Meek v. Pac. Elec. Ry., 175 Cal. 53, 164 P. 1117. Here also we cannot say, as a matter of law, that the amount thus awarded is excessive under the rule laid down in the cases cited.

Upon denying the motion for new trial, the court rendered an opinion. It is contended that in this opinion the trial court used language which indicated that the court "abused its discretion and failed to perform the duty enjoined upon it by law in the matter of eradicating or curbing excessive verdicts," thus bringing the case within the rule declared in the case of Morris v. Standard Oil Co., 188 Cal. 469, 205 P. 1073, 1075, where the trial court rendered the following opinion in denying the motion for new trial: "I consider the verdict and judgment excessive, but the appellate court is better able from its wide experience to reduce it to the proper amount than I."

The judgment was reversed upon the ground that it was the duty of the trial court, if it considered the judgment excessive, to provide for its reduction or grant a new trial. It is there stated that "practically, the trial court must bear the whole responsibility in every case. The power of appellate courts over excessive damages exists only when the facts are such as to suggest, at first blush, passion, prejudice, or corruption on the part of the jury."

In the instant case, there is no language used by the trial court which would indicate that it considered the damages excessive, nor is any such contention made by appellants.

[5] The final ground urged for reversal is the giving of the following instruction: "In addition to such damages, if you find for the plaintiffs and if you find from the evidence that plaintiff A. B. Rannard as a result of the serious injury suffered by his wife, etc. * * *"

It is argued that this is an instruction upon the facts, in that it told the jury that the injury was "serious." This contention is without merit. In his argument to the jury, counsel for defendants said: "Now the main question in this case is to determine what Mrs. Rannard should have at your hands. There is no question about the physical injuries which Mrs. Rannard had received, as testified to by the doctors who examined her. She was severely hurt. It was a very serious accident. It is very fortunate that she was not killed. * * * You know, it has been a little better than eight months since Mrs. Rannard met with this serious accident. Not at all surprising that she should be in this condition. It is really a remarkable recovery to this point when you consider how seriously she was injured."

Assuming that the jury were instructed that the injury was serious, no possible prejudice could result to defendants when their own counsel admitted to the jury that such was the fact. Furthermore, the only inference which could be drawn from the testimony adduced would be to the effect that the injuries received by the wife were serious. The only question presented here is how serious the injuries were.

[6, 7] The record, appellants contend, contains evidence which indicates that the court abused its discretion in denying the motion for new trial. Attempting to uphold this view, they point out that the introduction of certain evidence (to which they did not object) tended to inflame the minds of the jurors. The clothing which the wife wore at the time of the accident was permitted, without objection, to go before the jury. There was some blood thereon. Not only was such evidence admissible, but, having failed to object to its introduction, defendants cannot now be heard to complain in respect thereto. The same contention is made as to other testimony introduced by respondents, but no question is raised as to its admissibility, and no objection was made to its introduction. Under such conditions, appellants are foreclosed from making any attack thereon. We might add, that we are of the opinion that the testimony and evidence of which appellants complain was clearly admissible. We therefore hold that the trial court did not abuse its discretion in denying the motion for new trial.

The record in this case is remarkably free from error, and there is nothing to indicate that the amount awarded was arrived at in any manner other than that by a calm and dispassionate consideration of the evidence by the jury. There is nothing in the record pointing to any extraneous influences being brought to bear upon the jury.

The judgment is affirmed.

112 Cal. App. 748

MACHADO v. HARM et al.

Civ. 285.

District Court of Appeal, Fourth District, California.

March 23, 1931.

Rehearing Denied April 22, 1931. Hearing Denied by Supreme Court May 21, 1931.

1. Damages ⟹158(2).

Where there is general allegation of bodily injury and resulting damage, testimony regarding any injuries that might naturally result therefrom is admissible.

2. Damages ⟹143.

Defendant need not allege specifically his physical injuries sustained or which might have resulted from accident.

3. Damages ⟹158(1).

Under pleadings in personal injury action, court properly admitted evidence of permanent injuries other than injury to eye.

Complaint alleged plaintiff was thrown out of automobile and suffered fracture of frontal bone back of eye, injury to leg, and received shock to nervous system and bruises and contusions to extent causing great pain for 60 days and that eye was permanently injured. Evidence was admitted that there had been linear fracture of frontal bone and cerebral hemorrhage and that plaintiff was unconscious approximately eighteen hours, that there was injury to optic nerve which was permanent, and that plaintiff complained of dizziness occurring several times a day and headaches which would never be any better.

4. Damages ⟹216(4).

Instruction regarding damages for pain and suffering *held* not erroneous.

Instruction stated that damages for pain and suffering are to be fixed by jury as their discretion dictates and which may be reasonable and proper, and that jury might make such estimated damages from facts and circumstances and evidence by considering them in connection with their own knowledge and experience in affairs of life. Immediately thereafter court instructed that from all elements stated in instruction jury would resolve what sum would fairly compensate plaintiff for injury and loss sustained by him, not in excess of amount prayed for in complaint.

5. Damages ⟹216(1).

In personal injury action, portion of instruction to resolve what sum would fairly compensate plaintiff for injury and loss sustained, not, however, in excess of amount prayed for, *held* not erroneous.

6. Damages ⟹173(1).

In personal injury action, testimony regarding plaintiff's earning capacity *held* proper.

7. Appeal and error ⟹932(1).

Where jury returned verdict for lump sum, appellate court would presume jury did not take special damages into consideration.

In personal injury action, although evidence of special damages of ambulance and doctor bills was submitted and plaintiff was permitted to testify regarding his earning capacity before accident, no evidence was offered as to other items of damage which were specially pleaded, and jury returned a verdict for a lump sum.

8. Damages ⟹132(14).

$17,500 to business man 31 years old sustaining fractured skull and concussion of brain, permanent injuries to eye, optic nerve, injuries to leg, profound shock to nervous system and bruises and contusions upon body, causing great pain for 60 days, *held* not excessive.

9. Appeal and error ⟹1005(2).

On appeal, decision of trial court and jury on damages cannot be set aside unless verdict is so plainly and outrageously excessive as to suggest, at first blush, passion or prejudice or corruption on jury's part.

10. Trial ⟹296(3).

In automobile collision case, instruction that defendant was negligent if he violated statute *held* not erroneous, construed with other instructions (St. 1923, p. 557, § 122, and p. 553, § 113, as amended by St. 1927, p. 1436, § 30).

Immediately after instruction that, if defendant violated St. 1923, p. 557, § 122, defendant was negligent, court instructed that, if defendant violated St. 1923, p. 553, § 113, as amended by St. 1927, p. 1436, § 30, and if such violation had approximately contributed to happening of collision, then defendant was negligent, and immediately thereafter court gave two other instructions making it clear that any failure on defendant's part to observe law must have been proximate cause of accident before any verdict could be returned in favor of plaintiff.

Appeal from Superior Court, Fresno County; C. E. Beaumont, Judge.

Action by Manuel Machado against George G. Harm and others. Judgment for plaintiff, and defendants appeal.

Affirmed.

Ray W. Hays, of Fresno, for appellants.

M. S. Hamilton and Jesse E. Nichols, both of Oakland, and Fletcher A. Cutler and Ford & Johnson, all of San Francisco, for respondent.

LAMBERSON, Justice pro tem.

Action for damages for personal injuries resulting from a collision between a light truck driven by respondent and a heavy truck operated by appellant Withrow, as an employee of appellants Harm and Frasher.

The collision happened about 10 o'clock p. m. on March 9, 1928, and occurred on Eleventh street, which runs east and west in the city of Tracy, at a point between E and F streets.

The complaint alleged, in substance, that plaintiff was carefully operating an automobile in a westerly direction along and upon the northerly side of said Eleventh street when the defendants carelessly and negligently operated an automobile truck then and there the property of the defendants Harm and Frasher, in an easterly direction over and upon said northerly line of Eleventh street in such manner as to cause said automobile truck to violently and forcibly run into and collide with the automobile operated by plaintiff, thereby injuring plaintiff in the manner thereafter alleged.

The allegations of the complaint describing the injuries suffered by respondent were as follows: "That as a result of said collision, this plaintiff was thrown out of his automobile onto the paved highway with great violence and was cut over his left eye and suffered a fracture of his frontal bone back of his left eye, and his left leg was injured just below the knee; and was bruised and injured in other portions of his body; and received a profound shock to his nervous system and bruises and contusions upon his head, body and person to such an extent that said plaintiff suffered great pain for a period of sixty (60) days; that said plaintiff is informed and believes and upon such information and belief alleges that as a result of his said injuries the sight and vision of said left eye is permanently and seriously injured and that it may never be restored to its normal function and condition."

The complaint alleged that plaintiff was damaged in the sum of $50,000, and also set forth special damages amounting to a total sum of $659.30.

The appellant Withrow had stopped his 10-ton truck, to which was attached a 10-ton trailer, on the southerly side of Eleventh street, and had taken lunch across the street with a fellow employee who was driving another truck ahead of him. Following their meal, the men had returned to their trucks and the advance truck had proceeded out on the highway, while appellant, a few moments later, started his truck toward the center of the street. The respondent, who had delivered milk east of Tracy, was returning to his dairy and was driving west. He testified that he was proceeding on the right side of the center line of the street at a speed of between 17 and 18 miles per hour, and first saw the heavy truck approaching when about a block away, next saw the lights turn toward him, and applied his own brakes and his machine stopped immediately. He had no further recollection of the accident. An employee of the creamery followed respondent in another machine and saw the collision. He testified that the highway was 40 feet wide at the point of collision, and corroborated respondent's statement that the latter was traveling on the north side of the center line; that immediately after the collision the right front wheel of the heavy truck was almost on the center line of the street and the other front wheel was about 2 feet over such line, and a part of the truck beyond the wheels also extended over the center line; the heavy truck standing at an abrupt angle with such line. Police officers of the city of Tracy testified that the front wheels of the heavy truck were a distance of 3 or 4 feet on the north side of the center of the highway.

The jury returned a general verdict in favor of respondent in the sum of $17,500, and, after making a motion for a new trial, which was denied, the defendants appealed from the judgment.

No particular effort has been made to show that the evidence is insufficient to support the implied finding of the jury that the operator of the heavy truck was on the wrong side of the highway at the time of the collision and that injuries were sustained by respondent as a proximate result of the negligence of appellant Withrow. Any conflict in the evidence was resolved by the jury in favor of the respondent and in the absence of error cannot be disturbed by this court.

[1-3] Appellants urge that the court erred in admitting evidence of permanent injuries, other than the injury to respondent's eye. The attending physician testified that there had been a linear fracture of the frontal bone and cerebral hemorrhage, coming from within the skull at a point near the rear of the optic nerve; that the respondent was unconscious approximately 18 hours as a result of con-

cussion; that there is an injury to the optic nerve which is permanent; that the respondent complained of dizziness occurring several times a day and headaches, and would never be any better. A specialist in eye disorders was permitted to testify that respondent had a little less than one-third vision in the injured eye; that there was a pressure along the optic nerve which had caused inflammation; that the power of accommodation of the eye was practically destroyed; and that his condition, at the time of the specialist's examination, would be his permanent condition.

The allegations of the complaint as to the nature of respondent's injuries have already been stated. Where there is a general allegation of bodily injury and resulting damage, testimony as to any injury which might naturally result therefrom is admissible. A plaintiff is not required to allege specifically each physical injury sustained or which might have resulted from an accident. It is sufficient if such injuries can be traced to the occurrence complained of and are such as might naturally result from the injury. Kuhns v. Marshall, 44 Cal. App. 588, 186 P. 632; Latky v. Wolfe, 85 Cal. App. 332, 259 P. 470; Samuels v. California Street Cable Ry. Co., 124 Cal. 294, 56 P. 1115; Martin v. Pac. Gas & Elec. Co., 203 Cal. 291, 264 P. 246. In the instant case the complaint alleged several specific injuries, including the fracture of respondent's frontal bone back of the left eye, bruises and injuries in other portions of his body, and alleged that he received a profound shock to his nervous system. His allegation that he suffered great pain for a period of 60 days simply tends to describe the extent of the immediate suffering, and does not minimize the fact that the damage might naturally have resulted in permanent injuries suffered in the accident. Dizziness, vertigo, headaches, and defects in sight or vision, were results which might be expected to naturally flow from so serious an injury as a fracture of the skull and concussion of the brain, and the defendants must be presumed to be aware of the damages which would necessarily result from such an injury, and could not have been taken by surprise by proof of such resulting damage. Treadwell v. Whittier, 80 Cal. 574, 22 P. 266, 5 L. R. A. 498, 13 Am. St. Rep. 175. The court committed no error in admitting testimony as to such injuries.

[4] Appellants contend that the court erred in giving the following instruction: "You are instructed that the law prescribes no definite measure of damages for pain or suffering, if any, sustained by an injured person, but leaves such damages to be fixed by you as your discretion dictates and under all circumstances may be reasonable and proper. It is not necessary, therefore, that any of the witnesses should have expressed an opinion as to the amount of such damages for pain or suffering alleged to have been sustained by the plaintiff, but the jury may make such estimated damages from the facts and circumstances and evidence by considering them in connection with their own knowledge and experience in the affairs of life."

Immediately thereafter the court gave the following instruction: "If your verdict is in favor of the plaintiff, in assessing damages that you should award him, you should take into consideration the character of the injuries, if any, sustained by him, the nature, extent and severity of the injuries sustained and whether the same are temporary or permanent in their character. In estimating the amount of such damages you may consider the physical and mental pain suffered, if any; the extent, nature and character of the suffering, mental or physical, if any, and its duration. You may also consider any physical or mental pain, if any, which you believe from the evidence that plaintiff is reasonably certain to suffer in the future. And from all of these elements, you will resolve what sum will fairly compensate him for the injury and loss sustained by him, not, however, in excess of the amount prayed for in the complaint, to wit, the sum of $50,659.30."

In the case of Litherbury v. Kimmet, 183 Cal. 24, at page 27, 195 P. 660, 661, a similar instruction was quoted and the court said: "Reading the two instructions together, and, as we have said, they were actually given immediately together, it is plain enough to a lawyer that the very general language of the second instruction given (the first quoted above) has reference to a recovery measured by the specific rule of the preceding instruction and is controlled by it. This, however, might well not be so plain to a body of men, such as a jury, not trained in the construction of instruments and who may hear the instructions only and not have the advantage of seeing them together on the written page. It would have been better if the danger of such misunderstanding of the true effect of the instructions had been avoided as could easily have been done. While the instructions are open, we believe, to criticism in this respect, still the danger or probability of their having been misconstrued is not so great as to justify us in this case in setting aside the verdict."

In the case of Wiley v. Young, 178 Cal. 681, 174 P. 316, 318, the following instruction was given: "You are instructed, however, that with regard to pain and suffering the law prescribes no definite measure of damages, but the law leaves such damages to be fixed by you as your discretion dictates, and as under all the circumstances may be just and proper."

This instruction was held to be correct, when coupled with the preceding instruction which was as follows: "If you find the defendant liable, you are instructed that the damage should be fixed at such an amount as will compensate plaintiff for such loss sustained by her as set forth by her in her complaint, and any injury that she will sustain in the future as is supported by the evidence."

The court said that the effect of such an instruction as a whole is that the plaintiff is entitled to compensatory damages only, and that the instruction with reference to the amount of damages for pain and suffering is elaborated for the purpose only of disclosing to the jury that it is not necessary that any particular witness should have fixed a particular amount as the damage for such pain and suffering. We think that the purport of the instructions in the present case, when taken together, was to make it plain to the jury that the jury should award such sum as would fairly compensate the respondent for the injury and loss sustained by him.

[5] Complaint is made of that portion of the second instruction which reads, "not, however, in excess of the amount prayed for in the complaint, to wit, the sum of $50,659.30." This particular form of instruction was discussed at considerable length and approved in the case of Ritzman v. Mills, 102 Cal. App. 464, 283 P. 88, in which a number of California cases are cited. The intent of such an instruction, when taken in connection with the other instructions, is to keep the jury from awarding an amount in excess of the damages claimed by the plaintiff.

Objection is made by appellant that the verdict was excessive, and attention is called to the fact that, while evidence of special damages was permitted, covering ambulance and doctor's bills, and the respondent was permitted to testify as to his earning capacity before the accident, no evidence was offered as to other items of damage which were specially pleaded, and the jury returned a verdict for a lump sum of $17,500, and it could not be determined whether or not the jury took the special damages into consideration.

[6] Allowance of testimony as to respondent's earning capacity was proper. Ehat v. Scheidt, 17 Cal. App. 430, 120 P. 49; Leiner v. Eng-Skell Co., 104 Cal. App. 228, 285 P. 905.

In the case of Worden v. Central Fireproof Building Co., 172 Cal. 94, at page 97, 155 P. 839, 840, the court said: "The complaint alleged that by reason of the injury he had suffered great physical pain, 'and will continue to suffer,' and that the alleged injury to his knee is permanent, 'all to his damage in the sum of $15,000.' This is a sufficient allegation of the damage and it includes whatever loss of earning power may have been caused by the permanent injury stated. Consequences which naturally follow from a personal injury, because of the nature of the injury, are general damages, and need not be specially pleaded in order to recover damages resulting therefrom."

In the case of Johnson v. Pearson, 100 Cal. App. 503, at page 508, 280 P. 394, 396, the court used the following language: "Furthermore, if there is no evidence to support a judgment for special damages, as appellant contends, there is, however, ample evidence in the record to support a judgment for $4,000 for general damages, and, in the absence of any showing to the contrary, we must presume that the sum awarded respondent of $4,000 is for injuries received and the pain and suffering endured, and nothing for special damages."

[7] We think that the trial court committed no error in its ruling upon the testimony as to earnings, and that it must be presumed that the jury did not take the special damages into consideration.

[8, 9] The injuries suffered by respondent have already been described and discussed. He was 31 years of age at the time of the accident, apparently in good health, and apparently operating a successful and fairly profitable business, and he suffered injuries which obviously rendered him less capable of doing the work that he had done before the accident. There is nothing tangible in the record which would render it necessary for us to say as a matter of law that the verdict was the result of passion or prejudice or to disturb the judgment of the trial court following the verdict of the jury. In the case of Reneau v. Hirsch, 88 Cal. App. 1, at page 6, 262 P. 1100, 1102, the court said: "The rule is well established that the amount of damages in this kind of an action is committed, first, to the sound discretion of the jury, and next to the discretion of the judge of the trial court, who, in ruling upon the motion for a new trial, may consider the evidence anew, determine anew the facts, and set aside the verdict if it is not just. Upon appeal, the decision of the trial court and the jury on the subject cannot be set aside unless the verdict is so plainly 'and outrageously excessive as to suggest, at first blush, passion or prejudice or corruption on the part of the jury' "—citing cases.

[10] Another objection on the part of appellants to be considered is that the jury was instructed by the court as to the provisions of section 122 of the Motor Vehicle Act of the state of California (St. 1923, p. 557), and that the instruction concluded with this charge: "If you believe from the evidence that he violated this provision of the Motor Vehicle Act then and in that event he was negligent." Immediately thereafter another instruction was given as to the provisions of section 113 of the Motor Vehicle Act (as amended by St. 1927, p. 1436, § 30), in which instruction it was stated that if the jury believed from a preponderance of the evidence that the defendant Withrow violated this provision of the Motor Vehicle Act and that such violation, if any, proximately contributed to the happening of the collision in question, then he was negligent. Immediately thereafter the court gave two other instructions concerning the law of the state as to the driving of motor vehicles, in which the court made it clear that any failure on the part of the defendant to observe the law, if found by the jury, must have been the proximate cause of the accident before any verdict could be returned in favor of plaintiff. The court further instructed the jury that it is a presumption of law that the automobile being operated by the defendants was being operated in a lawful manner, and concluded with the following instruction: "The mere fact that an act or omission on the part of the defendants caused the collision in question, is not, in itself, sufficient to support a verdict in favor of the plaintiff. To render a verdict in favor of the plaintiff you must find that the defendants were guilty of negligence and that such negligence was the proximate cause of the injuries complained of, and further, that the plaintiff was without any fault that in the slightest degree contributed proximately to the injuries of which he complains, otherwise, your verdict must be for the defendants."

The court also instructed the jury as to what effect contributory negligence on the part of the plaintiff should have in the jury's consideration of the case. Taking the instructions together, we think it was made clear to the jury that any negligence on the part of the defendant arising by operation of law must have been the proximate cause of the injury before the jury could find against the defendant. An instruction similar in all respects to the one first given in the present case was given in the case of Sartori v. Granucci, 204 Cal. 28, 266 P. 280, but it may be said that, while the instruction was brought directly to the attention of the Supreme Court, the objection made was not on the same grounds as that made here. It has been held in a number of cases, however, that it is proper for the trial court to instruct the jury that a violation of an express provision of the law constitutes negligence per se. Mathes v. Aggeler & Musser Seed Co., 179 Cal. 697, 178 P. 713; Dewhirst v. Leopold, 194 Cal. 424, 229 P. 30; Towne v. Godeau, 70 Cal. App. 148, 232 P. 1010; Benjamin v. Noonan, 207 Cal. 279, 277 P. 1045; Kelley v. Hodge Transportation System, 197 Cal. 598, 242 P. 76.

The issues to be decided by the jury were fully and fairly presented to them by the instructions, and, if the instruction complained of, standing by itself, tended to prejudice the appellant's case, such prejudice was cured by other instructions given by the court. A complete review of the instructions would necessitate more space being devoted to the matter than is justified.

It is ordered that the judgment be affirmed.

We concur: MARKS, Acting P. J.; JENNINGS, J.

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113 Cal. App. 6

CARR v. BANK OF ITALY.

Civ. 6529.

District Court of Appeal, Second District, Division 2, California.

March 24, 1931.

Rehearing Denied April 22, 1931. Hearing Denied by Supreme Court May 21, 1931.

1. Trusts ⟹30½(1).

Where parties adopted plan imperfect in its operation, equity could not convert it into perfect one by imputing trust, where trust was not contemplated.

2. Trusts ⟹44(2).

Under evidence showing purchaser of property deposited check with bank under written instructions to deliver it on written instructions from purchaser, no trust relationship existed, and bank paying out part of money under court order was not liable to vendor.

> Vendor and purchasers of theater went to bank for purpose of opening escrow, but vendor was unable to give good description of chattel mortgage, and escrow clerk told parties matter could not be handled through escrow, and at his suggestion an instruction was drawn up to effect that purchaser handed bank check to hold until bank received certain chattel mortgage upon which it should indorse payment in amount of check, and that check was not to be delivered until bank received written instructions from purchaser. Thereafter bank was restrained in action in which purchaser was defendant from honoring check, and part of the amount of such deposit deposited was ordered paid on judgment rendered for plaintiff in that action.

Appeal from Superior Court, Los Angeles County; W. T. O'Donnell, Judge.

Action by Louise B. Carr against the Bank of Italy. From a judgment for plaintiff, defendant appeals.

Reversed.

Haas & Dunnigan and Walter F. Haas, all of Los Angeles, for appellant.

William P. Mealey, of Los Angeles, for respondent.

ARCHBALD, Justice pro tem.

Plaintiff and one Rockhill were the owners of a certain motion picture theater in Los Angeles, together with the furniture, pictures, etc., used in connection therewith. Plaintiff was the owner of a promissory note in the sum of $10,000 secured by a chattel mortgage on all of the personal property in the theater.

On July 20, 1926, plaintiff and Rockhill sold to one George Landers and his associate the theater and personal property for an agreed price, $8,000 of which was to be paid in cash and credited on the chattel mortgage. Landers and his associate Oscar Oberndorff, together with Rockhill, went to the Pico Heights branch of the defendant bank for the purpose of opening an escrow. At that time the chattel mortgage was in the east in the possession of a relative of plaintiff, being held as security for money advanced, and Rockhill was not able to give a good description of it. The escrow clerk thereupon told the parties that in his opinion the matter could not be handled through escrow. Oberndorff then said that they had "to get this money in the bank some way," to which the clerk replied that he could make a suggestion. The parties then told him that he should know his business, and that whatever he suggested would be all right with them. The result was that the escrow clerk drew up an instruction which was handed to Mr. Landers with the suggestion that he pass it on to Rockhill, the clerk saying to Landers that if it met with his (Landers') approval, and he would sign it, a cashier's check in the amount named would be obtained for him and held in accordance with the instruction. The instruction was then signed by Landers, who gave the clerk his check for $8,000, and a cashier's check was then drawn for such amount in favor of Landers. The instruction read as follows:

"Bank of Italy, Pico Heights Branch, Los Angeles, California

"I the undersigned hand you herewith Cashier's check No. 334035 for $8000.00. You are to hold this check until you receive a certain chattel mortgage upon which you will indorse a payment of $8000.00. This check is not to be delivered until you receive written instructions from the undersigned.

"George H. Landers."

Both the check and the signed instruction were then left with the bank. The evidence is conflicting as to whether or not the cashier's check was indorsed by Landers then or later when it was cancelled. On August 14, 1926, Landers and Mr. Carr, the husband and agent of plaintiff, went to the bank, and the $8,000 check was canceled and the sum of $584 was paid to Mr. Carr, Landers' receipt therefor being taken by the bank, and another cashier's check in Landers' favor was written for the balance, $7,416, at which time the number of the first cashier's check and the amount thereof were erased from the instruction and the number of the second check, 334209, and the amount, $7,416, were written therein in their place.

The chattel mortgage at this time had not arrived. Thereafter, and before it did arrive, the defendant bank was restrained in a certain action pending in the superior court, in which Landers and Oberndorff were defendants, from honoring any checks, drafts, or orders of Landers or Oberndorff or from paying out any moneys on drafts, orders, or checks held by said bank for the account of either of said parties, on the theory that the money deposited in the defendant bank and which went to make up the cashier's check so deposited, to the amount of $4,000, at least, belonged to the plaintiff in said action. After such order was made, by stipulation of the parties to that action, $4,500 was taken out of the cashier's check for $7,416 and deposited with the bank in the name of Oberndorff, to be held by the bank pending a determination of said action, leaving a balance of $2,916 in the form of a cashier's check in favor of Landers, which, on August 20, 1926, was deposited with defendant bank under an instruction similar to the first one given. On August 21, it having then arrived, Landers inspected the chattel mortgage, and the cashier's check for the balance of $2,916, indorsed by Landers, was given to Mr. Carr. There is testimony to the effect that the officer of the bank was told that possession of the theater was to be immediately given to the purchasers. The $4,500 was eventually ordered paid on the judgment rendered for the plaintiff in the action in which the restraining order was issued. This suit was brought by plaintiff against the bank for the $4,500, on the theory that the bank accepted the check for $8,000 and agreed to hold the same for plaintiff pending the production of the chattel mortgage, and that it failed so to do. From a judgment in favor of plaintiff the defendant appeals.

[1, 2] It is appellant's contention that the check in question remained at all times subject to the disposition of Landers, and that it was error for the trial court to permit the introduction of evidence which varied the terms of the written instruction accompanying its deposit. Respondent urges that, when the deposit of the check was accepted by the bank, it became a trustee for the benefit of respondent, and that the evidence was properly admitted to show the real intention of the parties.

Both parties admit that there was no escrow, and there could hardly be a contention that there was in view of the testimony on the subject. The parties wanted to form one, but the bank refused to make an escrow. Nor does respondent contend that the writing itself creates the trust alleged in the complaint. That is evident from the fact that respondent sought to introduce evidence extrinsic to it to show the intent of the parties. The real contention is that the acceptance of the draft, knowing that it was to be a part of the purchase price of the theater and knowing that possession was to be given immediately to the purchasers, implies a trust that the bank would not permit the draft to be used for any other purpose. The parties had no intention of making a deposit of the money in trust when they went into the bank. They intended to form an escrow. The bank refused it and the escrow clerk made a suggestion of a way that the money could be handled, which was adopted. A draft was purchased for the amount by Landers, not in the name of respondent, but in his own name, and that was deposited with the bank, not as the property of the bank, but as Landers' property. The instructions were not that it was to be delivered to respondent when the bank was satisfied that the amount of the chattel mortgage and the rate of payments were as understood by Landers at the time, but that it was not to be delivered "until you receive written instructions." The name of respondent does not appear in the instruction. The chattel mortgage upon which the bank is to "endorse a payment of $8000.00" is not described. The instruction is Landers'. The check is his, whether it was indorsed by him at the time of deposit or at the time of cancellation. When it was canceled and a small payment made to respondent or her agent, the new check was made in Landers' name and a receipt for the payment taken from Landers and not from Carr. At no time, apparently, was the chattel mortgage or note actually received by the bank. So it was clearly not the intention of the escrow clerk when he suggested the arrangement to make the bank a trustee of the check for the benefit of respondent or to do anything more than make it the depository of the check and Landers' agent to deliver it to whom and when instructed so to do by its owner, Landers. There was no relation of personal confidence or trust toward respondent assumed by the bank that we can see, and its rejection of the parties' offer to form an escrow, because of the fact that they could not give the escrow clerk a more definite description of the chattel mortgage and note, negatives any intention of assuming an even greater responsibility, or of any intention on the part of Landers and respondent to have the bank do so.

The case of Sayer v. Wynkoop, 248 N. Y. 54, 161 N. E. 417, 418, speaking of cases where a third party received money for one with whom it was deposited by the owner, says: "In all these cases * * * there appears to have been an express promise on the part of the person receiving the moneys to pay them over, or an acknowledgment by him that the moneys were received to be held in trust for such third person. However, it is apparent that the intention of the owner, and not that of the receiver, is controlling upon the question whether title to the moneys has been transferred and a trust has been created. True, there must be an assumption of the trust duty by the receiver, but that may arise through implication as well as through expression." Here everything that was done repels the thought that either Landers or the bank or respondent had any intention of creating a trust.

The Supreme Court in the case of Noble v. Learned, 153 Cal. 245, 94 P. 1047, 1049, says: "The contention appears to be that Noble was constituted a trustee of the shares or the certificates for the benefit of Mrs. Lee during her life, and of the parties named in the various indorsements after her death. By the creation of an express voluntary trust for the benefit of third persons the title or estate in the property, which is the subject of the trust, so far as may be necessary for carrying out the purposes of the trust, is vested in the trustee. This is implied in the very nature of the term 'trust.' 28 Am. & Eng. Ency. of Law (2d Ed.) 858; Civ. Code §§ 5863, 2250. It is plain, however, that the transactions above recited did not operate to convey to Noble any title whatever to the 40 shares or to the certificate. The written assignment of the shares, if operative at all, could be effective only to transfer title to the assignee, Mrs. Learned. * * * It follows that the transaction cannot be given the effect claimed, i. e., of making Noble a trustee." Assuming, without deciding, that parol evidence was properly admitted in the instant case, the only conflict in it appears to be whether or not the various checks deposited were indorsed by Landers at the time of deposit or at the time of cancellation. But regardless of when they were indorsed, the only conclusion to be drawn from the evidence is that the bank was to hold each check until it was authorized by Landers to deliver it. No title thereto was given the bank and no right to do anything with it except upon Landers' direction; and we fail to see how any trust could arise where no trust is imposed. In that respect there is a similarity between the Noble Case and the one now before us.

"A person holding property, real or personal and intending to make a voluntary disposition thereof for the benefit of another, may do so in either one of three modes: 1. He may make a simple conveyance or assignment of it directly to the donee, so as to vest in the latter whatever interest and title the donor has, without the intervention of any trust. 2. He may make a transfer of it to a third person upon trusts declared in favor of the donee. 3. He may retain the title and declare himself a trustee for the donee, and thus clothe the donee with the beneficial estate. By either of these modes, if the transaction is imperfect and executory, equity will not aid to enforce it; and if the intention of the party is to adopt one of the methods, a court of equity will not resort to either of the other methods for the purpose of carrying it into effect. * * * If the donor adopts the second or third, he need not use any technical words, or language in express terms creating or declaring a trust, but he must employ language which shows unequivocally an intention on his part to create a trust in a third person, or to declare a trust in himself." Pom. Eq. Jur. (4th Ed.) § 997. The language used here does not show such necessary unequivocal intention to create a trust, in our opinion. There is no question but that the parties would, under the advice of a lawyer, have made a deposit of the check under circumstances that would have placed it beyond the power of a creditor of Landers, or any one claiming a part of the fund as his own, to reach, but we cannot assume that the parties were expecting the bank to practice law or to do anything more than make a suggestion of plans which they themselves in their own discretion might adopt; and having adopted a plan so suggested, which was imperfect in its operation, equity cannot convert it into a perfect one by imputing "a trust where a trust was not in contemplation." Trubey v. Pease, 240 Ill. 513, 88 N. E. 1005, 1008, 16 Ann. Cas. 370.

As we view the evidence, and assuming, without deciding, that it was properly admitted, the only conclusion that could be drawn therefrom is that no trust relationship existed; that the cashier's check belonged at all times to Landers and could not be held by the bank against the order and judgment of the court which diminished it by the sum of $4,500, and that in consequence there is no liability on the part of the bank to respondent. We might also add that it appears from the evidence that the contract with Landers and Oberndorff for the purchase of the theater, together with the $3,500 paid by them, was declared forfeited, and the theater was sold to other parties subject, so far as plaintiff's share is concerned, to the unpaid balance of her chattel mortgage; so plaintiff would not seem to be in any worse financial condition than she was before.

Judgment reversed.

We concur: WORKS, P. J.; IRA F. THOMPSON, J.

113 Cal. App. 49

MacGRUER et al. v. DENIVELLE.
Civ. 7467.

District Court of Appeal, First District, Division 1, California.

March 27, 1931.

Rehearing Denied April 25, 1931. Hearing Denied by Supreme Court May 25, 1931.

1. Patents 🔑327(13).

Federal court decision in suit to enjoin infringement of patent that patent was invalid *held* not res judicata in action for maliciously obtaining injunction as conclusive proof that he knew he never had patent.

The federal District Court held in injunction suit that process claims, added to application for patent by amendment, were avoided by absence of oath, and that plaintiff failed to prove that more than two years' public use was experimental only, while Circuit Court of Appeals held patent invalid because plaintiff placed process and product on sale over two years before application and sold both for profit.

2. Judgment 🔑720.

Judicially determined matters cannot again be subject of legal controversy between same parties.

3. Malicious prosecution 🔑20.

"Probable cause" has been defined as reasonable cause, and, in both civil and criminal prosecutions, as honest suspicion or belief, founded on facts sufficient to warrant reasonable man in believing charge true.

[Ed. Note.—For other definitions of "Probable Cause (In Malicious Prosecution)," see Words and Phrases.]

4. Malicious prosecution 🔑24(1).

Mere failure to sustain action does not constitute, or warrant inference of, want of probable cause.

5. Malicious prosecution 🔑71(2).

Probable cause is fact question, to be determined, in action for malicious prosecution, from all circumstances surrounding institution of original proceeding.

6. Malicious prosecution 🔑56.

Burden of proving want of probable cause for instituting suit is on party so alleging.

7. Trial 🔑62(1).

At conclusion of plaintiff's evidence of circumstances surrounding institution of proceeding complained of in suit for malicious prosecution, defendant may interpose defense of probable cause.

8. Malicious prosecution 🔑64(2).

Trial court's finding of probable cause for suit to enjoin infringement of patent found invalid *held* warranted by prior federal court decision declaring patent valid.

9. Malicious prosecution 🔑35(1).

Action for malicious prosecution cannot be maintained merely because original proceeding was unsuccessful or abated.

🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

10. Malicious prosecution 🔑64(2).

Action for malicious prosecution must fall, unless malice and want of probable cause appear from evidence.

11. Malicious prosecution 🔑28.

Actual malice is element in cause of action for malicious prosecution.

12. Malicious prosecution 🔑27.

Malice, authorizing action for malicious prosecution, refers to condition of mind, that is, bad faith or want of sincere belief that cause is proper and intent to injure.

13. Malicious prosecution 🔑71(3).

Malice is fact question in action for malicious prosecution.

14. Evidence 🔑151(1).

Defendant in action for maliciously securing injunction may testify directly as to his motive and good faith.

15. Malicious prosecution 🔑64(2).

Evidence *held* to justify trial court's finding that defendant in action for maliciously securing injunction against infringement of patent found invalid did not maliciously or with intent to injure plaintiffs move for preliminary injunction.

Appeal from Superior Court, City and County of San Francisco; Albert Lee Stephens, Judge.

Action by George Smith MacGruer and another, copartners doing business under the firm name and style of MacGruer & Simpson, against Paul E. Denivelle. Judgment for defendant, and plaintiffs appeal.

Affirmed.

Vincent Surr and Clarence E. Todd, both of San Francisco, for appellants.

John Guthrie Heywood, of San Francisco, for respondent.

WARD, Justice pro tem.

This is an appeal by plaintiffs from a judgment in favor of defendant in an action for maliciously obtaining an injunction. The respondent, Denivelle, had been in the imitation travertine business in Eastern States; about 1912 he became the supervisor of all artificial travertine work for the Panama Pacific International Exposition at San Francisco. At such time the appellants MacGruer and Simpson (copartners) had a contract for plain and ornamental plastering on Machinery Hall, one of the Panama Pacific International Exposition buildings. During this period appellants informed respondent that they had a contract to do a large artificial travertine job in Los Angeles, whereupon respondent threatened to prevent the appellants from further manufacturing artificial travertine, claiming such manufacture to be an infringement of a patent then held by respondent. Subsequently, appellants started the work in Los Angeles and respondent secured a preliminary injunction from the District Court of the United States for the Northern District of California, Southern Division, upon the grounds that Denivelle was the sole and exclusive owner of United States letter patent (No. 1,212,-331); that said letters patent had theretofore been adjudged good and valid in law; that MacGruer and Simpson were infringing upon the letters patent by practicing for profit, without license, the process claimed in and patented by the letters patent in using and selling the product claimed therein. A simulation of Roman travertine limestone was the process of the patent referred to in the injunction proceedings. The decision in Los Angeles Lime Co. and Paul E. Denivelle v. Nye and the same plaintiffs v. Ceriat (C. C. A.) 270 F. 155, had sustained the validity of this patent, but in the injunction proceedings against MacGruer and Simpson, upon evidence not introduced in the previous cases, the court decided: "In the instant suit, however, the evidence is widely variant from that in the former suit, and requires a contrary decision. It now appears that claims 9 and 10 for the product of the process, were added to the application theretofore filed, by amendment without oath. The application was for a process alone, neither disclosed nor claimed invention of its product, and the absence of an oath avoids the patent to the extent of said claims. * * * More than two years' public use having been clearly established, the burden was plaintiff's to prove by full, unequivocal and convincing evidence that the use was experimental only. * * * Therein he failed." On appeal the Circuit Court of Appeals decided: "We conclude that the patent is invalid for the reason that more than two years prior to plaintiff's application for the patent he had placed the process and product of the invention on sale, and had sold both the process and product to the Pennsylvania Tunnel and Terminal Railroad Company for a profit."

The present action was shortly thereafter filed in which MacGruer and Simpson allege that by reason of "said malicious obtaining of said injunction" they were damaged by the loss of profits in the sum of $150,000. The complaint alleges that "Denivelle in his application for said patent made a false oath"; "that more than two years prior to the filing of said application for said patent said defendant Denivelle had placed the process and product of the said invention on sale in the United States and had sold in the United

States both the process and the product for profit;" that "although at said time he well knew that said patent was void, invalid and of no force or effect, maliciously and without probable cause filed a bill of complaint," etc. The court rendered judgment for the defendant.

[1, 2] Appellants contend that the decision in Denivelle against MacGruer, supra, is res judicata and constitutes conclusive proof that Denivelle never had a patent and knew that he never had and that the state court was without power to try this issue. The decisions in Denivelle against MacGruer did not determine that Denivelle made a false oath or that he knew that he never had a valid patent. The decisions simply determined that the patent was invalid. The whole opinion in the District Court of the United States for the Northern District of California, Southern Division, may be epitomized in the following quotation: "More than two years' public use having been clearly established, the burden was plaintiff's to prove a full, unequivocal and convincing evidence that the use was experimental only. * * * Therein he failed." On appeal the Circuit Court affirmed the lower court, but there is no holding that Denivelle made a false oath or that "he knew that he never had a patent." On the subject of res judicata, appellants cite many authorities with which we agree in principle, namely, that judicially determined matters cannot again be the subject of legal controversy between the same parties, but the questions herein involved were not judicially determined. In the United States Court the question was the validity of a patent, and not whether Denivelle made a false oath.

The main question to determine here is the issue, Did Denivelle, knowing his patent to be void, without probable cause, maliciously and with intent to injure MacGruer and Simpson, procure a preliminary injunction wherein they were enjoined and restrained from using, et cetera, the artificial stone embodying the invention of the claimed letters patent?

[3] "'Probable cause' has sometimes been defined as reasonable cause * * *; and in the case of both civil and criminal prosecutions has been further defined to be an honest suspicion or belief on the part of the instigator thereof, founded upon facts sufficiently strong to warrant a reasonable man in believing that the charge is true." Black v. Knight, 44 Cal. App. 756, 769, 187 P. 89, 94.

[4-7] The fact that a party may fail to sustain an action does not in and of itself constitute want of probable cause, and no inference may be drawn from that fact alone that there was a want of probable cause. Johnson v. Southern Pacific Co., 157 Cal. 333, 107 P. 611; McKenna v. Heinlen, 128 Cal. 97, 60 P. 668; 16 Cal. Jur., p. 750, § 17. Probable cause is a question of fact to be determined from all of the circumstances surrounding the institution of the original proceeding. The proof of want of probable cause is upon the party so alleging. At the conclusion of such evidence, the opposing party may interpose the defense of probable cause. Levy v. Brannan, 39 Cal. 485; 16 Cal. Jur., p. 748, § 16.

[8] In the present case the trial court found that there was probable cause for the filing of the injunction proceedings. To approve that finding we need only refer to the fact that, prior to the filing of the MacGruer injunction application, these same patents had been declared valid by the United States Circuit Court of Appeals in Los Angeles Lime Co. and Paul E. Denivelle v. C. L. Nye, and the same plaintiffs v. Ceriat, 270 F. 155. A successful determination of an issue rather indicates probable cause for bringing a second suit, notwithstanding that in the last action the same conclusion may not be maintained. See Dowdell v. Carpy, 129 Cal. 168, 61 P. 948.

[9, 10] "The general rule is well settled in this state, following the common-law doctrine, that no action for damages can be prosecuted against a plaintiff in an action from the fact per se that the action was unsuccessful or abated. The action must have been prosecuted maliciously and without probable cause, or the plaintiff cannot be made liable for bringing it." Vesper v. Crane Co., 165 Cal. 36, 41, 130 P. 876, 878, L. R. A. 1915A, 541. The two essentials, malice and want of probable cause, must appear from the evidence or the action must fall. Malice is the basis of the action, and we will therefore consider that question as applied to this case.

[11-13] Actual malice is an element in the cause of the action. Burke v. Watts, 188 Cal. 118, 204 P. 578. Malice refers to the condition of mind; first, that bad faith exists or a want of sincere belief that the cause is a proper cause, and, second, an intent to injure. Griswold v. Griswold, 143 Cal. 617, 77 P. 672. Malice is a question of fact. Burke v. Watts, supra. The trial court found that there was no malice on the part of the respondent in prosecuting or in procuring the issuance of the preliminary injunction.

[14, 15] It appears from the evidence that Denivelle knew from one of the employees of MacGruer and Simpson that the travertine plaster was a distinct process from any known to Denivelle. It was admitted by the respondent herein that he had been told that MacGruer and Simpson were using calcium carbide in their process, but he also testified: "When I received these samples, I could not tell whether they were made by the use of calcium carbide for the purpose of making voids in the material. * * * I presumed they were made by the process covered by my

patents, naturally. * * * I now believe that they infringed my patent as much as I did at the time I brought the suit." A defendant in an action for maliciously securing an injunction may testify directly as to his motive and good faith. Runo v. Williams, 162 Cal. 444, 122 P. 1082. The trial court was justified from the foregoing and other evidence in finding that the defendant did not maliciously or with intent to injure plaintiffs move for a preliminary injunction. Appellants failed by the test of a preponderance of evidence to prove that respondent, maliciously and without probable cause, obtained the preliminary injunction, and hence the judgment for defendants will be affirmed.

Judgment affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

112 Cal. App. 601

In re CHANDLER'S ESTATE.*

CHANDLER et al. v. CHANDLER.

Civ. 557.

District Court of Appeal, Fourth District, California.

March 16, 1931.

As Modified on Denial of Rehearing April 15, 1931.

1. Appeal and error 🔑35.

Order holding that community funds applied by decedent to improvement of his separate property became his separate property *held* appealable.

2. Appeal and error 🔑544(1).

Where only question raised is whether order is supported by findings, appeal may be taken on judgment roll alone.

3. Appeal and error 🔑671(1).

Papers shown in transcript *held* sufficient to present question whether community funds applied by decedent to improvement of separate property constituted his separate property.

> The papers shown in the transcript, although they could not technically be called a judgment roll, were in nature of judgment roll consisting of report of the inheritance tax appraiser, the objections thereto, the petition for partial distribution, the answer thereto, the findings of fact and conclusions of law, the order made and entered by trial court, and notice of appeal. The transcript was certified by the clerk of court as containing true copies of original records in his office of the matters named "constituting the judgment roll in said matter."

4. Trial 🔑404(2).

Purported conclusion of law that community funds were used by husband for improvement of his separate property *held* finding of fact.

5. Husband and wife 🔑258.

Definite amount of community funds applied by husband to improvement of separate property did not become husband's separate property, in absence of showing wife consented thereto.

Appeal from Superior Court, San Bernardino County; F. A. Leonard, Judge.

Ira J. Chandler and another filed petition for a partial distribution of the estate of Guy B. Chandler, deceased, to which Christina Chandler, individually and as administratrix of the estate of Guy B. Chandler, deceased, filed answer. The proceeding was consolidated by consent of parties for hearing, with petitioners' objections to report of appointed inheritance tax appraiser and appraiser for the estate. From the portion of the order holding that the community funds applied by decedent to his separate property became merged in such separate property, Christina Chandler, individually and as administratrix, appeals.

Portion of order appealed from reversed, with directions.

See, also, 297 P. 638.

Harry Lyons, of Los Angeles, and Swing & Wilson, of San Bernardino, for appellant.

D. Joseph Coyne, of Los Angeles, for respondents.

BARNARD, P. J.

Guy B. Chandler died intestate, leaving, among other things, three pieces of real property which are described in the inventory and appraisement as parcels 1, 2, and 3. His heirs at law and next of kin are a son and a daughter by a former marriage, who are petitioners and respondents in this matter, and his widow, who is administratrix of his estate and the appellant herein. A return and report having been filed by a duly appointed inheritance tax appraiser and appraiser for the estate, these petitioners filed objections thereto, and they also filed a petition for a partial distribution of said estate. The widow, individually and as administratrix filed an answer to said petition for partial distribution. By consent of the parties, these two matters were consolidated for hearing, and were tried and heard at the same time. The question

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*For opinion denying rehearing, see 299 P. 110.

presented at this hearing was whether the estate left by the decedent was his separate property, or whether it was the community property of himself and his wife. After a hearing, the court made findings by which it was found and adjudicated that the entire estate, except parcel 3 above referred to, was and is community property; that the said parcel 3 was the separate property of the decedent; that $11,021.58 of the community funds had been applied by the deceased toward paying off an incumbrance against said parcel 3 and in putting improvements thereon; that said amount so used in improving parcel 3 had lost its community character, and has become, and now is, merged in the separate property of the decedent; and that the whole of said parcel 3, with the improvements thereon, is the separate property of the decedent. From the portion of this order holding that the community funds thus applied by decedent to the benefit and improvement of his separate property had become merged in such separate property, and that the whole of said parcel 3, with the improvements thereon, constituted his separate property, the widow has taken this appeal.

[1-3] The respondents first contend that this appeal may not be considered, for the reason that no proper record is before this court; it being insisted that there is neither a properly settled bill of exceptions nor a clerk's transcript accompanied by a reporter's transcript. The transcript before us consists of the report of the inheritance tax appraiser, the objections thereto, the petition for a partial distribution, the answer thereto, the findings of fact and conclusions of law, the order made and entered by the trial court, and the notice of appeal. It is certified by the clerk of the court as containing true copies of the original records in his office of the papers named, "constituting the judgment roll in said matter." The order made was an appealable order. The only question raised by appellant is a question of law, as to whether the portion of the order appealed from is supported by the findings made. In such a case, an appeal may be taken upon the judgment roll alone. While the papers shown in the transcript here may not technically be called a judgment roll, they are in the nature of a judgment roll, and are sufficient to present the question raised. In re Ryer, 110 Cal. 556, 42 P. 1082.

[4] Respondents also insist that the court made no finding of fact to the effect that community funds to the amount of $11,021.58 had been used and applied by the deceased, to the benefit and improvement of said parcel 3, although they admit that statements to that effect are set forth under the heading of "Conclusions of Law." The record shows that one instrument was filed, headed "Findings of Fact and Conclusions of Law," which later contains the heading "Conclusions of Law," and under that heading appears the matter which is here questioned. While so headed, the court actually finds that such community funds amounting to $11,021.58 were used and applied for the benefit and improvement of parcel 3, and then, as a conclusion of law, holds that such funds have lost their community character and have become merged in the separate property of the deceased. Regardless of its inclusion under the separate heading of "Conclusions of Law," this was a finding of fact. Lange v. Waters, 156 Cal. 142, 103 P. 889, 19 Ann. Cas. 1207; Stanward v. Yellow Taxi Cab Co., 75 Cal. App. 96, 241 P. 902.

[5] The only question raised by appellant is whether or not a definite and ascertained amount of community property applied by a husband to the benefit and improvement of his separate property becomes the separate property of the husband, where nothing else appears except the fact that it was so used. This question was decided in the case of Provost v. Provost, 102 Cal. App. 775, 283 P. 842, 844, and we see no reason, either upon principle or authority, to hold otherwise. In that case, the court, after reviewing a number of cases in which it has been held that, where a husband uses community property to improve the separate property of his wife, the title to the improvements follows the land, points out that such cases are based upon the proposition that, since the husband has control of the community funds, if he voluntarily annexes them to the separate property of the wife, he will be presumed to have intended that the improvements thus made are to become a part of her separate property. The court then says: "To merely state a case where the facts are reversed and the husband has spent community funds in improving his own separate estate is to make manifest the palpable impropriety of applying these decided cases as precedents for holding that, simply because community property is annexed to the separate property of one of the spouses, the whole is thereby for all purposes the separate property of that spouse. Since the facts are reversed, logic compels the conclusion that the community funds do not merge in the separate property where the husband has, without consent of the wife, improved his own separate property with that belonging to the community. To hold otherwise would be to permit the authority of the husband in controlling the community property, given him in the interest of greater freedom in its use and for its transfer for the benefit of both himself and his wife, to become a weapon to be used by him to rob her of every vestige of interest in the community property with which the law has expressly invested her. Such a conclusion would violate every sense of justice, and outrage every principle of fair dealing, known to the law."

In our opinion, it was error for the trial court, after finding that a definite and fixed amount from the community funds had been applied to the benefit and improvement of the separate property of the decedent, to hold that such funds had lost their community character and were merged into the separate property of the decedent; there being nothing to show that the wife had consented thereto.

The portion of the order appealed from is reversed.

We concur: MARKS, J.; JENNINGS, J.

112 Cal. App. 606

In re CHANDLER'S ESTATE.

CHANDLER et al. v. CHANDLER.

Civ. 558.

District Court of Appeal, Fourth District, California.

March 16, 1931.

1. Executors and administrators ⟹339.

Statute requiring five days' notice of trial of issues of fact *held* not applicable to administratrix' petition to mortgage estate property (Code Civ. Proc. §§ 594, 1578).

2. Executors and administrators ⟹339.

Where due notice had been given of administratrix' petition for permission to mortgage estate property, court had jurisdiction, although adversaries elected not to be present at hearing (Code Civ. Proc. § 1578).

3. Appeal and error ⟹909(4).

In absence of contrary showing, appellate court presumes that formal statements of trial court showing formal hearing on administratrix' petition to mortgage estate property were true.

> The order granting permission to mortgage recited that it was made in open court; that it came on regularly to be heard; and, after reciting that it further satisfactorily appearing to the court, the order proceeded to set forth facts which justified the making of the mortgage petitioned for.

4. Appeal and error ⟹909(4).

Court's statement that certain facts satisfactorily appeared at hearing held in open court raised presumption that facts appeared by proper evidence.

5. Executors and administrators ⟹342.

Jurisdiction of court to make order permitting estate property to be mortgaged is not dependent on administratrix' filing of account (Code Civ. Proc. § 1628).

6. Appeal and error ⟹909(4).

In absence of contrary evidence, appellate court assumed that finding that administratrix had filed account was correct (Code Civ. Proc. § 1628).

7. Executors and administrators ⟹354.

That prior petition of administratrix to mortgage was never acted on did not affect court's jurisdiction to hear subsequent petition properly noticed.

Appeal from Superior Court, San Bernardino County; F. A. Leonard, Judge.

Christina Chandler, individually and as administratrix of the estate of Guy B. Chandler, deceased, filed petition for permission to mortgage certain property belonging to the estate, to which Ira J. Chandler and another filed answer and objections. From order granting permission to mortgage, Ira J. Chandler and another appeal.

Affirmed.

See, also, 297 P. 636.

D. Joseph Coyne, of Los Angeles, for appellants.

Harry Lyons, of Los Angeles, and Ralph E. Swing, of San Bernardino, for respondent.

BARNARD, P. J.

Guy B. Chandler died intestate, and his estate is in the course of administration in the superior court of San Bernardino county. His widow is administratrix of the estate, and two children by a former marriage are appellants herein.

The respondent administratrix filed a petition for permission to mortgage certain property belonging to the estate, on July 7, 1930, the hearing of which was set by the clerk for July 21, 1930. Notices were given as provided by law, and on July 18, 1930, the appellants filed an answer and objections to this petition. On July 21, 1930, the trial judge signed an order granting permission to mortgage the property involved, which order was filed on July 22, 1930. It is from that order that this appeal is taken.

[1, 2] Appellants first contend that they were denied a hearing in the trial court. They did not appear at the time set for the hearing of the petition, and they now contend that, since this matter involved a trial of issues of fact, they were entitled to five days' notice of such trial, and that the court

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⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

had no jurisdiction on July 21, 1930, to do anything except to set a future date for trial, of which notice must be given them, as provided in section 594 of the Code of Civil Procedure. If this section had any application to such a hearing as we are considering, the fact would still remain that appellants had more than five days' notice of said hearing; the record showing that notice of the same was given them on July 7, 1930. However, we think the section referred to has no particular application to the case before us. The hearing and notice involved in this proceeding are governed by section 1578 of the Code of Civil Procedure, in which it is provided that the court, at the time fixed and appointed by the clerk, or at such other time to which the hearing may be postponed, if satisfactory proof is made that due notice of the hearing has been given, must proceed to hear the petition and any objections that may be filed or presented thereto. The order here appealed from recites that it satisfactorily appeared to the court that due notice had been given in the manner provided by law. Due notice having been thus given, the court had jurisdiction to proceed, which jurisdiction was not affected by the fact that appellants elected not to be present.

[3, 4] It is next urged that no formal hearing was held in the trial court, and that the order appealed from must have been made in chambers. Nothing appears in the record to support this contention. The order in question recites that it was made in open court, that it came on regularly to be heard; and, after reciting that "it further satisfactorily appearing to this court," the order proceeds to set forth facts which justified the making of the mortgage petitioned for. In the absence of any showing to the contrary, it must be presumed that these formal statements of the court are true and correct, and that the facts recited as satisfactorily appearing to the court were made to appear by proper evidence. The objection is made that the order does not affirmatively state that evidence was taken or witnesses sworn, but it is only reasonable to infer that such was the case from the court's statement that certain facts satisfactorily appeared at a hearing held in open court, and the presumption is in favor of the order.

[5, 6] The third point raised by appellants is that an order could not be made permitting property belonging to this estate to be mortgaged, since it appeared from the objections filed by appellants that the administratrix had failed to file an account as required by section 1628 of the Code of Civil Procedure. Had such a fact been true, it would not have affected the validity of this order, since the jurisdiction of the court to make the same was not dependent upon the filing of an account. For any such neglect, other remedies were available to appellants. However, the court found that it was untrue that the administratrix had failed to file such an account, and, in the absence of any evidence to the contrary, we must assume that such finding is correct.

[7] It is finally urged that the court had no power to make the order appealed from, for the reason that a prior petition to mortgage the same property was then pending, which had never been acted upon by the court. In this regard, the record shows that such a prior petition to mortgage was filed on June 23, 1930, and a hearing on the same was fixed by the clerk for July 7, 1930. No service of notice of the time and place fixed for said hearing appears in the record, although an answer and objection from these same appellants appears, which was filed July 5, 1930. It is apparent that this first proceeding was abandoned because proper notice had not been given. In any event, the fact that such a prior petition to mortgage was filed and never acted upon does not affect the jurisdiction of the court to proceed to hear a subsequent petition, which was properly noticed and regularly brought on for hearing.

The order appealed from is affirmed.

We concur: MARKS, J.; JENNINGS, J.

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112 Cal. App. 765

In the Matter of the Estate of Guy B. CHANDLER, Deceased. Ira J. CHANDLER and Harriet M. Chandler, Appellants, v. Christina CHANDLER, Individually and as Administratrix of the Estate of Guy B. Chandler, Deceased, Respondent.

Civ. 559.

District Court of Appeal, Fourth District.
California.
March 16, 1931.

Appeal from Superior Court, San Bernardino County; Chas. L. Allison, Judge.

See, also, 297 P. 636.

D. Joseph Coyne, of Los Angeles, for appellants.

Harry Lyons, of Los Angeles, and Ralph E. Swing, of San Bernardino, for respondent.

BARNARD, P. J.

Guy B. Chandler died intestate, and his estate is in the course of administration in the Superior Court of San Bernardino county. The respondent herein is the widow of the deceased and the administratrix of his estate, and the appellants are children of the deceased by a former marriage.

On October 7, 1930, the respondent administratrix filed a petition for permission to execute a deed of trust involving certain property belonging to the estate, and the same was set for hearing by the clerk of the court on October 20, 1930. Notices were given as provided by law, and these appellants filed an answer and objections to said petition on October 17, 1930. The minutes of the court show that on October 20, 1930, the hearing was continued to October 27, 1930. An order granting the petition was made in open court on October 27, 1930, from which this appeal is taken. Apparently the appellants did not appear either on October 20, 1930, or October 27, 1930.

As grounds for reversal, the appellants raise three points: First, that they were denied a hearing in the trial court; second, that no formal hearing was held in the trial court, but that the order appealed from was probably made in chambers; third, that the court had no power to make the order appealed from because the administratrix had failed to file an account as required by section 1628 of the Code of Civil Procedure.

These same three points were raised in another appeal in this same estate, an opinion in which has this day been filed. In re Estate of Chandler (Cal. App.) 297 P. 638. The record on this appeal shows a similar situation and a state of facts similar in every respect, so far as these three points are concerned, to those involved in the other appeal just referred to.

Upon the authority of that decision, and for the reasons therein given, the order here appealed from is affirmed.

We concur: MARKS, J.; JENNINGS, J.

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112 Cal. App. 702

WHITTEMORE et ux. v. DAVIS et al.

Civ. 7661.

District Court of Appeal, First District,
Division 1, California.
March 20, 1931.

1. Fraud 🔑41.

Complaint alleging fraudulent representations that mortgagee would reconvey property to plaintiffs, if they discontinued action against defaulting purchasers to quiet title, *held* insufficient.

Defendants demurred to the complaint for failure to allege that plaintiffs had, and effectively pleaded, cause of action to quiet title, whether such action was still pending, or how and to what extent they suffered any detriment or loss or defendants benefited by plaintiff's inaction.

2. Fraud 🔑41.

Complaint alleging fraudulent representations that mortgagee would reconvey property to plaintiffs, if they defaulted in foreclosure proceeding, *held* insufficient.

Defendants demurred to the complaint for failure to allege whether plaintiffs had meritorious defense to foreclosure proceeding, how or to what extent they suffered any detriment or loss or defendants were benefited by default, or in what respects foreclosure judgment was affected thereby.

3. Fraud 🔑46.

Complaint alleging plaintiffs' execution of quitclaim deed to mortgagee bank in reliance on fraudulent representations that it would reconvey property to plaintiffs *held* insufficient.

The complaint did not allege that any representative of the bank ever stated that it would immediately reconvey the property to plaintiffs, or that they believed alleged statement that the bank would have to have a quitclaim deed before contract for reconveyance could be finally consummated.

4. Fraud 🔑20.

To recover damages for fraudulent representation, plaintiff must have been so thoroughly induced thereby that, judging from ordinary experience, he would not, in all reasonable probability, have entered into contract otherwise.

5. Pleading 🔑34(4).

Pleading must be construed most strongly against pleader.

6. Pleading 🔑34(4).

When pleading is silent as to material dates, or does not clearly state facts relied on, it must be presumed that statement thereof would weaken pleader's case.

7. Pleading 🔑236(1).

Refusal of leave to file fourth amended complaint after sustaining demurrer to third amended complaint *held* within court's discretion.

Appeal from Superior Court, Los Angeles County; Leon R. Yankwich, Judge.

Action by Rex Frank Whittemore and wife against Raymond M. Davis and others. From a judgment on an order sustaining defendants' demurrer to plaintiffs' third amended complaint without leave to amend, plaintiffs appeal.

Affirmed.

Brooks Gifford, of Pasadena, for appellants.

Farrand & Slosson, of Los Angeles, for respondents.

WARD, Justice pro tem.

This is an appeal from a judgment entered upon an order sustaining defendants' demurrer to plaintiffs' third amended complaint without leave to amend. The complaint is an attempt to state an action sounding in damages for fraud and deceit alleged to have been practiced upon plaintiffs by defendants in a certain loan transaction which is set forth in the complaint. All of the defendants are directors in the defendant American Savings Bank of Pomona, a corporation, and the defendant Davis is manager of the bank. In substance the third amended complaint alleges that on February 2, 1923, plaintiffs executed a note to the bank for $5,000 which was secured by a mortgage on certain property in Los Angeles county; that subsequent to the execution of the mortgage, and prior to the actual payment to the plaintiffs of the sum of $5,000 by defendant American Savings Bank of Pomona, the defendant Raymond M. Davis, acting as the manager and agent and with the sanction and approval of the directors of said defendant corporation, demanded of the plaintiffs the execution of another note for the sum of $3,000, which amount, the defendant Raymond M. Davis stated, was to be a bonus for the execution of said $5,000 loan; that accordingly the plaintiffs did execute a note for $3,000, but that said note was absolutely without consideration; that in September, 1923, plaintiffs sold the property described in the mortgage to one C. E. Jones and wife; that the Joneses defaulted in their payments and plaintiffs filed against them a quiet title action; that an officer of the bank in July, 1925, without the knowledge or consent of the plaintiffs, attached the $3,000 note to the mortgage; that upon the same date the bank filed a foreclosure action against the plaintiffs and the Joneses. Appellants alleged in this action that said foreclosure action was brought by defendant bank through its duly authorized agent, for the purpose of defrauding these plaintiffs, and each of them; that defendant Robinson knew that the $3,000 note was not a part of the original mortgage, and that said defendant Robinson, acting as the duly authorized agent of the bank, intended to defraud and did defraud the plaintiffs out of the value of their property.

Plaintiffs further allege that C. E. Jones and Mary Doe Jones were served with process in the foreclosure action; that subsequent to said service of process on plaintiffs, and before the time for answering had expired, defendant bank, through its agent, defendant Davis, stated to plaintiffs that, if plaintiffs would default in the foreclosure proceeding and would discontinue the prosecution of the quiet title action against C. E. Jones and Mary Doe Jones, defendant bank would resell and reconvey to the plaintiffs the property mortgaged, at whatever price the bank was able to buy it, at the sale of said property in the foreclosure action, upon the following terms and conditions, namely: that if the price paid by the defendant bank for said property were $7500 or less, plaintiffs were to pay defendant bank in cash; if, however, defendant bank was forced to pay more than $7500, plaintiffs were to pay $7500 in cash and the balance by their notes to be due in ninety days and to be secured by a mortgage upon said property; that plaintiffs accepted the foregoing proposition of defendant bank; that the said defendant Davis, continuing to act as the duly authorized agent of the bank, falsely, fraudulently, and knowing the same to be untrue, represented to plaintiffs that no contract in writing was necessary for the purpose of binding said defendant bank to resell and reconvey said mortgaged property, but that the forbearance of plaintiffs to prosecute the quiet title action against C. E. Jones and Mary Doe Jones, together with the further forbearance of plaintiffs to defend the foreclosure action just referred to, would constitute sufficient consideration to bind defendant bank to resell and reconvey the property at whatever price defendant bank might buy it on foreclosure; that said foregoing promises and representations of defendant bank, through its duly authorized agent, Raymond M. Davis, were false, fraudulent, and untrue; that neither the defendant bank nor defendant Raymond M. Davis believed them to be true, and that said promises and representations were made without any intention of performing them, and with intent to defraud the plaintiffs; that plaintiffs believed and relied upon the foregoing false fraudulent representations, and as a direct result of their reliance upon said false and fraudulent statements were defrauded out of the value of their property; that plaintiffs defaulted and ceased to prosecute the quiet title action; that judgment was recovered by the bank in the sum of $9,246.09 in the foreclosure action upon the $8,000; that the property was sold for the sum of $8,328.85 and costs in the sum of $81.91; that a default judgment was entered in the sum of $917.24; that plaintiff demanded that the bank reconvey to plaintiffs and offered the sum of $7,500 in cash and a note payable in ninety days secured by a mortgage for $828.85; that on or about the 20th day of October, 1925, at the defendant American Savings Bank of Pomona, defendant Robinson, with the knowledge, approbation, and approval of the directors of the bank, falsely, fraudulently, and knowing it to be untrue, stated to plaintiff Rex Frank Whittemore that the contract of conveyance of the property from defendant American Savings Bank to plaintiffs was nearly completed, but that before it could be finally consummated defendant bank would have to have a quitclaim deed to the property signed by these plaintiffs; that said foregoing statements of defendant bank, through its duly authorized agent, were false, fraudulent, and untrue; that neither the defendant bank nor defendant F. C. Robinson believed them to be true, and that said statements were made without any intention of performing them, and with intent to defraud plaintiffs; that plaintiffs executed and delivered a quitclaim deed to the bank; that further demands to reconvey were refused and plaintiffs ask damages in the sum of $25,917.24.

[1] A general demurrer was filed; also a special demurrer upon twelve designated grounds. The third amended complaint is indefinite and incomplete in many respects, but we will consider only the points raised that warranted an order sustaining the demurrer without leave to amend. Ground 2 of the demurrer reads as follows: "Whether or not a cause of action existed in favor of plaintiffs against C. E. Jones and Mary Doe Jones at the time they filed the quiet title action, or at any time, and/or whether said cause of action was effectively pleaded and/or whether said action is still pending and/or in what manner or to what extent plaintiffs, or either of them, suffered any detriment or loss or defendants gained any benefit by plaintiffs' inaction in said action." The statement in the complaint in reference to the Joneses is immaterial to the issue attempted to be raised unless it could be connected with a continuous scheme or plan on the part of the defendants to defraud. If so, defendants were entitled to know in what manner plaintiffs were deceived and thereby defrauded. Inaction or cessation of prosecuting the quiet title action could not interfere with the orderly proceedings in the foreclosure suit.

[2] In ground 5 the defendants demurred as follows: "Whether at the time plaintiffs did default in the foreclosure proceedings," a valid and meritorious defense thereto existed in favor of plaintiffs, or either of them, or in what manner or to what extent plaintiffs, or either of them, suffered any detriment or loss, or defendants gained any benefit by plaintiffs' default and/or in what respects, if at all, the judgment of foreclosure" "was affected by or was other and different by reason of plaintiffs' alleged default."

There are no allegations in the complaint that the Whittemores were or were not in default under the mortgage. If owners of property are in default in a foreclosure action, and the proper foundation is laid by the mortgagees to bring the action properly alleged, the owners have no defense, and the failure to file an untenable defense could not form consideration for a contract. If the Whittemores had a defense, then it should be alleged as a means of determining the question of consideration for the alleged contract to forbear from appearing and defending. In appellants' brief there is no contention presented that any defense could have been made to the foreclosure suit in so far as the $5,000 note is concerned, but that the $3,000 note was given without consideration and that that allegation is sufficient consideration for the contract not to defend in the foreclosure suit. The allegations in reference to the $3,000 note are uncertain and ambiguous. The terms of the mortgage are not set out, and no reference is made which would indicate whether or not this mortgage did not also secure the $3,000 note. These omissions were important because appellants' alleged contract to forbear to plead is relied upon as part consideration for an alleged subsequent agreement with the bank.

[3, 4] Defendants also demurred to the portion of the complaint alleging the execution and delivery of the quitclaim deed. The complaint does in effect state that the plaintiffs relied upon promises and representations that the bank would immediately give to plaintiffs a contract of conveyance of the property, but it does not appear in the complaint that any representative of the bank ever made a statement that the bank would immediately give to appellants a reconveyance. It does appear that the "bank would have to have a quitclaim deed," but it does not appear that appellants believed such alleged statement. "Unless an untrue statement is believed and acted upon, it can occasion no legal injury. It is essential, therefore, that the party addressed should trust the representation, and be so thoroughly induced by it, that, judging from the ordinary experience of mankind, in the absence of it he would not, in all reasonable probability, have entered into the contract or other transaction." Spinks v. Clark, 147 Cal. 439, 444, 82 P. 45, 47.

[5, 6] The demurrer raises many other objections of incompleteness of allegation and lack of dates. It is unnecessary to discuss the other points presented except to say that upon special demurrer most of the objections should be sustained. A pleading must be construed most strongly against the pleader (Du Bois v. Padgham, 18 Cal. App. 301, 123 P. 207) and, so construed, the complaint fails to state a cause of action. If the allegations in a pleading are silent as to dates, and it appears that such dates are material to the issue, it must be presumed that a statement of such dates would have weakened the pleader's case. The same rule applies when the pleader

fails to make a clear specific statement of the facts relied upon. Smith v. Buttner, 90 Cal. 100, 27 P. 29. Paragraph 171, page 274, of volume 1 of Perry on Trusts and Trustees (7th Ed.), relied upon by appellants, is not applicable to this case. The authorities cited do not support the form of action appellants elected to pursue.

[7] In Stewart v. Douglass, 148 Cal. 512, 83 P. 699, the trial judge sustained a demurrer to the fourth amended complaint, and the Supreme Court held: "It was not error for the court to refuse to allow further amendments to the complaint. When a demurrer is sustained to a complaint, it is within the discretion of the court either to allow an amended complaint to be filed, or to give judgment forthwith in favor of the defendant. The appellate court will in every such case sustain the action of the court below, whatever course it may take, unless it is made to appear by the record that there has been an abuse of discretion." A plaintiff may not, without limit, replead after demurrer sustained. In this case another amended complaint would have been a fourth attempt to state a cause of action. The trial court was well within its discretion when it determined that, if appellants could not present a cause of action in the third attempt, the limit had been reached.

Judgment affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

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113 Cal. App. 1

PEOPLE v. ROGERS.

Cr. 2034.

District Court of Appeal, Second District,
Division 2, California.
March 24, 1931.

1. Criminal law ⇨570(1).

In prosecution for grand theft, evidence *held* sufficient to sustain finding of jury denying plea of not guilty by reason of insanity.

2. Criminal law ⇨354.

Evidence on issue of insanity showing circumstances under which prosecuting witness' purse was taken, and defendant's appearance and statements at time, was admissible.

> On trial on the plea of insanity, the complaining witness testified that he was jostled while walking down an aisle and that instantly he felt his pocketbook go and grabbed the hand that took it, just as it was being passed to a third party. He further testified that defendant was the man who picked his pocket; that he was clean shaven, and that his hair was cut, presenting an entirely different appearance from that which he exhibited in court; and that when he saw the pocketbook being taken by the third party he said, "That is my property," to which the third party replied, "That is all right, this is a detective."

3. Criminal law ⇨773(2).

Jury should be informed as to nature and character of defendant's acts in determining plea of insanity in criminal prosecution.

4. Criminal law ⇨773(2).

Instruction that generally burden of proof was upon prosecution, but that burden of proving existence of insanity was on defendant, *held* not erroneous.

5. Criminal law ⇨570(2).

Defendant in criminal prosecution must establish insanity by preponderance of evidence.

Appeal from Superior Court, Los Angeles County; William T. Aggeler, Judge.

De Witt Rogers was convicted of grand theft, and he appeals.

Affirmed.

Orbison & Irwin, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Alberta Belford, Deputy Atty. Gen., for the People.

IRA F. THOMPSON, J.

The defendant was charged with grand theft by an information filed by the district attorney. He interposed two pleas, the one not guilty and the other not guilty by reason of insanity. This appeal is from the judgment pronounced upon the verdicts and from an order denying his motion for a new trial, but in fact only involves the trial upon the second plea of not guilty by reason of insanity.

[1] Without raising a point, but just upon general principles, counsel for appellant first take a few scattering shots at what they term "the anomalous procedure" and then argue as their first reason for a reversal of the judgment that the testimony is insufficient to support the verdict. All that we need to do is to refer to the testimony which supports the jury's finding. Dr. E. H. Steele, one of the physicians appointed by the court, testified that he had made a special study of nervous and mental diseases; that he had made a mental and physical examination of the defendant; that he "observed him both in the jail, ward 110 of the County Hospital, and in the Psychopathic Ward of the County

Hospital." This witness further testified as follows: "I observed his conduct and took into consideration his conduct as well as his answers to questions, and he claimed to have no recollection of the charge for which he was arrested, and could give a very poor history of his past. It was so poor, in fact, that it made me believe that he was trying to avoid giving information about himself. It was found that he had a positive Wasserman of the blood, but he had no physical signs showing that he had syphilis of the nervous system." He also testified that in his opinion the defendant knew the difference between right and wrong and was "not legally insane." Dr. Charles L. Allen, who it was stipulated had been connected with the lunacy commission of Los Angeles county for several years, also testified that he had made an examination of the defendant's "nervous functions, and questioned him"; that he "found nothing at the time of" his "examination that would indicate that he was unable to appreciate the nature and quality of his acts"; that he could distinguish right from wrong and was legally sane. This witness also said that the defendant was "uneducated * * * a man of very inferior intelligence," but that he formed "the opinion that he was simulating insanity, because what he told me sounded so foolish and not in keeping with what a person who is really hallucinating will tell you; more like something a child will tell you when he wanted to make up something." Again, the doctor said: "He has an intelligence equal to, or greater than that of a child of 12 years." Another physician attached to the staff of the Norwalk State Hospital, who according to the testimony had made a special study of mental diseases, testified that he had examined the appellant; that in his opinion the defendant was not insane; and that he could understand the difference between right and wrong. When asked why he formed that opinion, the doctor replied: "I formed that opinion because I find in the man no evidence of mental disease. I find him able to appreciate the nature and qualities of his acts, weigh the consequences of his acts; I find no evidence, in other words, of mental disease. This man was able to give me a history of his life. He knew where he was. His memory was unimpaired. He was alert, active, had a correct knowledge of his environments; presented nothing which could be construed as delusions of a typical character or any ideas which sometimes motivate the acts of insane people. There was none of that brought forth. Physical examination of the defendant presented no manifestation of disease. For these reasons, I was led to the conclusion that he was not insane." In addition, the gentleman from whose pocket the purse was taken testified that he was jostled while walking down an aisle in the Grand Central Market and that instantly he felt his pocketbook go and grabbed the hand that took it just as it was being passed to a third party; that the defendant was the man who picked his pocket; that he was clean shaven and his hair was cut. presenting an entirely different appearance from that which he exhibited in court. He further testified that as he saw the pocketbook being taken by the third party the witness said, "That is my property," to which the third party replied: "That is all right, this is a detective." An officer, who was the detective mentioned, testified to the same effect. It is unnecessary for us to comment at length upon this testimony. It cannot be seriously contended that it furnishes an insufficient foundation for the conclusion of the jury even though the evidence opposed to it would have justified a contrary verdict.

[2, 3] It is next asserted that the trial court committed error when it permitted the witness Brown, whose testimony is substantially stated in the résumé already set forth to the effect that the defendant took his pocketbook, etc., to which statement should be added the fact that the witness had never seen the man before and formed no opinion of his sanity or insanity, to testify. Complaint is also made of the testimony of the police officer which was as we noted to the same effect. They say, and properly so, that the sole issue before the court was the sanity of the defendant at the time the acts complained of were committed. But they insist that, "the attempt and purpose was to place full evidence of the offense before the jury—for its prejudicial effect was known by the prosecution." Let us note, first, that the judge at the very beginning of the trial informed the jury that the sole issue was whether the defendant was sane or insane, and, second, that in his final instructions he was particularly careful to emphasize the same thing. It is difficult to believe, therefore, that the jury could possibly have misunderstood their duty in this particular. Now let us assume a different case, one that is hideous and repulsive in its nature and the manner of its commission. Would not such evidence go a long way toward establishing the insanity of the accused? Or we may assume another situation where the crime is planned and carried out with a methodical niceness, evidencing extreme care to prevent detection, could it be seriously contended that such evidence was not pertinent to the inquiry of whether the accused was sane. So here, the testimony of jostling and the testimony concerning defendant's appearance and what was said and left unsaid at the immediate time are all proper to aid the jury in determining whether he was sane at the particular time he was engaged in performing the acts. It may not have been of great probative value, but it was admissible. The reasoning in People v. Linton, 102 Cal. App. 608, 283 P. 389, 392, is in point. There the objection was that the trial court read the information to the jury trying the

issue of insanity. The District Court of Appeal said: "Obviously, however, the very purpose of the insanity trial was to ascertain whether appellant had reasoning capacity sufficient to distinguish between right and wrong as to the particular acts he was charged with having committed * * * and manifestly the jury could not intelligently determine that question without being first informed as to the nature and character of such acts."

[4, 5] There is a further assignment of error to the effect that the trial judge misinstructed the jury. He told them that while generally the burden of proof is upon the prosecution, yet it was subject to this exception that, "Where insanity is relied upon as a defense, the burden of proving the existence of such insanity is on defendant, and it is incumbent upon him to establish, by preponderance of evidence, that he was insane at the time of committing the act charged." It is true, of course, as counsel argue, that the burden of proof does not shift, but it is equally true that the defendant when relying upon the plea of insanity must establish that fact by a preponderance of the evidence. Regardless of whether it is ever necessary to instruct jurors in the technical art to the degree here suggested it is patent that in the particular case appellant is grasping at the shadow and not the substance. As heretofore stated, the sole issue in the trial was the sanity of the defendant and it was sufficient to explain to them that the burden of proving insanity by a preponderance of the evidence rested upon the defendant. Where the burden of proof rested generally was a nonessential.

Judgment and order affirmed.

We concur: CRAIG, Acting P. J.; ARCHBALD, Justice pro tem.

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112 Cal. App. 163

EDGAR v. CITRARO et al.

Civ. 6865.

District Court of Appeal, First District, Division 1, California.

Feb. 25, 1931.

Rehearing Denied March 27, 1931. Hearing Denied by Supreme Court April 23, 1931.

1. Trial 🔑253(7), 296(7).

"Formula instruction," directing verdict if jury finds certain facts, must embrace all elements essential to recovery; omitting any element being error not cured by inclusion in other instructions.

2. Trial 🔑296(3).

In action by automobile guest for injuries, instruction requiring finding on contributory negligence *held* not "formula" instruction, and, though omitting element of proximate cause covered by other instructions, *held* not to warrant reversal.

Instruction that one of defendants was admittedly negligent, and that, before liability can attach, jury must determine whether plaintiff's guest was contributorily negligent, did not in terms direct verdict, and record disclosed that court gave seven other instructions fully covering doctrine of proximate cause. Hence it was clear instruction was not intended as "formula" instruction, and, in view of all instructions, it was unlikely jury accepted instruction as "formula" instruction or was misled by omission of element of proximate cause from single instruction. Therefore, omission did not warrant reversal.

3. Automobiles 🔑246(54).

In action by automobile guest, instruction other driver was admittedly negligent *held* justified by testimony (St. 1923, p. 553, § 113).

Evidence showed beyond question that driver involved in collision entered and was traversing intersection at speed greater than fifteen miles an hour, though St. 1923, p. 553, § 113, makes it unlawful to traverse an intersection with driver's view obstructed at speed greater than 15 miles per hour. Furthermore, according to other automobile driver's own admissions, after seeing car enter intersection, he failed to stop or bring own automobile under control within distance of 50 feet which he admittedly could have done, and under his testimony it followed necessarily that from intersecting line to point of collision, a distance of 20 feet within intersection, his speed must have been in excess of 15 miles per hour.

4. Automobiles 🔑168(6).

Court *held* justified in holding motorists traversing intersection with obstructed view at greater than statutory speed negligent as matter of law (St. 1923, p. 553, § 113(b) 2).

5. Automobiles 🔑168(2).

Statute *held* to mean vehicle's speed, though within maximum limit, is unlawful, if greater than reasonable and proper under circumstances (St. 1923, p. 553, § 113(a) and (b) 2).

Qualifying clause "subject to the provisions of subdivision (a) of this section," as employed at beginning of subdivision (b) of St. 1923, p. 553, § 113, means simply that, even though vehicle is driven within maximum speed fixed by subdivision (b), it is nevertheless unlawful speed if greater than is reasonable and proper, having regard to traffic, surface, and width, of highway, or is such as to endanger life, limb, or property of any person.

6. Automobiles 🔑168(2).

Statute declaring violation of speed limit, only prima facie evidence of violation of section, *held* controlling only in criminal proceeding (St. 1923, p. 554, § 113 (c).

7. Automobiles 🔑242(1).

Evidence justifying holding motorist negligent as matter of law, he was not entitled to presumption of operation in lawful manner.

8. Trial 🔑260(3).

Instruction on presumption of obeying law was properly refused because covered in other instructions.

9. Trial 🔑295(1).

Where instruction, read in entirety, was correct, and court gave additional instruction proposed by defendant on same subject, there was no error.

10. Trial 🔑260(1).

Where refused instruction embodied principles not involved in case, and pertinent principles were covered in given instructions, there was no error.

11. Automobiles 🔑6.

Statute taking away guest's right of action to recover for driver's ordinary negligence does not affect causes of action existing when section became effective (St. 1929, p. 1580, § 141¾).

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by Florence Edgar, a minor, by John F. Edgar, her guardian ad litem, against Frank Citraro and others. From a judgment in favor of plaintiff, named defendant appeals.

Affirmed.

See, also, 283 P. 123, 124, 125.

Cooley, Crowley & Gallagher, of San Francisco, for appellant.

Vincent W. Hallinan, of San Francisco, for respondent.

PER CURIAM.

Two automobiles driven respectively by the defendants Frank Citraro and C. D. Pratt collided at the intersection of Julian and Fifth streets in San Jose about 8 o'clock in the evening. Riding with Citraro at the time were Mrs. Rose Edgar, her minor children Florence and John, and her sister, Mrs. Frances P. Traylen, all of whom were more or less injured. Five actions for damages grew out of the accident. Four were instituted by the injured parties, and the fifth by the parents of Florence Edgar to recover the damages they claimed to have sustained on account of the injuries to their daughter. In all of them Citraro and Pratt were joined as parties defendant; it being charged that the accident resulted from their concurrent negligence.

The actions brought by Florence Edgar and Mrs. Traylen were tried separately before juries, and verdicts were rendered against both defendants. The action brought by Edgar and his wife for damages resulting to them on account of the injuries to their daughter Florence, and the one brought by the boy in his own behalf, were tried together before a jury, and a verdict against both defendants was awarded in favor of Edgar and his wife, but it does not appear from the record before us what disposition was made of the boy's action. The fifth action, wherein Edgar and his wife sought to recover damages for the personal injuries she sustained, was tried before the court, sitting without a jury, and the court also found against both defendants. Citraro and Pratt took separate appeals from each judgment. Consequently there are eight appeals; each being presented on a separate record. Nos. 6865, 6866, 6867, 6868, 6905, 6916, 7069, 7070, 297 P. 649, 651, 652, 652, 652, 653, 654. In all of the trials the evidence relating to the cause of the accident was substantially the same. Whatever difference there is will be noted in the opinions filed in the other cases. In the appeals from the judgments obtained in the jury trials the assignments of error relate to the giving, and the refusal to give, certain instructions; and in the remaining appeal the main point urged is that the court erred in denying defendants' applications to file amended answers.

Citraro was driving westerly along Julian street, which is 40 feet wide between curbs, and Pratt was driving southerly along Fifth street, which between curbs is 60 feet wide. The view of the intersection was admittedly obstructed, as that term is defined by section 113 of the California Vehicle Act (St. 1923, p. 553), and consequently, under the provisions of said section, it was unlawful to traverse the same at a speed greater than 15 miles an hour. Citraro entered the intersection first, and had nearly reached the other side when the machines collided, the front end of Pratt's car striking Citraro's near the right rear end, immediately following which Citraro's car overturned twice. Pratt admits that, when he was still 30 feet north of the intersection, traveling at a speed of 25 to 30 miles an hour, he saw Citraro enter the intersection, and that, by applying the brakes of his car with full force, he could have brought it to a standstill within a distance of 35 feet; but that he did not so apply them until he reached the intersecting line of Julian street. He was then only 20 feet distant from the pathway of the on-coming Citraro machine, too close to avert a collision therewith. Citraro admits, too, that he was traveling across the intersection at a speed in excess of 15 miles an hour, and that, when he entered the intersection, he looked up Fifth street and saw the approach of the Pratt car, traveling, as he claims, at a speed of about 45 miles an hour, but that he "kept going right across Fifth street, picking up speed a little until the collision." None of the parties riding with Citraro were aware of the presence of the Pratt car until the cars collided. The impact occurred within the intersection 20 feet south of the intersecting line of Julian street, and within 5 feet of the westerly curb line of Fifth street.

[1, 2] In the present action, wherein Florence Edgar was awarded damages for the injuries she received, one of the numerous instructions given was as follows: "Under the evidence in this case, the defendant C. D. Pratt is admittedly guilty of negligence, and the questions, therefore, which you are to determine before liability can attach to the defendants are whether or not the plaintiff Florence Edgar was guilty of contributory negligence." Both appellants contend that the instruction is erroneous, in that it omits the element of proximate cause. It is doubtless the rule that, where a so-called "formula" instruction is given, directing a verdict in the event the jury finds certain facts to be true, it must embrace all the elements essential to a recovery, and that the omission therefrom of any of such elements amounts to error, the prejudicial effect of which is not overcome by the inclusion of the omitted elements in other instructions. (Starr v. Los Angeles Ry. Corp., 187 Cal. 270, 201 P. 599). But, as will be noted, the foregoing instruction does not in terms direct a verdict, and the record discloses that the court gave no less than seven other instructions wherein the doctrine of proximate cause was fully and completely covered (see instructions VIII, X, XII, XIII, XIV, XIX, and XX, as set forth in transcript No. 6865). It is apparent, therefore, that the instruction complained of was not intended by the court as a "formula" instruction, and, when all the instructions are read and considered together, it seems wholly unlikely that the jury accepted it as such or was misled by the omission of the element of proximate cause from this single instruction. The situation falls, therefore, within the rule applied in the case of Douglas v. Southern Pacific Co., 203 Cal. 390, 264 P. 237, and does not warrant a reversal. See, also, Robinet v. Hawks, 200 Cal. 265, 252 P. 1045; Towne v. Godeau, 70 Cal. App. 148, 232 P. 1010.

[3] The defendant Pratt makes the separate contention that the court erred in stating to the jury that he was admittedly guilty of negligence, claiming that the nature of his testimony was such as to raise a conflict on that point. This contention cannot be maintained, however, in the face of the evidence showing beyond question that he entered and was traversing the intersection at a speed greater than 15 miles an hour; and, furthermore, according to his own admissions, after seeing Citraro enter the intersection, and without the slightest excuse or reason, he failed to bring his car to a stop, or even under control, within a distance of 50 feet, which he admits he easily could have done; and, even though, as he claims, after seeing Citraro enter the intersection, he "gradually slowed down" from 25 or 30 miles an hour to a speed of not more than 15 miles an hour at the point of collision, it follows necessarily that from the intersecting line to the point of the collision, a distance of 20 feet within the intersection, his speed must have been in excess of 15 miles an hour. The cases the defendant Pratt relies upon in furtherance of his theory as to the latter point are not pertinent here, because they involve the construction of the provisions of the previous Vehicle Act of 1913, fixing a speed limit of ten miles an hour "on approaching" an intersection where the driver's view was obstructed, which is essentially different from the provisions of the Vehicle Act of 1923 (St. 1923, p. 517) in force at the time this accident happened, which fixes a speed limit of 15 miles an hour "in traversing" an intersection, etc.

[4] The court also instructed the jury that, if it found that Citraro and Pratt were traversing said intersection at a speed in excess of 15 miles an hour, they were guilty of negligence "as a matter of law," and, if it further found that such negligence was the proximate cause of the accident, and that plaintiff herself was free from contributory negligence, plaintiff was entitled to a verdict. Both defendants contend that under the provisions of section 113 of the Vehicle Act of 1923, which, as stated, was in force at the time this accident took place, it was not negligence "as a matter of law" to traverse an intersection at a speed greater than 15 miles an hour, but was only prima facie evidence of negligence, and that consequently the instruction was erroneous. We find no merit in the contention. Subdivision (b) 2 of said section 113 declares that "subject to the provisions of subdivision (a) of this section and except in those in-

stances where a lower speed is specified in this act, it shall be lawful for the driver of a vehicle to drive the same at a speed not exceeding * * * fifteen miles an hour in traversing an intersection of highways when the driver's view is obstructed. * * *" And it has been held in the case of Benjamin v. Noonan, 207 Cal. 279, 277 P. 1045, in quoting approvingly from an earlier case (Scragg v. Sallee, 24 Cal. App. 133, 144, 140 P. 706, 710), that it is "strictly correct" to instruct a jury that the act of driving a vehicle over a street or public highway beyond the statutory speed limit is "of itself negligence," or "negligence as a matter of law," or "negligence per se." The more recent case of Loggie v. Interstate Transit Co. (Cal. App.) 291 P. 618, holds to the same effect.

[5, 6] Aside from what is said in those cases, we think it evident from an analysis of the different provisions of said section 113, first, that the qualifying clause, "subject to the provisions of subdivision (a) of this section," as employed at the beginning of subdivision (b), means simply that, even though a vehicle is driven within the maximum speed fixed by subdivision (b) of said section, it is nevertheless an unlawful speed if it is greater than is reasonable and proper, having regard to the traffic, surface, and width of the highway, or is such as to endanger the life, limb, or property of any person. Subd. (c) section 113. Such was the construction given to the provisions of the previous Vehicle Act (Cook v. Miller, 175 Cal. 497, 166 P. 316; Garns v. Halpern, 193 Cal. 193, 223 P. 545), and the same construction has been placed on the act of 1923 (Truitner v. Knight, 83 Cal. App. 655, 257 P. 447; Davis v. Brown, 92 Cal. App. 20, 267 P. 754; City of Sacramento v. Hunger, 79 Cal. App. 234, 249 P. 223. And, secondly, when the provisions of subdivision (c) of said section 113, which purport to declare the legal status of evidence establishing violations of the speed restrictions fixed by said section, are read along with the provisions of sections 153 and 154 of said act, relating to the arrest of the violators and the institution against them of criminal proceedings, it is clear that the provisions of said subdivision (c) of said section 113 were intended to be controlling only in criminal proceedings. Moreover, our attention has been called to no case, nor have we been able to find any, holding that a complaint in a civil action for negligence, based upon a violation of the statutory speed restrictions fixed by subdivision (b) of section 113 of the Vehicle Act, "shall specify" as provided in subdivision (c) thereof "approximately the speed at which the defendant is alleged to have driven and exactly the lawful speed at the time and place of the alleged offense." And manifestly, to adopt defendants' contentions in this regard would be to establish in negligence cases involving violations of the speed restrictions of the Vehicle Act a standard of proof entirely different from the one heretofore governing such cases, and wholly contrary to the one prevailing in cases of negligence based upon all other statutory violations. We are not prepared to hold that such was the intention of the Legislature in enacting subdivision (c) of said section 113.

[7] The defendant Pratt complains also of the refusal to instruct the jury in his behalf that it is presumed that every man obeys the law, and that consequently in the present case it must be presumed that he was at all times operating his automobile "at the legal speed limit" and in a careful and prudent manner. As already pointed out, however, the evidence was legally sufficient to justify the trial court in holding that he was guilty of negligence as a matter of law; and the jury was so instructed. That being so, he was not entitled to the benefit of the presumption that he was at all times operating his automobile in a lawful manner.

[8, 9] The defendant Citraro assigns as error the giving, and refusal to give, a number of other instructions, but we find no merit in any of his objections. Instruction No. XLII, proposed by him, embodying the legal principle that it is presumed that every man obeys the law, was properly refused, because the subject-matter thereof was fully covered in instruction No. XXVI which the court gave. The main portion of instruction No. VI relating to the doctrine of contributory negligence as given by the court is not included in the quotation in defendant's brief, and, upon examining the instruction, it will be found that the entire instruction as given conforms to the law as laid down in the case of Dowd v. Atlas Taxi. Co., 187 Cal. 523, 202 P. 870. See, also, Curran v. Earle C. Anthony Co., 77 Cal. App. 462, 247 P. 236. Moreover the court gave three additional instructions proposed by defendant on the same subject.

[10] Whatever defects there may have been in instruction XX relating to the right of way at intersections was cured by six other instructions upon the same subject which were given at the request of Citraro. (See instructions XXX to XXXV, inclusive.) Instructions Nos. XL and XLI which the court refused to give embodied certain principles not involved in this case, and the pertinent principles therein contained were covered in instructions XXXIII and XXV which the court gave.

[11] The accident happened and the judgments were obtained prior to the enactment of section 141¾ of the California Vehicle Act (St. 1929, p. 1580), which took away the right of action of a guest in a vehicle to recover for personal injuries based on ordinary negligence of the driver, and defendant Citraro contends on all of the appeals that the provisions of said section are to be given a retrospective operation, in which case the judgments obtained against him would be nullified, because admittedly the injured parties were riding as his guests at the time of the accident, and there is no claim made that he was either intoxicated or guilty of gross negligence. The question presented has been decided adversely to defendant's contention by the recent case of Callet v. Alioto (Cal. Sup.) 290 P. 438, which holds that the provisions of said section are to be given prospective operation, and consequently do not affect causes of action existing at the time said section became effective.

The judgment is therefore affirmed.

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112 Cal. App. 172

TRAYLEN v. CITRARO et al.

Civ. 6866.

District Court of Appeal, First District, Division 1, California.

Feb. 25, 1931.

Rehearing Denied March 27, 1931. Hearing Denied by Supreme Court April 23, 1931.

1. Automobiles ⚿244(20, 35).

In action by guest against motorists colliding in intersection with obstructed view, while traveling above statutory speed, evidence justified conclusion motorists were negligent as matter of law (St. 1923, p. 553, § 113 (b) 2).

2. Trial ⚿296(3).

In guest's personal injury action against motorists, omission of element of proximate cause in other than "formula" instruction *held* not prejudicial, where covered in other instruction.

3. Negligence ⚿136(25).

Question of proximate cause becomes one of law, where facts are uncontroverted, permitting of only one inference.

4. Automobiles ⚿201(8), 245(64), 246(57).

In action by guest, it appearing collision would not have occurred but for violation of statutory speed limit by both drivers, accident was result of concurrent negligence, making issue of proximate cause question of law, justifying refusal of instruction thereon.

5. Automobiles ⚿246(57).

Undisputed evidence, in action by guest against motorists, showing collision was caused by concurrent negligence of both drivers, refusing instruction one driver's negligence was sole proximate cause of accident *held* not error.

6. Automobiles ⚿246(60).

Motorist, being negligent as matter of law, was not entitled to instruction on presumption of obeying law.

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by Frances P. Traylen against Frank Citraro and others. From a judgment in favor of plaintiff, named defendant appeals.

Affirmed.

See, also, Edgar v. Citraro, 297 P. 653, 654.

Cooley, Crowley & Gallagher, of San Francisco, for appellant.

Vincent W. Hallinan, of San Francisco, for respondent.

PER CURIAM.

This is the second of five actions arising out of a collision which took place at the intersection of Fifth and Julian streets in San Jose, between two automobiles driven respectively by the defendants Pratt and Citraro. In four of them judgments were obtained by the plaintiffs therein and the defendants took separate appeals. The result of the fifth action does not appear. In the present action Mrs. Traylen, who was one of the passengers riding in the Citraro machine at the time of the accident, obtained a verdict for damages against both defendants for the personal injuries she received as a result of the collision. The judgment in one of the other actions has this day been affirmed (Florence Edgar, a Minor, etc., v. Citraro et al. [Cal. App.] 297 P. 645, 651), and, except as hereinafter noted, the evidence in the present case as to the manner in which the accident happened is substantially the same as in that case, and the essential facts are set forth in the opinion therein. Most of the points urged for a reversal of the judgment in the present action also are disposed of in the opinion in that case, and consequently it will be unnecessary to consider the same here.

The state of the record in the present case differs from the one in that case, however, in this: There the court instructed that Pratt was guilty of negligence as a matter of law, but left the question of Citraro's negligence for the jury to determine; whereas, here the jury was instructed that both defendants were guilty of negligence as a matter of law. The instruction read as follows: "I instruct you that under the evidence in this case that

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⚿For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

the defendants are, and each of them is, as a matter of law guilty of negligence and the question which you are to determine before liability can attach to defendants, and before any question of damage should be considered by you, is whether or not the plaintiff Frances P. Traylen, was guilty of contributory negligence."

[1] The evidence is legally sufficient to sustain the trial court's conclusion that both defendants were guilty of negligence as a matter of law. In addition to the testimony given in the Florence Edgar Case, Pratt admitted here that, when he crossed the intersecting curb line of Julian street into the intersection, he was traveling 20 miles an hour, which clearly established a violation of the statutory speed restriction (subd. (b) 2, § 113, California Vehicle Act [St. 1923, p. 553]); and Citraro did not take the witness stand at all in the present case, and the testimony given by others was to the effect that he was traveling across the intersection at a speed greater than 15 miles an hour, and therefore in violation of the provisions of the Vehicle Act above cited.

[2] Both appellants contend here, as in the Florence Edgar Case, that the form of the instruction given was erroneous, in that it omitted the element of proximate cause; but, as pointed out in our opinion in that case, the form of the instruction does not bring it within the classification of a so-called "formula" instruction, and consequently, if the element of proximate cause was covered by any other instruction, a reversal is not warranted. Such an instruction was given in the present case at the request of the defendant Pratt. It was as follows: "Plaintiff having alleged that she has been damaged by the careless and negligent act of the defendants as set forth in her complaint, the burden of proving affirmatively by a preponderance of the evidence every fact and circumstance necessary to make out her case is cast upon her; the law presumes nothing against the defendants or either of them; the law casts upon the plaintiff the burden of proving by a preponderance of the evidence that the plaintiff was injured and damaged through the careless and negligent act of the defendants or either of them *as alleged in her complaint* and that such careless and negligent act on the part of the defendants *was the proximate cause of such injury and damage as is alleged in the complaint*, otherwise you must render a verdict for the defendants." (Italics ours.) It is evident, therefore, that the omission to include the element of proximate cause in the instruction complained of was not prejudicial. Wirthman v. Isenstein, 182 Cal. 108, 187 P. 12; Douglas v. Southern Pacific Co., 203 Cal. 390, 264 P. 237; Robinet v. Hawks, 200 Cal. 265, 252 P. 1045; Towne v. Godeau, 70 Cal. App. 148, 232 P. 1010.

[3, 4] Furthermore, it is well settled that the question of proximate cause, like those of negligence and contributory negligence, becomes one of law where the facts are uncontroverted and only one deduction or inference is deducible therefrom. 20 R. C. L. p. 148; 45 Cor. Jur. pp. 1320, 1322. And in the present case it would appear as a mathematical certainty that, if either defendant had been traveling across the intersection within the statutory speed limit, or had slackened his speed after having seen the approach of the other, the two machines would not have reached the same point at the same time, and consequently there would have been no collision. In other words, it was a clear case of concurrent negligence wherein the evidence shows beyond any reasonable inference to the contrary that the negligence of each defendant contributed proximately to the happening of the accident. In this regard the case is the same in principle as Cook v. Miller, 175 Cal. 497, 166 P. 316, 317, and Berges v. Guthrie, 51 Cal. App. 547, 197 P. 356, 357, which holds that where, as here, a collision occurs between two automobiles while the respective drivers thereof are violating the statutory traffic regulations, and would not have occurred had either of them observed the provisions of the statute, the accident is the result of their concurrent negligence, and the negligence of each is the proximate cause thereof. In the present case, therefore, the issue of proximate cause was one of law, and the trial court would have been justified in refusing to give any instructions on that subject.

[5] For the same reason the trial court did not err in refusing to give certain instructions proposed by Citraro based on his theory of the case that the "intervening, independent negligence" of Pratt was the sole proximate cause of the accident. In this regard Citraro's position is the same as if he were suing Pratt for damages, and Pratt were urging the defense of contributory negligence, for in such a case Citraro admittedly would not be entitled to a verdict in his favor if the uncontroverted evidence were sufficient to justify the court in holding as a matter of law that his negligence contributed proximately to the happening of the accident. Such was the situation in Cook v. Miller, supra, and the court therein said: "If he [the plaintiff] had not passed to the right of the wagon he would not have struck the automobile. So, also, if the defendant had turned the corner by going to the right of the intersection, his automobile would not have been struck by the motorcycle. The disobedience of the ordinance by both of them brought on this accident. It was the result of their concurrent negligence, the negligence of each was the proximate cause,

and each contributed to the injury." Also in Berges v. Guthrie, supra, wherein the judgment in favor of plaintiff was reversed upon the ground that he was guilty of contributory negligence as a matter of law, the court said: "* * * If the defendant had not recklessly emerged from behind the street car without waiting to see whether an automobile was approaching from his right, which would have the right of way, he would not have struck the plaintiff. On the other hand, if the plaintiff had slackened his speed upon approaching the crossing, where his view of the road traffic was obstructed by the street car and automobile following it, defendant would have cleared the street before plaintiff reached the point of collision, or plaintiff would have had time and space to turn safely to his right into Twenty-Third street, and thus have avoided the accident when he saw the danger impending. It appears, therefore, that the situation here is closely analogous to the facts in the case of Cook v. Miller, supra, and that the disobedience of the ordinance by both plaintiff and defendant brought about the accident; the negligence of each being a proximate cause. Under such circumstances the plaintiff should not recover."

And so in the present case, if Citraro had been traveling across the intersection at the lawful rate of speed of 15 miles an hour, or had reduced his speed to the lawful rate upon seeing the rapid approach of the Pratt machine, he would not have reached the pathway of the Pratt Machine, and consequently would not have been struck thereby; or, if Pratt had been traveling at a lawful rate of speed, or had applied his brakes with full force upon seeing Citraro enter the intersection, he would not have struck the Citraro machine.

[6] The instructions proposed by Citraro to the effect that he was entitled to the presumption that every man obeys the law were properly refused because, as pointed out in our decision in the Florence Edgar Case with respect to similar instructions proposed by Pratt, the evidence established, and the jury was instructed, that Citraro was guilty of negligence as a matter of law. The remaining points urged in furtherance of these appeals are answered and disposed of adversely to defendants' contentions in the Florence Edgar Case.

The judgment is affirmed.

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112 Cal. App. 764

Florence EDGAR, a Minor, by John F. Edgar, Her Guardian ad Litem, Plaintiff and Respondent, v. Frank CITRARO, Defendant and Respondent, and C. D. Pratt, Defendant and Appellant.

Civ. 6867.

District Court of Appeal, First District, Division 1, California.

Feb. 25, 1931.

Rehearing Denied March 27, 1931. Hearing Denied by Supreme Court April 23, 1931.

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

See, also, 283 P. 123, 124, 125; Traylen v. Citraro, 297 P. 649; and Edgar v. Citraro, 297 P. 653, 654.

Hartley F. Peart and Gus L. Baraty, both of San Francisco, for appellant.

Vincent W. Hallinan, of San Francisco, for respondent.

PER CURIAM.

A judgment for damages after verdict by a jury was entered against the defendants in the above-entitled action and separate appeals were taken therefrom, which have been presented on separate records. The appeal taken by the defendant Citraro has been this day determined adversely to his contentions (Florence Edgar, a Minor, etc., v. Citraro et al. [Cal. App.] 297 P. 645), and all of the points urged by the defendant Pratt on the present appeal were considered and disposed of in our decision therein. Therefore, in conformity with the conclusions stated therein, the judgment as to appellant Pratt is also affirmed.

112 Cal. App. 763

Frances P. TRAYLEN, Plaintiff and Respondent, v. Frank CITRARO, Defendant and Respondent, and C. D. Pratt, Defendant and Appellant.

Civ. 6868.

District Court of Appeal, First District, Division 1, California.

Feb. 25, 1931.

Rehearing Denied March 27, 1931. Hearing Denied by Supreme Court April 23, 1931.

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

See, also, Edgar v. Citraro, 297 P. 645, 653, 654.

Hartley F. Peart and Gus L. Baraty, both of San Francisco, for appellant.

Vincent W. Hallinan, of San Francisco, for respondent.

PER CURIAM.

Separate appeals were taken by the defendants Pratt and Citraro from a judgment for damages entered against them, after verdict by a jury, in the above-entitled action; and the appeals are presented on separate records. All of the grounds urged for reversal by both defendants were considered and determined in the adverse decision we have this day filed in the appeal taken by the defendant Citraro. Frances P. Traylen v. Citraro et al., No. 6866, 297 P. 649. Therefore, in accordance with the views therein expressed, the judgment as to the defendant Pratt is affirmed.

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112 Cal. App. 762

John F. EDGAR and Rose Edgar (His Wife), Plaintiffs and Respondents, v. Frank CITRARO, Defendant and Respondent, and C. D. Pratt, Defendant and Appellant.

Civ. 6905.

District Court of Appeal, First District, Division 1, California.

Feb. 25, 1931.

Rehearing Denied March 27, 1931. Hearing Denied by Supreme Court April 23, 1931.

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

See, also, 283 P. 123, 124, 125; 297 P. 645, 653; and Traylen v. Citraro, 297 P. 649.

Hartley F. Peart and Gus L. Baraty, both of San Francisco, for appellant.

Vincent W. Hallinan, of San Francisco, for respondents.

PER CURIAM.

This appeal, taken by the defendant Pratt from the judgment for damages entered herein against both defendants, after verdict by a jury, is companion to the one taken by the defendant Citraro from the same judgment; the appeals having been presented on separate records. We have this day determined the latter appeal adversely to the contentions of the appellant therein (John F. Edgar et ux. v. Citraro et al., 297 P. 654), and in our decision therein we disposed also of all of the contentions made by the defendant Pratt on the present appeal. Therefore, upon the grounds therein stated, the judgment as to the defendant Pratt is affirmed.

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112 Cal. App. 761

John F. EDGAR and Rose Edgar (His Wife), Plaintiffs and Respondents, v. Frank CITRARO, Defendant and Respondent; C. D. Pratt, Defendant and Appellant.

Civ. 6916.

District Court of Appeal, First District, Division 1, California.

Feb. 25, 1931.

Rehearing Denied March 27, 1931. Hearing Denied by Supreme Court April 23, 1931.

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

See, also, 283 P. 123, 124, 125; 297 P. 645, 651, 654; and Traylen v. Citraro, 297 P. 649.

Hartley F. Peart and Gus L. Baraty, both of San Francisco, for appellant.

Vincent W. Hallinan, of San Francisco, for respondents.

PER CURIAM.

Plaintiffs obtained a judgment for damages against both of the defendants in the above-entitled action, and the latter took separate appeals which are presented on separate records. On the companion appeal, taken by the defendant Citraro, which we have this day held to be without merit (John F. Edgar et ux. v. Citraro et al., 297 P. 645), we considered also and determined adversely all questions raised by the defendant Pratt on the present appeal. The judgment as to the defendant Pratt is therefore affirmed.

112 Cal. App. 183

EDGAR et ux. v. CITRARO et al.

Civ. 7069.

District Court of Appeal, First District, Division 1, California.

Feb. 25, 1931.

Rehearing Denied March 27, 1931. Hearing Denied by Supreme Court April 23, 1931.

1. Action 🔑50(3).

Collision gave rise to separate cause of action in favor of each injured guest.

2. Action 🔑50(3).

Injuries in same automobile collision to mother and minor daughter who were guests gave rise to three distinct causes of action.

> One cause of action arose in favor of husband and wife for personal injuries to wife; another in favor of minor daughter for injuries she sustained; and third and distinct cause of action in favor of husband and wife, as parents of minor daughter, to recover indemnity for financial loss they sustained on account of injuries to daughter.

3. Action 🔑50(3).
Pleading 🔑52(2).

Spouses could unite separate causes of action, for injuries to wife and financial loss from injuries to minor daughter arising out of same accident, in one complaint, if separately stated, or bring separate suits, subject to right of court to consolidate (Code Civ. Proc. § 427).

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by John F. Edgar and wife against Frank Citraro and another. From a judgment in favor of plaintiffs, named defendant appeals.

Affirmed.

See, also, 283 P. 123, 124, 125, 297 P. 645, 651; and Traylen v. Citraro, 297 P. 649.

Cooley, Crowley & Gallagher, of San Francisco, for appellant.

Vincent W. Hallinan, of San Francisco, for respondents.

PER CURIAM.

Rose Edgar, one of the plaintiffs above named, and her minor daughter, Florence, were riding in an automobile driven by the defendant Citraro and were injured when it collided with one driven by the defendant Pratt at the intersection of Fifth and Julian streets in San Jose. The other occupants of the Citraro car were Mrs. Edgar's minor son John, and her sister Mrs. Traylen, who were also injured. Several actions for damages grew out of the collision. Two were filed by the plaintiffs herein. In one of them they sought to be indemnified for the financial loss they suffered by reason of injuries to their daughter Florence, and in the other (the present one) they asked for damages on account of the personal injuries sustained by Mrs. Edgar. The former action was consolidated for trial with one brought by the boy John in his own behalf, and a jury awarded Edgar and his wife a verdict. Judgment being entered accordingly, the defendants took separate appeals, and the judgment has this day been affirmed as to both defendants. John F. Edgar et ux. v. Citraro et al., 297 P. 652, 654. Following the trial of that action, the present one was tried before the court sitting without a jury, and the court found against both defendants. Judgment was entered in conformity with such findings, from which the defendants have taken separate appeals.

[1-3] Prior to the commencement of the trial of this action, defendants presented separate motions for leave to file amended and supplemental answers, so as to plead as a bar to the present action the pendency of the other action and the judgment entered therein. The motions were denied, and the trial court's rulings in that regard furnish the grounds for the present appeals; it being contended that the right of Edgar and his wife to damages on account of the collision constituted but one inseverable cause of action; and that therefore, since they split the same into two demands and brought one action on each, the first action was a bar to the second. Only a few authorities have been cited by respondents in opposition to the foregoing contention, and those which are cited are far from the point, and consequently have not been at all helpful in determining what appears to be a serious question of pleading. However, upon analyzing the arguments made by appellants and the authorities they have cited in support thereof, it will be found, we think, that their contention is based upon a confusion of the meaning of the term "cause of action," and consequently is unsound.

Says the Supreme Court in the case of McKee v. Dodd, 152 Cal. 637, 93 P. 854, 855, 14 L. R. A. (N. S.) 780, 125 Am. St. Rep. 82: "A cause of action, as Professor Pomeroy points out with his usual lucidity (Remedies and Remedial Rights, § 452 et seq.), arises out of an antecedent primary right and corresponding duty and the delict or breach of such primary right and duty by the person on whom the duty rests. 'Of these elements, the primary right and duty and the delict or wrong combined constitute the cause of action in the legal sense of the term and as it is used in the Codes of the several states.'" In the present case, as shown, the negligent acts of defendants resulted in the injury to several persons. The primary right of each person injured was therefore violated, which gave rise to a separate cause of action in favor of each injured person. One cause of action arose in favor of Edgar and his wife for the personal injuries Mrs. Edgar sustained; another in favor of Florence Edgar for the injuries she sustained; and there was still a third and distinct cause of action which arose out of the injuries to Florence Edgar and in favor of Edgar and his wife, as the parents of Florence, to recover indemnity for the financial loss they sustained on account of the injuries to their daughter. It will be seen, therefore, that, although this latter cause of action in favor of Edgar and his wife had its origin in the same transaction out of which their first cause of action arose, nevertheless it was founded manifestly upon the violation of a different primary right; and, that being so, the two causes of action were distinct, and, under the provisions of section 427 of the Code of Civil Procedure, plaintiff had the option of uniting the two in one complaint, providing the same were separately stated, or of bringing a separate suit on each cause of action (Realty Construction, etc., Co. v. Superior Court, 165 Cal. 543, 132 P. 1048), subject to the right of the court to consolidate the same for trial.

For the reasons stated, it is our opinion that the trial court did not err in denying leave to amend the answers.

The judgment is affirmed.

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112 Cal. App. 178

EDGAR et ux. v. CITRARO et al.

Civ. 7070.

District Court of Appeal, First District,
Division 1, California.
Feb. 25, 1931.

Rehearing Denied March 27, 1931. Hearing Denied by Supreme Court April 23, 1931.

1. Automobiles 🔑168(6).

Motorists colliding in intersection, with obstructed view, while traveling above statutory speed, *held* negligent as matter of law (St. 1923, p. 553, § 113 (b) 2).

2. Negligence 🔑136(25).

Question of proximate cause becomes one of law where facts are uncontroverted, permitting of only one inference.

3. Appeal and error 🔑1067.
Automobiles 🔑244(36).

In guest's action against motorists colliding in intersection, with obstructed view, court *held* warranted in holding each defendant as matter of law guilty of negligence contributing proximately to collision; hence neither defendant could complain of refusal to instruct on such elements (St. 1923, p. 553, § 113 (b) 2).

Evidence showed beyond all reasonable inference to contrary that collision resulted from concurrent negligence of defendant motorists, and that negligence of each proximately contributed thereto; plaintiff guest's own driver admitting that, when he entered intersection, he saw other car approaching at high speed and continued across intersection, and other driver admitting that, when he was still 30 feet from intersection, traveling at excessive speed, he saw other automobile entering intersection, and by applying brakes could have stopped car within 35 feet, but made no effort so to apply brakes until he reached intersection, when he was only 20 feet distant from pathway of car, too close to avert collision.

4. Trial 🔑237(1).

In action by guest against motorists, issues of negligence and proximate cause being questions of law under evidence, instruction on doctrine of preponderance of evidence *held* adequate.

Court, in instructing on doctrine of preponderance of evidence and burden of proof, stated that in civil cases preponderance of evidence is required, and by "preponderance of evidence" is meant such evidence, as, when weighed with that opposed to it, has more convincing force, and from which it results that greater probability is in favor of party on whom burden rests. It then gave more elaborate instructions on same doctrine in connection with issues of contributory negligence. Under circumstances, instruction was not erroneous as not adequately informing jury that burden of proving case by preponderance of evidence was on plaintiffs.

Appeal from Superior Court, City and Coun- of San Francisco; Franklin A. Griffin, Judge.

Action by John F. Edgar and wife against Frank Citraro and another. From a judgment in favor of plaintiffs, named defendant appeals.

Affirmed.

See, also, 283 P. 123, 124, 125, and 297 P. 653.

Cooley, Crowley & Gallagher, of San Francisco, for appellant.

Vincent W. Hallinan, of San Francisco, for respondents.

PER CURIAM.

Plaintiffs, as the parents of Florence Edgar, a minor, brought this action to recover the damages they claimed to have sustained by reason of the injuries their daughter received in a collision between two automobiles driven respectively by the defendants Citraro and Pratt, which occurred at Fifth and Julian streets in San Jose. The action was consolidated for trial with one brought by John Edgar, a minor, against the same parties and arising out of the same collision, and upon trial before a jury the plaintiffs herein were awarded a verdict against both defendants. The result of the case brought by John Edgar, a minor, does not appear from the record. From the judgment entered in favor of these plaintiffs, the defendants have taken separate appeals.

[1-3] At the time of the collision Florence Edgar was one of several occupants of the Citraro machine. The others were her mother, Mrs. Rose Edgar, her aunt, Mrs. Frances P. Traylen, and her brother John, all of whom, including Florence, brought actions for damages. The actions instituted by Florence Edgar and Mrs. Traylen were tried separately and resulted in verdicts in their favor and against both defendants; and separate appeals were taken from the judgments entered therein, which we have this day affirmed. Florence Edgar, a Minor, etc., v. Citraro et al., Nos. 6865 and 6867, 297 P. 645, 651, and Frances P. Traylen v. Citraro et al., Nos. 6866 and 6868, 297 P. 649, 652. The evidence in the present case is substantially the same as that adduced in the Florence Edgar Case, and all of the essential facts as to the manner in which the accident happened are set forth in the opinion filed therein. As there stated, the Citraro car, which was traveling westerly along Julian street, entered the intersection first, and had nearly reached the other side when the Pratt car, which was traveling southerly along Fifth street, entered the intersection and struck the right rear end of the Citraro car, which overturned twice. Both cars were traveling across the intersection at a speed exceeding 15 miles an hour, which was in violation of subdivision (b) 2 of section 113 of the California Vehicle Act of 1923 (St. 1923, p. 553), which was in force at the time of the accident. Consequently, both were guilty of negligence as a matter of law, and the court so instructed the jury; the instruction being as follows: "I instruct you that under the evidence in these cases the defendants are, and each of them is, as a matter of law, guilty of negligence, and the question which you are to determine in each case before liability can attach to the defendants, and before any question of damage should be considered, is the question of contributory negligence. If Florence Edgar was guilty of contributory negligence, her parents, John F. Edgar and Rose Edgar, cannot recover any damages in the action No. 175,550, in which they are plaintiffs." As will be observed, the instruction omits reference to the element of proximate cause, and no other instruction was given upon that subject, although both parties requested that such instructions be given. It is contended, therefore, by both defendants that the failure to give such instructions constituted prejudicial error.

As pointed out in the opinion in the Frances P. Traylen Case, supra, it is well settled that the question of proximate cause, like the questions of negligence and contributory negligence, becomes one of law where the facts are uncontroverted and only one deduction or inference is deducible therefrom. 20 R. C. L. p. 148; 45 Cor. Jur. pp. 1320, 1322. And in the present case the evidence shows beyond all reasonable inference to the contrary that the collision resulted from the concurrent negligence of the defendants, and that the negligence of each proximately contributed thereto. In this regard Pratt admits that, when he was still 30 feet north of the intersection line, traveling at a speed of 25 or 30 miles an hour, he saw the Citraro car enter the intersection, and that, by applying the brakes with full force at that time, he could have stopped his car within a distance of 35 feet, but that he made no effort to so apply his brakes until he reached the intersecting line of Julian street. He was then only 20 feet distant from the pathway of the on-coming Citraro car, too close to avert a collision therewith. On the other hand, Citraro admits that, when he entered the intersection, he looked up Fifth street and saw the approach of the Pratt car, traveling, as he claims, at a speed of 45 miles an hour; nevertheless he admits that he neither applied the brakes nor diverted his course, but "kept going right across Fifth street, picking up speed a little," as he says, until he was struck by the Pratt machine. Under such circumstances, the trial court was justified in concluding as a matter of law that the negligence of each defendant contributed proximately to the happening of the accident, for manifestly, if either had been traveling across the intersection within the statutory speed limit, or had slackened his speed or diverted his course, after seeing the approach of the other, their respective machines would not have reached the same point at the same time, and there would have been no collision.

A similar situation was presented in the cases of Cook v. Miller, 175 Cal. 497, 166 P. 316, 317, and Berges v. Guthrie, 51 Cal. App. 547, 197 P. 356, 357, and in the former case the court said: "If he had not passed to the right of the wagon he would not have struck the automobile. So, also, if the defendant had turned the corner by going to the right of the intersection, his automobile would not have been struck by the motorcycle. The disobedience of the ordinance by both of them brought on this accident. It was the result of their concurrent negligence, the negligence of each was a proximate cause, and each contributed to the injury." In the latter case, the driver of one of the two cars involved in the collision sued the driver of the other for damages, and on appeal the judgment he obtained was reversed upon the ground that the evidence showed that the negligence of both drivers contributed proximately to the happening of the accident. In this regard the court said: "* * * If the defendant had not recklessly emerged from behind the street car without waiting to see whether an automobile was approaching from his right, which would have the right of way, he would not have struck the plaintiff. On the other hand, if the plaintiff had slackened his speed upon approaching the crossing, where his view of the road traffic was obstructed by the street car and automobile following it, defendant would have cleared the street before plaintiff reached the point of collision, or plaintiff would have had time and space to turn safely to his right into Twenty-Third street, and thus have avoided the accident when he saw the danger impending. It appears, therefore, that the situation here is closely analogous to the facts in the case of Cook v. Miller, supra, and that the disobedience of the ordinance by both plaintiff and defendant brought about the accident; the negligence of each being a proximate cause. Under such circumstances the plaintiff should not recover."

We are of the opinion, therefore, that, under the uncontroverted facts of the present case, the court was warranted in holding as a matter of law that the negligence of each defendant contributed proximately to the collision, and that therefore neither defendant is in a position to complain of the refusal of the trial court to instruct the jury upon that element.

[4] The court gave the following general instruction upon the doctrine of preponderance of evidence and burden of proof: "In civil cases a preponderance of evidence is required, and by a 'preponderance of evidence' is meant such evidence as, when weighed with that opposed to it, has more convincing force, and from which it results that the greater probability is in favor of the party upon whom the burden rests." It then gave more elaborate instructions upon the same doctrine in connection with the issues of contributory negligence. The defendant Pratt claims that the instruction above quoted was erroneous, in that it did not adequately inform the jury that the burden of proving plaintiffs' case by a preponderance of evidence was upon the plaintiffs. We think that under the circumstances, the instruction was adequate, because, as already shown, under the evidence, the main issues of negligence and proximate cause became questions of law.

Nor are we able to sustain defendant Pratt's complaint regarding instruction IX as given by the court, for the reason that any omission in said instruction was covered by instruction XII relating to the same subject. (See transcript No. 6905.) The remaining points urged by both defendants are discussed and determined in the Florence Edgar and Frances P. Traylen Cases, supra.

In conclusion, it may be stated that, although the evidence was substantially the same in all three of the jury cases the trial court appears to have instructed differently in each case in this regard: In the first case, brought by Florence Edgar, the jury was instructed that Pratt was guilty of negligence as a matter of law, and the question of Citraro's negligence was left for the jury to determine. It also gave instructions upon the doctrine of proximate cause. In the second case, brought by Frances P. Traylen, it instructed the jury that both defendants were guilty of negligence as a matter of law, and it also gave certain instructions upon the doctrine of proximate cause. And in the present case it likewise instructed that both defendants were guilty of negligence as a matter of law, but it refused to give any instructions upon the doctrine of proximate cause. Notwithstanding this unusual condition, a reversal is not warranted in any of the cases, in our opinion, for the reason that the evidence in the first two cases would have been legally sufficient also to justify the trial court in holding, as it did in the present case, that both defendants were guilty of negligence as a matter of law, and that the negligence of each contributed proximately to the happening of the accident.

The judgment is affirmed.

212 Cal. 84

WATWOOD v. FOSDICK.

L. A. 10859.

Supreme Court of California.
March 28, 1931.

1. Landlord and tenant 🔑162.

In absence of statute, it is landlord's duty to keep in repair stairways or other parts of building used in common by tenants.

2. Landlord and tenant 🔑162.

In absence of statute, landlord need not remove structural defects in parts of building used by tenants in common, where defects are visible and known to tenants.

> This is true because tenant takes premises as they are at time of commencement of tenancy.

3. Landlord and tenant 🔑162.

Statutes require new stairways in new tenement houses to have handrails, but in old buildings only new stairways need have handrails, though building is remodeled (St. 1917, pp. 1475, 1497, 1498, §§ 5, 45, 49).

> St. 1917, p. 1475, § 5, provides that building not erected for, or not used as, tenement house at passage of act, if thereafter converted to such use, shall become subject to all provisions of act affecting tenement houses thereafter erected. Section 45 provides that every tenement house thereafter erected shall have not less than two stairways, and section 49 provides that every stairway thereafter constructed should have at least one handrail, and, if over five feet in width, shall have handrail on each side.

In Bank.

Appeal from Superior Court, San Diego County; Charles C. Haines, Judge.

Action by Florence Watwood against E. D. Fosdick. Judgment for plaintiff, and defendant appeals.

Reversed.

Superseding opinion of the District Court of Appeal reported in 290 P. 505.

Wright & McKee and C. M. Monroe, all of San Diego, for appellant.

W. K. Brown and O. C. Ludwig, both of San Diego, for respondent.

LANGDON, J.

This is an action for damages for personal injuries. Defendant was the owner of a two-story building containing four flats, two on the first floor and two on the second. There was a single entrance for all tenants and an inside stairway used in common by all tenants. Plaintiff rented a lower floor flat on February 20, 1926. On April 27, 1926, she visited an acquaintance on the upper floor, and in returning slipped on the stairs and fell to the bottom, sustaining various injuries.

The evidence tended to show that she had caught her foot in the worn rubber covering of one of the steps and had stumbled. There was no handrail on the stairway, and plaintiff had been aware of this fact from the beginning of her tenancy. The trial court nevertheless found that the accident would not have happened had there been a handrail, and concluded that the failure to install such a protection constituted negligence which proximately caused the injury. Judgment was therefore rendered for plaintiff, from which judgment the defendant landlord appealed.

[1, 2] It is clear that, in the absence of some special statute, the landlord cannot be held liable under the above facts. It is his duty to keep stairways or other parts of the building used in common by tenants in repair, but he is under no duty to remove structural defects which are visible and known to the tenant. The latter takes the premises as they are at the time of the commencement of the tenancy. Miller v. Hooper, 119 Me. 527, 112 A. 256; Dwyer v. Woollard, 205 App. Div. 546, 199 N. Y. S. 840; 16 R. C. L. 1040; 36 C. J. 215, § 893. The case of Hassell v. Denning, 84 Cal. App. 479, 258 P. 426, relied upon by plaintiff, is not in conflict with these conclusions, for in that case there was a railing which had been permitted by the landlord to fall into disrepair, and its dangerous condition was unknown to the tenant.

[3] At the time of the accident, there were in existence a city ordinance and a state statute requiring buildings of this type to provide handrails for stairways. Both the ordinance and the statute were passed subsequent to the erection of this building, and in both it is expressly provided that they shall not be retroactive. However, the building was reconstructed by defendant upon his purchase of it in 1920, after the passage of the state statute; and by said reconstruction it was changed from a duplex dwelling to a house containing four flats or tenements. The statute (Stats. 1917, c. 738) provides in section 5 thereof: "A building not erected for, or which is not used as a tenement house at the time of the passage of this act, if hereafter converted to or altered for such use, shall thereupon become subject to all of the provisions of this act affecting tenement houses hereafter erected." Section 45 provides: "Every tenement house hereafter erected * * * shall have not less than two * * * stairways. * * *" Section 49 provides: "Every stairway hereafter constructed shall be as follows * * * Every stairway shall have at least

one handrail, and if the stairway be five feet or more in width, shall have a handrail on each side thereof."

Whatever be the reason for the difference in these sections, the statute distinguishes between tenement houses hereafter constructed and stairways hereafter constructed. The stairway involved herein was not newly constructed at the time the building was remodeled, but remained in its original state. It was not, therefore, within the terms of section 49. None of the other sections, however, contain any requirement of a handrail. The plain meaning of the statute appears to be that, in new buildings, new stairways shall have handrails; in old buildings, only new stairways need have such handrails, whether or not the building is remodeled. In other words, in reconstructing the building, the owner came within other provisions of the act, but was not required to place handrails on a stairway already constructed.

In view of the above provisions of the statute, defendant was not guilty of a violation thereof, and no question of negligence per se arises. Hence it is unnecessary to consider the highly doubtful proposition that the absence of the handrail was the proximate cause of the injury. It appears that the trial court has placed a liability upon the landlord beyond that established by our statutes and decisions. It follows that the judgment must be, and is hereby, reversed.

We concur: WASTE, C. J.; RICHARDS, J; SHENK, J.; CURTIS, J.; SEAWELL, J.; PRESTON, J.

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212 Cal. 33

In re RAUSCHENPLAT'S ESTATE.

GREVE et al. v. STAIRS et al.

L. A. 11938.

Supreme Court of California.
March 25, 1931.

1. Wills ⚷531(2).

Devise to testator's sister and other named person and "all * * * living children of my deceased half-brother," share and share alike, should be distributed per capita.

2. Wills ⚷488.

Where clause in will is unambiguous, it was error to admit evidence of deceased's declarations respecting intention (Civ. Code, §§ 1318, 1340).

In Bank.

Appeal from Superior Court, San Luis Obispo County; T. A. Norton, Judge.

In the matter of the estate of Frederick Rauschenplat, deceased. From a portion of a decree of final distribution, Adolph Wilhelm Louis Greve and others appeal, opposed by James W. Stairs, as executor of the last will and testament of Frederick Rauschenplat, deceased, and others.

Reversed, with directions.

Superseding opinion in 291 P. 432.

John Carfraie Birnie, of San Francisco, for appellants.

H. J. Dubin, of San Luis Obispo, for respondents.

WASTE, C. J.

This is an appeal by the three children of Mathias Grayfe (Greve) from that portion of the decree of final distribution construing the following provision appearing in the will of Frederick Rauschenplat, deceased: "Secondly, I give, devise and bequeath all of my estate, real and personal, and wherever situate, to Wilhelmina Battie, my sister, of Hamburg, Germany; to all of the living children of my deceased half-brother, Mathias Grayfe, late of Hamburg, Germany, and to Paulina Stairs, daughter of James W. Stairs, of San Luis Obispo, California, share and share alike."

[1] The appellants maintain that it was the intention of the testator, looking at the will from all four corners, that the estate should be distributed per capita as to the persons therein named, and also per capita as to each child living of the deceased half-brother, Mathias Grayfe. Under appellants' contention, they will each receive one-fifth of the estate; whereas, under the decree of distribution, they receive but one-ninth of the decedent's property.

Appellants' interpretation of the distributive clause of the will appears to be the correct one. In Estate of Morrison, 138 Cal. 401, 71 P. 453, the residue of the estate was "to be divided between my sister Mrs. Wann and her daughters and my brother Edward Stettinius." Unlike the present case, the Morrison will contained no express provision that such residuary beneficiaries should take the estate "share and share alike." By other provisions of the will, the "daughters" were mentioned by name, and each of them left a specific legacy. It was concluded in that case that it was the intention of the testator to divide the residuum of the estate equally among the four persons per capita, and that no class composed either of the mother and daughters, or of the two daughters, was contemplated. Regarding the construction which should be placed upon the words "share and share alike," the court said: "It is further argued by appellant that the omission to add to the residuary clause of the codicil the words 'share and share alike' shows, or tends to show, that the construction above given is wrong. It is true that in the original will that expression is used three times, including the residuary clause, and is used once in the codicil. It is quite true that the words 'share and share alike' *would have prevented discussion as to the intention of the testatrix;* but if the language used means the same thing, and especially when such meaning is clearly consistent with all its other provisions, their absence cannot justify a different construction." (Italics added.)

A will providing that the estate be divided "Among my Brothers & Sisters children, and David R. Neil and Andrew Neil, also Lulu Keith equally," was held to be a devise to the three persons last named equally with each of the nieces and nephews per capita. Neil v. Stuart, 102 Kan. 242, 169 P. 1138.

In Hill v. Bowers, 120 Mass. 135, the testator left the residue of his estate "to the children of my brother J, * * * and to the children of my said nephew A. * * *" At the time of the testator's death there were living eight children of "J." and two of "A." It was held that each of all such children took per capita and not per stirpes.

In Lee v. Lee, 39 Barb. (N. Y.) 172, the gift of the residue was to a brother, the children of a deceased sister, and the daughter of another brother, "in equal proportions, share and share alike." It was held that each of the nieces and nephews took an equal share with the brother named as a beneficiary.

While the decisions are by no means harmonious, a fair statement of the rule appears in 2 Jarman on Wills (6th Ed.) 205, where it is said: "Where a gift is to the children of several persons, whether it be to the children of A and B or to the children of A and the children of B, they take per capita and not per stirpes. The same rule applies where a devise or bequest is made to *a person and the children of another person;* or to a person described as standing in a certain relation to the testator and the children of another person standing in the same relation. * * *" (Italics ours.)

Although the names of the children of the deceased half-brother of the testator do not appear in the will, if the thought in the mind of the testator was that a certain portion of his estate should be inherited only by immediate, living representatives of his deceased half-brother, the impossibility of designating such persons by name is clearly manifest. The words of the testator that those persons designated in the will were to take his property "share and share alike" are convincing as to his intention that the children of the half-brother, along with the others, were to take per capita and not per stirpes. This conclusion finds support in the following clause of the will wherein it is stated that, "should any of the beneficiaries named herein contest this my will the share so bequeathed to him or her hereby shall go to the other beneficiaries *in equal shares.*" (Italics added.)

[2] The clause in the will here under consideration is not ambiguous, and it was error for the court below to admit evidence of alleged declarations of the deceased as to how he intended disposing of his property. Neil v. Stuart, supra, 102 Kan. 242, 169 P. page 1139. Sections 1318 and 1340 of the Civil Code appear to be pertinent to this inquiry.

That portion of the decree of distribution appealed from is reversed, with directions to the court below to enter its decree in accordance with the views herein expressed.

We concur: RICHARDS, J.; LANGDON, J.; PRESTON, J.; SHENK, J.; SEAWELL, J.; CURTIS, J.

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212 Cal. 81

DREWS v. GIRSH et al.

Sac. 4364.

Supreme Court of California.

March 27, 1931.

Mortgages ⚷114.

Purchaser's liability on trust deed note for money advanced by vendor *held* not limited to sums paid before purchaser executed quitclaim deed to vendor.

The quitclaim deed, in consideration of which vendor gave up right of action for unpaid balance of purchase price, provided that he waived no rights under agreement, pursuant to which note was executed, and that quitclaim deed had no bearing on such transaction.

In Bank.

Appeal from Superior Court, San Joaquin County; George F. Buck, Judge.

Action by A. A. Drews against J. Girsh and another. Judgment for defendants, and plaintiff appeals.

Affirmed.

A. P. Hayne, of Stockton, for appellant.

Herbert C. Coblentz and McNoble, Parkinson & Coblentz, all of Stockton, for respondents.

LANGDON, J.

This is an action brought by plaintiff to have determined the amount due under a note

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

secured by a deed of trust on certain real property.

The essential facts, as we view them, are as follows: Plaintiff Drews was the owner of a ranch. He entered into an agreement to purchase from defendant Girsh another ranch, the price payable in installments. Under that contract plaintiff and his wife went into possession of the property. In order to improve it, he desired to purchase two pumps. He was at this time in default on installments under the contract and was also unable to meet other obligations. In this extremity he approached defendant Girsh and the latter agreed to stand the cost of the pumps and other necessities, provided that security was given. Security was offered in the shape of a promissory note for $1,000, secured by a deed of trust on the ranch owned by plaintiff Drews. Thereafter plaintiff changed his mind and decided to take one large pump instead of the two previously chosen; and defendant Girsh made a down payment of $125 on it. Subsequently defendant Girsh made a payment constituting the balance of $600. He also paid various sums for title insurance, taxes, hay insurance, equipment, etc. The situation, then, is as follows: Plaintiff, the purchaser under an executory contract for the sale of real property, induced his vendor to pay a number of his bills for expenses and improvements, and in return gave him a note for $1,000, secured by a deed of trust on other property. There would seem to be no doubt that the holder of the note, having given consideration, is entitled to enforce it according to its tenor.

Plaintiff contends, however, that defendant is entitled to recover only the sum of $100; and in support of this contention points to another transaction between the parties. It appears that plaintiff defaulted on his contract of purchase, and that on June 11, 1928, he gave up his interest therein by making a quitclaim deed to defendant Girsh. Plaintiff claims that any sums paid by defendant Girsh after the execution of the quitclaim deed were wholly voluntary on his part, and resulted in improvement of his own property; that therefore they cannot be included in determining the consideration supporting the note. This argument is completely answered by the following provision in the deed: "First party also quitclaims to second party the personal property described in said agreement. By accepting this deed second party waives all claims for damages against first party, or his wife, arising by reason of their occupancy or use of any of the property herein described, or in any way connected with the transaction described in said recorded agreement herein referred to. First party does not, by this deed, consent to any of the charges made in that certain memorandum delivered to first party by second party on June 8, 1928, or to the application of any part of a certain sum of one thousand dollars raised by second party on the security of certain land of first party, to any of said charges, nor does second party waive any rights thereunder, *this instrument not having any bearing upon said other transaction whatever.*" (Italics ours.)

The plain purport of this provision, considered in the light of the circumstances, is this: Defendant Girsh had a right of action against plaintiff for the balance of the purchase price due under the contract, and gave up that right upon a return of the property by quitclaim deed. But having already paid certain sums on behalf of plaintiff, and believing himself obligated to make other payments, as, e. g., the balance of $600 due on the pump contract, defendant Girsh determined to hold plaintiff liable on his promissory note. Hence the deed was made to state expressly that this liability is unaffected by it.

Without going into a discussion of propositions of law presented in appellant's brief which have no application to the facts of this case, we conclude that there is nothing in the record to show that the liability assumed by plaintiff on his promissory note is not valid and subsisting.

The judgment is affirmed.

We concur: WASTE, C. J.; SHENK, J.; RICHARDS, J.; SEAWELL, J.; PRESTON, J.; CURTIS, J.

212 Cal. 36

ROGERS v. INTERSTATE TRANSIT CO.

Sac. 4215.

Supreme Court of California.

March 25, 1931.

Rehearing Denied April 23, 1931.

1. Evidence ⚷89.

Presumption in favor of party is dispelled by testimony of party himself or of his witnesses.

2. Appeal and error ⚷1170(9).

In automobile collision case, in which plaintiff and his witnesses testified regarding circumstances of collision, giving of instruction that law presumed plaintiff took ordinary care of his own concerns *held* harmless error (Const. art. 6, § 4½).

Plaintiff and his witnesses testified in detail regarding plaintiff's acts and conduct just prior to and at time of collision, and defendant's witnesses gave their

> version of collision, and testified regarding acts and conduct of plaintiff in connection therewith, and in other instructions jury's attention was expressly directed to evidence in case, and they were instructed that they could not find verdict in plaintiff's favor unless they found from evidence that plaintiff was in no wise guilty of negligence proximately contributing to accident.

3. Automobiles 🔑244(12, 44).

Evidence that bus occupied center of road, and when plaintiff's car succeeded in passing bus accelerated its speed and struck plaintiff's car from behind, *held* to sustain verdict for plaintiff on issues of negligence and contributory negligence (St. 1923, p. 558, § 126).

4. Damages 🔑132(9).

$20,000 damages for automobile collision injuries, plaintiff's left foot being amputated, *held* not excessive.

5. Negligence 🔑83.

"Last clear chance doctrine" applies when one is in imminent peril, but in exercise of ordinary care is ignorant of danger, or, knowing of danger, is unable to extricate himself, and, on contrary, accused is aware of danger and by ordinary care may avoid injuring him, but fails to do so.

> [Ed. Note.—For other definitions of "Last Clear Chance," see Words and Phrases.]

6. Automobiles 🔑246(58).

Instruction on last clear chance *held* applicable to evidence that bus after being passed by automobile accelerated speed and struck automobile.

7. Automobiles 🔑246(38).

Last clear chance instruction *held* to include element that bus driver could have avoided accident.

> The instruction was to the effect that, although the contributory negligence of motorist was one of proximate causes of his injuries, yet, if driver of bus perceived that motorist, by his own negligence, had placed himself in position of peril from which he probably could not escape, and, if perceiving motorist's perilous condition, bus driver failed to exercise ordinary care to avoid injuring motorist, and such negligence was proximate cause of motorist's injuries, he could recover.

8. Appeal and error 🔑1064(1).

In action for automobile collision injuries, instruction on last clear chance *held* not prejudicial.

9. Trial 🔑256(10).

Party complaining of instruction on last clear chance must present more accurate instruction if better definition is desired.

In Bank.

Appeal from Superior Court, Shasta County; Walter E. Herzinger, Judge.

Action by Norman Rogers against the Interstate Transit Company. Judgment for plaintiff, and defendant appeals.

Affirmed.

Superseding opinions of District Court of Appeal in 284 P. 499, 285 P. 731, and (Sup.) 290 P. 571.

Carter & Smith and Jesse W. Carter, both of Redding, Annette Abbott Adams, of San Francisco, and George Allan Smith, of Monterey, for appellant.

Carr & Kennedy, of Redding, for respondent.

Devlin & Devlin & Diepenbrock, of San Francisco, amici curiæ.

PER CURIAM.

The appeal in this cause first came on for hearing before the District Court of Appeal of the Third District. That court affirmed the judgment of the trial court, and a petition for a transfer was thereafter filed and granted by this court. In an opinion later filed by us, we adopted in the main the opinion of the District Court of Appeal, and accordingly affirmed the judgment of the trial court. Thereafter a petition for a rehearing was filed, which was granted mainly for the reason that we desired to give further consideration to the claim that the trial court erred to the prejudice of the defendant in giving plaintiff's instruction No. 23, which reads as follows: "The burden is upon the defendant to prove the negligence of plaintiff by a preponderance of the evidence, and in considering the evidence upon this point you will keep in mind that the law presumes that plaintiff, at the time in question here, took ordinary care of his own concerns."

[1, 2] The particular portion of the instruction to which the appellant objects is that in which the court instructed the jury that "the law presumes that the plaintiff, at the time in question here, took ordinary care of his own concerns."

At the trial of this action, plaintiff not only testified as to the circumstances of the collision between the car he was driving and the auto stage of the defendant, but he produced witnesses who gave evidence, both direct and on cross-examination, of his acts and conduct just before and at the time of the collision. Whether the plaintiff took ordinary care of his own concerns while operating his car at that particular occasion was a matter of evidence established by the plaintiff and witnesses called by him in support of his claim that he did. In the face of this evidence, there was no room for any presumption. If the evidence on his part showed that he was negligent, then it cannot be said that the jury, notwithstanding this evidence, might presume that he was not negligent, or that he took ordinary care of his own concerns, which amounts to the same thing. On the other hand, if this evidence showed that plaintiff was not negligent in the operation of his car at the time of its collision with defendant's stage, then that fact was before the jury, not as the result of any presumption, but in response to testimony of witnesses testifying in the case. In either event, the jury, in determining whether the plaintiff was guilty of negligence, would look to, and be governed by, the evidence before the court, and not by any presumption. Whatever the rule may be when the evidence contrary to the presumption is produced by the adverse party, it is well established in this state that a presumption in favor of a party is entirely dispelled by the testimony of the party himself or of his witnesses. Mar Shee v. Maryland Assurance Corporation, 190 Cal. 1, 9, 210 P. 269. In such a case it was error, we think, for the court to instruct the jury as to the presumption that the plaintiff took ordinary care of his own concerns.

We question, however, whether this error was of so serious a nature as to justify a reversal of the judgment of the trial court. As already stated, the plaintiff and other witnesses produced by him, including the occupants of his car, testified in detail as to plaintiff's acts and conduct just prior to, and at the time of, the collision. Witnesses produced by the defendant gave their version of the collision, in which they testified as to the acts and conduct of the plaintiff in connection therewith. In the face of this direct and positive evidence, it is hardly conceivable that the jury would have placed any great reliance, if any at all, on any presumption as to plaintiff's conduct, even though they were told by the court that they might do so. In other instructions, and particularly in defendant's instructions No. 20 and No. 27, the attention of the jury was expressly directed to the evidence in this case, and they were instructed that they could not find a verdict in plaintiff's favor, unless they found from said evidence that plaintiff was in nowise guilty of negligence which proximately contributed to said accident. Taking the instructions as a whole, we are satisfied that the jury could not have been misled by the one complained of and which contained the reference to the presumption that the plaintiff took ordinary care of his own concerns.

By section 4½ of article 6 of the Constitution, courts are restrained from reversing judgments on the ground of misdirection of the jury, unless after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice. The evidence in the case, both that on behalf of the plaintiff and that produced by the defendant, is quite full and complete upon all of the issues presented by the pleadings. While it might have sustained a verdict in favor of either party, that in behalf of the plaintiff was sufficient beyond any question to support the verdict rendered. We seriously question whether any different result would be attained by a retrial of the case under instructions with plaintiff's instruction No. 23 eliminated therefrom. There was, therefore, no miscarriage of justice, and for that reason the judgment should not be reversed.

With the exception of what was said regarding the plaintiff's instruction No. 23 in the opinion previously rendered by us, we are satisfied that it correctly determines all issues presented on this appeal. We have therefore eliminated therefrom all discussion therein in reference to said instruction No. 23, and, as thus modified, we have adopted the same as the opinion of this court. It is as follows:

"This is an appeal from a judgment for damages for injuries sustained in an automobile collision.

"At 1 o'clock p. m. on March 11, 1927, the defendant's auto stage was being driven southerly along a straight stretch of level highway in Shasta county between Anderson and Cottonwood. It was occupying more than half of the concrete portion of the roadway, and was traveling about 35 miles an hour. The plaintiff, who was an able-bodied man 30 years of age, and who had been employed by Mr. A. J. Loggie for 8 years as his auto mechanic and chauffeur, was driving his employer's Packard limousine in the same direction. The owner of the Packard with a companion occupied the rear seat.

"The concrete pavement was 15 feet wide with a 5-foot graveled shoulder sloping down to a shallow ditch on either side. At a point about 1 mile from Cottonwood the Packard car overtook the stage, and undertook to pass it on the proper side. The highway was unobstructed. No other machines were in sight. Several times the horn of the Packard was blown, and the plaintiff attempted to pass the stage, which failed to yield any portion of its position on the highway. Finally the plaintiff drove to the extreme left side of the roadway with about half of the machine traveling upon the graveled shoulder, and repeatedly sounded the horn as a warning in passing the stage. As the Packard reached a point opposite the front of the stage, the latter appeared to increase its speed. The Packard, however, succeeded in passing the stage, and for a considerable distance continued to keep its position on the extreme left side of the roadway. The defendant testified in this regard: 'I never attempted to turn in (front of the stage) at all. I kept going at the same rate of speed I was going while I was passing it.' On redirect examination he said: 'I turned slightly on the pavement, following the left side, driving straight ahead.' The machines were running about 35 miles an hour. There is a serious conflict of evidence as to just how the accident occurred. The appellant contends that the plaintiff cut in front of the stage, hooking his rear right fender over the left end of the stage bumper, and thus diverted the course of the Packard from the highway into the ditch upon the right. There is, however, ample testimony to support the plaintiff's theory that, after he had passed the stage and was proceeding along his proper side of the highway, the stage increased its speed and struck the Packard. The left angle of the stage bumper hit the rear right fender of the Packard, back of the wheel. The impact crumpled the mud guard and shoved the rear end of the car violently to the left. The plaintiff lost control of the machine, and it pitched diagonally across the highway in front of the stage into a telephone pole on the right side of the highway, cutting down the pole, upsetting and wrecking the Packard, and hurling the plaintiff from the car to the ground. The plaintiff's left foot, which was caught between the clutch pedal and the brake lever, was nearly torn off. He was taken to the hospital at Cottonwood, where his foot was amputated above the ankle. He is now forced to wear a cork foot and limb, to his great inconvenience, discomfort, and humiliation. The jury rendered a verdict in his favor for the sum of $20,000. A judgment was duly entered for this amount, from which an appeal was perfected.

"The appellant asserts that: (1) The judgment is not supported by the evidence; (2) the plaintiff was guilty of contributory negligence; (3) the court erred in giving and refusing certain instructions; and (4) the amount of the judgment was excessive.

"There is substantial evidence to support the judgment. Three witnesses testified to substantially the foregoing statement of facts.

"The appellant contends that the plaintiff was guilty of contributory negligence in attempting to cut in ahead of the stage, and that in so doing the right rear fender of the Packard hooked over the left end of the front bumper of the stage, and caused the Packard to be shunted to the right diagonally across the highway in front of the stage. The implied finding of the jury that this was not true finds ample support in the evidence. A physical inspection of the fender in question discloses no evidence that the bumper was hooked in behind it, or that the fender was drawn out by such a forcible pull as would have resulted under such circumstances. On the contrary, it appears reasonable to conclude that the fender may have been indented by a severe blow from the bumper of the stage. This accords with other corroborating testimony. It is possible the indentation in the Packard fender may have been caused by its cutting in and striking the stage bumper. Either theory of the cause of the accident is reasonably possible. We are therefore bound by the findings of the jury in this regard.

"The portion of the highway upon which the stage was traveling at the time of the accident is material in determining the question of defendant's negligence. Mr. Purdy testified in this regard: 'The stage was right over, I would say, in the middle of the highway.' On cross-examination he said: 'I would say that there was probably five feet between the stage and gravel (on the left side). * * * I looked out and saw that we cleared the stage and were by the stage, and all at once this (stage) hit us.' Mr. Loggie testified regarding the same subject: 'I would say that (the stage) had at least two-thirds of the pavement.' The portion of the highway upon which the Packard traveled after it succeeded in passing the stage is also important in determining whether the plaintiff was guilty of contributory negligence. Reading the record as a whole, it seems improbable that the Packard passed to the right of the central line of the highway prior to the occurrence of the collision. At least there is ample testimony to support the theory that it did not do so, and upon the contrary that the stage continued to travel with a portion of the vehicle upon the wrong side of the highway. Regarding the relative positions in which these two machines traveled upon the highway and the circumstances incident to the accident, Mr. Loggie testified:" Here follows a recital of testimony, unnecessary to be repeated, in support of the conclusion contained in the next paragraph, as follows:

[3] "The foregoing testimony sustains the implied finding of the jury that the stage driver was guilty of negligence in violating the provisions of section 126 of the California Vehicle Act (St. 1923, p. 558), which proximately caused the accident. It is apparent that, if the stage was traveling with a portion of the vehicle on the left side of the concrete without changing its course after the Packard succeeded in passing it, and that its speed was then accelerated so that it overtook the Packard traveling on its proper side of the highway, and struck the fender with such force as to divert the course of the Packard, hurl it into the ditch, and cause the injuries sustained by the plaintiff, this conduct on the part of the stage driver would amount to ac-

tionable negligence and render the defendant liable for damages which resulted therefrom. The evidence will sustain this theory of the accident.

"For the foregoing reasons, the evidence will also support the implied finding that the plaintiff was not guilty of contributory negligence.

[4] "Considering the pain, the discomfort, inconvenience, and humiliation on account of the loss of plaintiff's foot and the consequent necessity of going through life with an artificial limb, we are of the opinion that the amount of the judgment was not excessive. * * *

"The only instruction offered on the doctrine of the last clear chance to avoid an accident is assailed as inapplicable to the facts of this case and as erroneous, for the reason that two necessary elements are omitted from the hypothesis of the charge, to wit, that the plaintiff was unable to extricate himself from the peril, and, upon the contrary, that the defendant was aware of plaintiff's danger; that he was able to prevent the accident, and failed to do so. This instruction reads:

"'As the court has already stated, the claim is made by defendant that plaintiff was guilty of contributory negligence. The court instructs you that although it appears to you that the contributory negligence of plaintiff was one of the proximate causes of his injuries, yet if the defendant's agent having charge of the stage, perceived that the plaintiff, by his own negligence, had placed himself in a position of peril from which he probably could not escape, and if perceiving plaintiff's perilous condition (he) failed to exercise ordinary care and prudence to avoid injuring the plaintiff and such neglect was also a proximate cause of plaintiff's injuries, he is entitled to recover.'

[5] "The doctrine of the last clear chance applies when one is in imminent peril, but in the exercise of ordinary care is ignorant of the danger (Hoy v. Tornich, 199 Cal. 545, 553, 250 P. 565), or, knowing of the danger, is unable to extricate himself, and, upon the contrary, the accused is aware of the danger to the complainant and by the use of ordinary care may avoid injuring him, but fails to do so (Basham v. Southern Pacific Co., 176 Cal. 320, 168 P. 359; Chappell v. San Diego Ry Co., 201 Cal. 560, 258 P. 73)."

[6-9] On the plaintiff's theory of the case, based on sufficient evidence in support thereof, the doctrine of the last clear chance was applicable to the facts. But it is contended that the foregoing instruction was lacking in two elements necessary to the application of the doctrine, viz., that "the driver of the bus could, by the exercise of ordinary care, have avoided the accident after he observed plaintiff in a position of peril, and that plaintiff himself exercised ordinary care for his own safety after he found himself in a position of peril." The first element was in substance included in the instruction. The second element might well have been included, but the instruction as a whole was more elaborate and complete than the statement of the doctrine involved in Townsend v. Butterfield, 168 Cal. 564, 143 P. 760, which was held not to be prejudicial, especially since it was the duty of the defendant to prepare and present a fuller and more accurate instruction on the subject if it desired a better definition of the rule. See, also, Galwey v. Pacific Auto Stages, 96 Cal. App. 169, 273 P. 866; 14 R. C. L. § 56, p. 797.

Other instructions are complained of. The charge to the jury was full and fair, and we find no prejudicial error therein; nor does it appear that the plaintiff in his argument to the jury overstepped the bounds of propriety to such an extent as to constitute prejudicial misconduct, particularly in view of the admonition of the court with reference thereto.

The judgment is affirmed.

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212 Cal. 130

UNRUH v. NELSON et al.

NELSON v. UNRUH et ux.

L. A. 10092, 10093.

Supreme Court of California.

March 31, 1931.

1. **Appeal and error** ⚿1060(2).
Depositions ⚿99, 101.

Refusal to permit plaintiff's counsel to read to defendant as witness admissions in defendant's deposition taken in prior dismissed action, and exclusion of deposition, *held* reversible error (Code Civ. Proc. §§ 2021, subd. 1, 2022).

Admissions in form of questions and answers in defendant's deposition were excluded on objection that deposition was admissible only for impeachment, and that, witness not having yet made affirmative statement, no foundation existed for the effort. This exclusion was error, since deposition was taken under Code Civ. Proc. § 2021, subd. 1, and under section 2022 could be read on trial of subsequent action between same parties on same cause of action.

2. **Depositions** ⚿90, 101.

Presence of defendant whose deposition was taken under statute did not require exclusion of deposition, and it could have been offered by either party (Code Civ. Proc. §§ 2021, subd. 1, 2022).

3. Depositions ⚷99.

Deposition of defendant taken in prior action dismissed before trial *held* admissible as affirmative testimony, not merely for impeachment (Code Civ. Proc. §§ 1850, 1870, subd. 2, 2021, subd. 1, 2022).

4. Witnesses ⚷305(1).

Defendant's deposition being admissible, defendant thereby waived privilege against self-incrimination (Code Civ. Proc. §§ 1850, 1870, subd. 2, 2021, subd. 1, 2022).

In Bank.

Appeals from Superior Court, Los Angeles County; Reuben S. Schmidt, Judge.

Actions by Albert Unruh against Olof Nelson and by Elisa Nelson against Albert Unruh and wife, in which latter action named defendant filed cross-complaint against plaintiff and another. From adverse judgments in both actions, Albert Unruh appeals.

Reversed.

Perry F. Backus and W. I. Gilbert, both of Los Angeles, for appellant.

Albert A. Kidder, Jr., of Hollywood, and Earl O. Lippold, of Los Angeles, for respondent.

Marcus C. Clark, of Los Angeles, for Emily Unruh.

PRESTON, J.

Two actions for damages. Cause No. 1 is for criminal conversation. Cause No. 2, by reason of the complaint and cross-complaint, contains two reciprocal causes of action for alienation of affections. Action No. 1 was preceded by the same kind of a suit between the same parties upon the same cause of action, dismissed prior to trial and judgment; these two actions followed. In the original action, which was dismissed, the deposition of defendant Olof Nelson was taken under section 2021, subdivision 1, and section 2055, Code of Civil Procedure, and said defendant was therein examined and cross-examined at great length. This deposition should be specially noted as it forms the basis of the discussion to follow of the legal questions here involved.

These suits grow out of the alleged adulterous relations between Olof Nelson and Emily Unruh, wife of plaintiff Albert Unruh. Cause No. 1 is by Albert Unruh against Olof Nelson upon this claim, being a cause of action for criminal conversation. Cause No. 2 was begun as an action by Elisa Nelson against Albert and Emily Unruh, husband and wife, charging them with alienation of the affections of her husband, Olof Nelson, growing out of the same adulterous relationship above mentioned. In this latter action, however, Albert Unruh cross-complained and alleged alienation of the affections of his wife by Nelson and wife and their attorney.

Issues were joined on the two complaints and cross-complaint. The actions were not consolidated, but were tried together, one jury alone being impaneled. In cause No. 1, at the conclusion of plaintiff's evidence, a judgment of nonsuit was promptly given upon the ground of insufficiency of the evidence. The jury were held over; plaintiff Elisa Nelson declined to proceed under the allegations of her complaint, which left only the issues tendered by the cross-complaint of Albert Unruh, who attempted to prove a cause of action, but, at the conclusion of his evidence, he met the identical fate meted out to him in the first cause of action, to wit, nonsuit upon the ground of insufficiency of the evidence. Motions for new trial in both cases were made and denied. Albert Unruh is the sole appellant in both actions. The briefs are meager and unsatisfactory. Appellant gives but little consideration to any of the questions, and many of the more important ones presented by the record are not referred to at all.

We, however, propose to discuss only the legal questions growing out of the deposition taken, as above noted, and to do this without substantial aid from the briefs. At the outset, it may be here noted that in this deposition defendant Olof Nelson admits a brazen meretricious relationship with the wife of appellant, covering a period of some two or three years, with repeated acts of sexual intercourse with her at various places, vacant buildings, a territory known as "no man's land," and even in her own home. The deposition also shows a home, in which were small children, broken up, with the wife leaving the state. In short, it shows a complete case of criminal conversation (Barlow v. Barnes, 172 Cal. 98, 155 P. 457; Bedan v. Turney, 99 Cal. 649, 653, 34 P. 442), and, in connection with the other testimony, shows at least a prima facie case of alienation of affections as charged in the cross-complaint. The appellant went to trial largely in reliance upon defendant's own admissions, but he had also been alert and tapped the wires of his own home. He thereby secured and gave much damaging testimony with reference to repeated conversations between his wife and defendant Nelson of such a nature that they could have sprung only from an illicit relationship. These conversations said defendant also admitted in part, particularly admitting that he took appellant's wife to an out of the way lodging house.

When ready to present further evidence, appellant called said defendant as a witness under section 2055 of the Code of Civil Procedure. The court immediately ruled that leading questions would not be permitted, which of itself put appellant at a great disadvantage in attempting to wring from this defendant admissions in accord with his deposition. He then propounded to said defendant direct questions upon the subject of illicit intercourse with his wife. He was met with objections that answers would tend to incriminate said defendant, thereby invading the territory made inviolate by the Constitution. The court promptly sustained the witness in all these refusals to testify.

[1, 2] Counsel for appellant at this juncture undertook to identify and read to the witness certain admissions in the form of questions and answers thereto found in said deposition. This move was obstructed by the objection that this could be done only as a matter of impeachment, and, the witness not having as yet made an affirmative statement, no foundation existed for the effort. The court sustained this objection also. The deposition itself was then offered in evidence, and the offer was promptly denied by the court.

We need search no further for reversible error. As above noted, this deposition was taken pursuant to subdivision 1 of section 2021 of the Code of Civil Procedure, and under the express provisions of section 2022 of said Code it could be read upon the trial of a subsequent action between the same parties upon the same cause of action. Consolidated Lumber Co. v. Fidelity, etc., Co., 161 Cal. 397, 402, 119 P. 506. It is also elementary that, as said defendant was a party to the action and his deposition was taken under subdivision 1 of said section 2021, his presence would not prevent the introduction of the deposition in evidence, but it could have been offered by either party to the action. Newell v. Desmond, 74 Cal. 46, 15 P. 369; Johnson v. McDuffee, 83 Cal. 30, 23 P. 214; Adams v. Weaver, 117 Cal. 42, 49, 48 P. 972.

[3, 4] This, of course, was not merely a matter of impeachment. It was positive affirmative testimony which should have been admitted as relating to the issues tendered by the pleadings as well as "the act, declaration or omission" of the party (sections 1850 and 1870, subd. 2, Code Civ. Proc.). It follows also as of course that, if the deposition was admissible in evidence, said defendant had thereby waived the privilege the law throws around answers which might tend to incriminate him.

Many other questions could be discussed, but we do not deem it necessary. Throughout the presentation of the case, the court's attitude and rulings were such as to unduly restrict the attorney for appellant in the presentation of his client's cause. We have no reason to believe, however, that liberality will not be shown upon a retrial of the cause; hence we need not specify further particulars in this connection.

The judgment in each of the two above causes is hereby reversed.

We concur: WASTE, C. J.; CURTIS, J.; LANGDON, J.; SHENK, J.; RICHARDS, J.; SEAWELL, J.

212 Cal. 237

PEOPLE v. PANTAGES.

Cr. 3398.

Supreme Court of California.

April 2, 1931.

1. Criminal law 🔑719(1).

In criminal case, argument of counsel should be based solely upon evidence.

2. Criminal law 🔑704.

Opening statement by defendant's counsel does not constitute evidence and is not binding, and therefore, in absence of bad faith, failure to make good such statement should not be argued.

3. Criminal law 🔑713.

Conviction should not rest even slightly upon dereliction, of counsel, but should ordinarily be grounded upon acts committed by defendant.

4. Criminal law 🔑704.

District attorney may in argument direct jury's attention to defendant's failure to substantiate counsel's opening statement.

5. Criminal law 🔑723(1).

In prosecution for statutory rape, prosecutors' argument, in effect, charging defendant's counsel with grossest bad faith in failing to substantiate part of opening statement, *held* error.

> Defendant's counsel, in opening statement, pointed out what defendant expected to prove in his defense. Defendant repeatedly but unsuccessfully attempted to introduce certain evidence to substantiate part of opening statement, whereupon district attorney and deputy in argument to jury pointed out that defendant's attorneys failed to make good fulfillment of their promise which represented only bunch of "unredeemed pledges" and in effect charged defendant's attorneys with the grossest bad faith.

6. Criminal law 🔑730(1).

Instruction to disregard improper argument does not cure error, where it appears reasonably clear that harmful result could not have been remedied.

7. Criminal law ⚷730(8).

In prosecution for statutory rape, prosecutors' argument giving their personal opinion with reference to witnesses' character or credibility *held* error, notwithstanding instruction to disregard.

> District attorney in substance told jury during argument that as long as he was district attorney he would not put named doctor on witness stand, and that wife of another witness appeared in desperation to support her husband's testimony. As to another witness prosecutor stated that he "is as clean as a hound's tooth and there isn't a thing against him," and as to still another that "he stands without the possibility of impeachment."

8. Criminal law ⚷730(8).

In prosecution for statutory rape, district attorney's argument based on assumption that prosecutrix was a virgin *held* error, notwithstanding cautionary instruction.

> Based on assumption that prosecuting witness was a virgin, district attorney made dramatic appeal to jury. At close of case, trial court instructed jury that if counsel upon either side made any statements concerning facts of case "you must be careful not to regard such statements as evidence and must look entirely to the proofs in ascertaining what the facts are."

9. Witnesses ⚷372(1).

Questions on cross-examination of witness, tending to show bias, are competent, and great latitude should be allowed in developing existence of bias (Code Civ. Proc. §§ 1847, 2051).

> If witness, directly or indirectly, be induced either to give false testimony or to color truth of sworn statements, jury should be placed not merely in possession of affirmative ultimate fact of bias or denial thereof, but, if necessary, should hear basic facts, if any, upon which such conclusion is founded.

10. Witnesses ⚷372(2), 374(1).

Fact that witness may have received some favorable consideration from district attorney for favorable testimony may be disclosed by cross-examination or other evidence.

11. Witnesses ⚷372(2).

In prosecution for statutory rape, refusing to permit cross-examination of state's witness, regarding motives or state of mind, *held* error (Code Civ. Proc. §§ 1847, 2051).

> Proposed cross-examination sought to inquire of witness whether he knew that he had been indicted in another state on various criminal charges, and whether any arrangement or promise had been held out to him by district attorney or police department or sheriff, whereby if witness should testify favorable to prosecution in instant case he might receive leniency or more favorable action in case of possible extradition.

12. Rape ⚷40(5).

In prosecution for statutory rape, evidence showing previous acts of unchastity is inadmissible for sole purpose of attacking prosecutrix's character.

13. Rape ⚷40(2).

In prosecution for rape, accomplished by force or violence, testimony showing prior unchaste acts of prosecutrix is admissible.

> Evidence under such circumstances is admissible, not for direct purpose of impeaching prosecutrix's character, but for purpose of discrediting her testimony relating to use of force or violence by defendant in accomplishing his purpose.

14. Rape ⚷40(5).

In prosecution for statutory rape accomplished by force, defendant's testimony showing prior unchastity of prosecutrix *held* admissible on question of use of force and consent (Code Civ. Proc. § 2061, subd. 3).

15. Rape ⚷40(5).

In prosecution for statutory rape accomplished by force, testimony showing previous unchastity of prosecutrix *held* admissible as bearing on place of imprisonment to be recommended by jury (Pen. Code, § 264).

16. Rape ⚷40(5).

In prosecution for statutory rape accomplished by force, testimony showing prior unchastity of prosecutrix *held* admissible as bearing on question of penetration.

> If from the evidence the jury believed that no penetration took place, defendant at most could have been convicted of no greater offense than attempt to commit rape.

17. Indictment and Information ⚷164.

"Issue of fact" in criminal cases arises from allegation of ultimate fact made by one of parties which is denied by other.

> [Ed. Note.—For other definitions of "Issue of Fact," see Words and Phrases.]

18. Criminal law ⚷337.

Generally, issues of fact can only be determined by introduction of evidence made acceptable by statute or legal practice.

19. Criminal law ⟹857(1).

Jury in determining ultimate fact of either guilt or innocence should not be influenced by either pity or sympathy.

20. Rape ⟹13.

Generally in prosecution for statutory rape, consent of prosecutrix is not an issue.

21. Rape ⟹38(2).

In prosecution for statutory rape accomplished by force, evidence of prosecutrix' consent is admissible for impeachment as to manner of act and whether crime was committed.

22. Rape ⟹59(8).

In prosecution for statutory rape accomplished by force, instruction that prosecutrix' consent was wholly immaterial *held* prejudicial error, where evidence showing consent was admissible for impeachment purposes.

23. Rape ⟹60.

Jury's recommendation, in rape case, as to place of imprisonment, is essential, inseparable part of verdict, and therefore binding upon trial court (Pen. Code, § 264).

24. Rape ⟹38(1).

In prosecution for statutory rape accomplished by force, testimony showing facts and circumstances attending commission of offense *held* admissible for jury's consideration on question of place of imprisonment (Pen. Code, §§ 17, 264).

> Facts and circumstances surrounding offense, admissible, include degree of force or violence exercised by defendant, consent of prosecutrix, and any other circumstances throwing relevant and material light upon true situation of defendant and prosecutrix at and reasonably preceding time offense was alleged to have been committed.

25. Rape ⟹40(5).

Prior unchastity of prosecutrix may not be put in issue in statutory rape case, except when force is claimed to have been used.

26. Rape ⟹38(2).

In prosecution for statutory rape claimed to have been accomplished by force, accused may combat showing of force by evidence usual in force cases (Pen. Code, §§ 17, 264, and § 261, subd. 3).

SEAWELL and CURTIS, JJ., dissenting.

In Bank.

Appeal from Superior Court, Los Angeles County; Charles W. Fricke, Judge.

Alexander Pantages was convicted of the crime of rape of a female person under the age of 18 years, and he appeals.

Reversed, and cause remanded for a new trial.

Superseding opinion in 292 P. 500.

See, also, 286 P. 467, 469; 291 P. 831.

Le Compte Davis, Jerry Giesler, and W. I. Gilbert, all of Los Angeles, Louis Titus, of Washington, D. C., and Earle M. Daniels, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., Frank Richards, Deputy Atty. Gen., and Buron Fitts, Dist. Atty., and Robert P. Stewart, Chief Deputy Dist. Atty., both of Los Angeles, for the People.

PER CURIAM.

A hearing in this cause was granted in order that this court might give to the contentions of the parties, presented by extended briefs and on a voluminous record, more thorough consideration than was possible within the constitutional period. After oral argument and a careful consideration of the points involved and an examination of the record, we adopt as the opinion of this court in the main the opinion of the District Court of Appeal, Second Appellate District, Division 1 (292 P. 500), written by Mr. Justice Houser, as follows:

Defendant appeals from a judgment of conviction of the crime of rape of "a female person under the age of eighteen years." He also appeals from each of three several orders by which was denied respectively his motion for a new trial, his motion in arrest of judgment, and his motion for leave to file application for probation.

It is first contended by appellant that the evidence adduced on the trial of the action was legally insufficient to support the verdict. It would serve no useful purpose to herein set forth the facts which were presented by the prosecution in substantiation of the charge made against defendant. In that regard it may suffice to state that after careful consideration of the evidence, even viewed in the light as presented by appellant, this court is of the opinion that the contention as to its legal insufficiency cannot prevail.

[1-5] Misconduct of the district attorney and of his chief deputy is urged by appellant as a reason for the reversal of the judgment and the order by which the motion for a new trial was denied. In that connection, the first specification relates to comments made by the district attorney in his argument to the jury, particularly with reference to the failure of defendant to produce evidence in support of a statement made by one of the attorneys representing defendant in his opening statement to the jury as to what defendant expected to prove in defense of the accusation of the crime, for the alleged commission of which he was then on trial. The history of such several errors of which appellant first complains is that in his argument to the jury the chief deputy district attorney made the remark that defendant's attorneys had "failed to make good the fulfillment of their promise," which represented only "a bunch of unredeemed pledges"; and that "you saw how the court repeatedly called for an offer to make competent these innuendoes——" After objection thereto by defendant, the court instructed the jury to disregard "any remarks of counsel about offers of proof." Thereafter, in presenting his argument to the jury, the district attorney referred to the same matter as that which theretofore had been commented upon by the chief deputy district attorney, to which remarks defendant again objected. Thereupon the trial court ruled that "the district attorney may call attention to the opening statement and may mention the fact that that was not sustained by evidence, and that there was no evidence to that effect." On each of several other occasions following an objection by counsel for defendant to statements contained in argument presented by either the district attorney or his chief deputy, which statement injuriously reflected upon and criticized counsel for defendant for their failure to produce evidence in substantiation of designated portions of their opening statement to the jury, the judge of the trial court not only failed to rebuke the district attorney or his chief deputy, but indicated his approval of the remark in question. An illustration of objectionable remarks made by the district attorney is the following:

"Now, ladies and gentlemen, the only reason why I am stating this thing to this jury is this: They knew in their hearts they could not prove it, they knew they had no evidence and they knew in their hearts that there was no such evidence. They had to get something before this jury. They had intimated to you, they had insinuated it to you, they had to plant a seed in your mind, and the only way in God's green world that they could get it in front of you, in the absence of some testimony, was to say it to you in their opening statement, hoping that we would overlook it in closing argument. * * * They knew in their hearts they could not prove it, for they knew it was not true, but they had to get something of that type, they had to throw up a smoke screen, and that opening statement, ladies and gentlemen of this jury, is just about in keeping with the whole character of the insinuation, the innuendoes, the aspersions on the character of that old Mrs. Pringle as she sat on the witness stand here. * * * His whole conduct, the whole conduct of the defendant, from the moment that W. I. Gilbert stood in front of this jury, has been the projection of a defense based on insinuation and innuendo and indirection without one single effort, or one single word of testimony coming from the lips of any human being to this jury to back up their insinuations. They could not do it and they knew it, any more than when Mr. Gilbert said, as a positive fact, in the same statement, that the spots on her clothing will be accounted for by her own physical condition—by her own physical condition! Where is your testimony? * * * Has there been produced before this jury one single word that would account for the presence of spermatozoa upon a dress of that girl other than from the organs of the defendant himself, Alexander Pantages? I say to you, with all the earnestness and all the candor that God has put in me, that they had no evidence, and they knew before they came here that they had no evidence as to anything of that sort. They had to implant it in your minds. They had to have it there in your mind when you heard the State's case come in, instead of waiting, as they usually do in these cases, for their opening statement at the beginning of their case they implanted the seeds of innuendo and indirection into your mind, all through the case. They have not lived up to their promise to you. They could not and they knew in their hearts that it was not true and they could not have lived up to it, and they knew when they stood here and made a positive statement of fact to this jury, and to this court, that they could not prove the things that they told you they were going to prove. * * *"

In People v. Stoll, 143 Cal. 689, 77 P. 818, the rule is stated that the only purpose of an opening statement by counsel is to apprise the jury in a general way of what is expected to be proved; but that it has no binding force as against the party in whose behalf it is made; nor can it be considered as evidence of any fact. In each of several cases where no evidence was offered in support of an opening statement made by a district attorney, the court held that, in the absence of a showing of "bad faith" on the part of the district attorney in making such statement, no reversible error was present. People v. Wong Hing, 176 Cal. 699, 169 P. 357; People v. Lewis, 124 Cal. 551, 57 P. 470, 45 L. R. A. 783; People v. Donaldson, 36 Cal. App. 63, 171 P. 442; People v. Davis, 26 Cal. App. 647, 147 P. 1184.

In the instant case the record discloses the fact that on numerous occasions occurring during the trial, owing to objections which were interposed by the district attorney and which were sustained by the trial court, unsuccessful efforts were made in behalf of defendant to introduce evidence in support of the alleged facts which, in his opening statement to the jury, the attorney for defendant had said he expected to prove, and which statement was the subject of criticism and argument by the district attorney, from which it follows that, at least legally speaking, defendant may not be said to have presented his opening statement in "bad faith."

It is clear that in the trial of an action, proper argument should be based solely on the evidence, and that if the opening statement to the jury does not constitute evidence and is not binding upon the party making it, then, in the absence of "bad faith," his failure to "make good" should not be argued by the opposite party as a reason for a verdict. The conviction of a defendant of the crime of which he is accused should rest not even slightly upon the dereliction (if any) of his counsel, but ordinarily should be grounded upon acts committed by the defendant either actually or by law imputed to him. As ruled by the trial judge, and as indicated in State v. Boyce, 24 Wash. 514, 64 P. 719, the district attorney and his chief deputy were within their legal rights in plainly and simply directing the attention of the jury to the fact that, although counsel for defendant had stated to the jury that he expected to prove certain specified facts on behalf of defendant, nevertheless no evidence had been received by the court in substantiation thereof; but when, in substance, the district attorney and his chief deputy had thus far proceeded, the limit of legitimate quasi argument in that regard had been reached. To go further (and in the face of the fact that defendant had repeatedly, but unsuccessfully, attempted to introduce evidence relating to the situation which he had stated that he expected to develop) and to charge the attorney or attorneys who represented defendant with the grossest of "bad faith" in the matter, and thereupon, impliedly at least, to predicate an impassioned and compelling argument demanding the conviction of defendant, constituted an error which was prejudicial to the substantial rights of defendant. It is a well-known fact that intemperate and inflammatory language coming from the lips of a high officer of the county claims an attention from the ordinary juror which, if similarly given voice by the defense, it does not receive. When it is considered that what was said by the district attorney was apparently with the sanction and approval of the judge of the trial court, the prejudicial effect on the substantial rights of the defendant becomes apparent.

[6, 7] The next specifications of alleged misconduct by the district attorney relate to his argument to the jury wherein he either indicated, or by his language expressly stated, his personal opinion with reference to the personal character or reliability of each of two witnesses. The several remarks to which attention herein is directed were as follows:

(a) "* * * Doctor Beatty came on the witness stand here. I did not put Doctor Beatty on, and I say to this jury right now, as long as I am district attorney of this county I will never put Doctor Beatty on the witness stand."

(b) "* * * What does Mrs. Biffle say? Mrs. Biffle, ladies and gentlemen. I feel sorry for her. She is here trying desperately to do what any wife would do, to support her husband. Mrs. Biffle never appeared in this picture. She testified that she read Mr. Biffle's testimony in the newspaper at home and that out of desperation she came down here to support her husband, but she didn't quite support him for, listen,—"

(With reference to the statement that "out of desperation she came down here to support her husband," it is contended by appellant, and not denied by respondent, that "a careful review of the testimony of Mrs. Biffle, * * * will not disclose even a remote basis" for the inference drawn by the district attorney.)

In addition to the foregoing, appellant complains of remarks made on each of two separate occasions in argument by the chief deputy district attorney, wherein he said:

(c) "* * * How about Mr. Gilbert (one of the attorneys who represented defendant), just as skilful as any of them, and a little bit worse. You know what he did in your presence. He actually asked that man Hale, who is as clean as a hound's tooth and there isn't a thing against him, 'Don't you know there are ten felony charges pending against you, or were pending against you on August 9th?'"

(d) "* * * Then I recall another which is symbolic of the fairness of these three experts engaged in this arduous defense and simply speak of the innuendo when Mr. Gordon, who otherwise stands, and who stands without the possibility of impeachment, they asked him questions about his visit to Reno. It was ruled out; it is not in the case."

In the case of People v. Alpine, 81 Cal. App. 456, 254 P. 281, 286, the record shows that the deputy district attorney in charge of the prosecution of the action made various remarks which reflected upon each of several witnesses who had testified in behalf of the defendant. On appeal, in considering the question generally, among other things, the appellate court said:

"The remarks of the deputy district attorney to which appellant took exception constituted misconduct of an extreme type, and the trial judge erred in not instructing the jury to disregard them. They did not present a legitimate argument upon the evidence before the jury, and, moreover, they constituted an impeachment of appellant's witnesses in a manner not contemplated by the law."

In State v. Heaton, 149 Wash. 452, 271 P. 89, 91, a situation similar to that involved herein was given consideration by the court. It was there said:

"The declarations of counsel for the state in his argument to the jury (above quoted), referring to the credibility of certain of the state's witnesses, to the effect that he had worked with them long and was in a position to know their character, transcended the bounds of legitimate argument and amounted to an attempt on the part of counsel to testify as to the witnesses' good character. Such a statement as this cannot be met by any answering argument, and it is vain to attempt to do away with the prejudicial effect of such assertions by an instruction of the court to the effect that argument of counsel is not to be regarded as evidence." (Citing authorities.)

In the case of Gutzman v. Clancy, 114 Wis. 589, 90 N. W. 1081, 1084, 58 L. R. A. 744, wherein it appeared that in his closing argument to the jury, in referring to one of the witnesses, the attorney for the prosecution had personally impeached the integrity of such witness, the conduct of the attorney was denounced and the conclusion reached that the error was so prejudicial as to necessitate a reversal of the judgment. The following excerpts from the opinion of the court will serve to illustrate the view which is generally taken with reference to such conduct:

"* * * That the statement objected to, upon its face, is improper, as an attempt to state facts to the jury as of the knowledge of the counsel, and not by way of inference from the evidence which they had a right to consider, is obvious. * * * Counsel have no right to avail themselves of the opportunity of addressing the jury in argument to make assertions upon their own knowledge, which, if admissible at all, could be so only under the sanction of a witness' oath. * * * That solemn statements of fact, not by way of argument and deduction from the evidence, but as of the counsel's own knowledge, are likely to have weight with juries, cannot be doubted. The respectability and standing of counsel only serve to enhance the peril. * * *"

In People v. Lieska, 161 Mich. 630, 126 N. W. 636, 639, where on appeal error arising from a similar situation was specified, among other things, the court said:

"* * * It has been repeatedly held by this court that, * * * it is reversible error for the prosecuting attorney to make unwarranted attacks upon respondent's witnesses calculated to arouse in the jury an unjust suspicion of their character and truthfulness. * * * Juries very properly regard the prosecuting attorney as unprejudiced, impartial, and nonpartisan, and insinuations thrown out by him regarding the credibility of witnesses for the defense are calculated to prejudice the respondent. As was said in People v. Cahoon [88 Mich. 456, 50 N. W. 384], supra, these questions and insinuations reflected upon the character of the witnesses. The prosecuting attorney has no right to discredit the witness by innuendo."

And in People v. Huff, 173 Mich. 620, 139 N. W. 1033, 1036, in which the record disclosed the fact that the prosecuting attorney adopted methods not unlike those presented for consideration in the instant case, the Supreme Court of Michigan made the statement that witnesses were entitled to respectful consideration, and not only was it the duty of the trial court to protect witnesses from insinuation and unjust and unwarranted attacks of counsel, but that: "* * * It was highly improper and reversible error for the prosecuting attorney, in the absence of testimony on the subject, to thus praise and extol the skill and standing of a witness for the people. Juries are apt to consider the prosecuting attorney as unprejudiced and impartial, and statements of fact made by him are apt to have great weight. This court has held that it is improper for the trial court to call attention to the high character of a witness in the charge. Wisner v. Bardwell, 38 Mich. 278. It is equally improper for the prosecuting attorney to go outside the testimony and make such statements."

The record herein shows that as to each of the several remarks hereinbefore set forth timely objection thereto was made by an attorney representing defendant on the trial of the action, and that in each instance the judge of the trial court instructed the jury to disregard it. It is now urged by respondent that in such circumstances any erroneous conduct in the premises committed by the district attorney, or by the chief deputy, must be deemed to have been corrected and the error thus voided. Although authorities are not lacking in their declaration of the law in substance that the effect of such prejudicial misconduct may be cured by an instruction to the jury to disregard the remark of counsel, nevertheless an exception to such general rule is noted where the misconduct is of such a character that it is reasonably clear that its harmful result could not have been obviated or remedied by an instruction to the jury to disregard it. People v. Simon, 80 Cal. App. 675, 679, 252 P. 758, and cases there cited. It is apparent that repeated acts of misconduct of the same tenor may present a situation radically different from a single isolated transgression of the same general nature; also, that a stern rebuke by the judge of the trial court to the violator of the rule which forbids conduct of the nature of that here under consideration might possibly remove the impression initiated by the misconduct in question. But, to the contrary, that a mild suggestion from such judge as to the impropriety of several separated acts of misconduct, each of the same variety as the others, might produce no result other than a possible accentuation in the minds of the members of the jury of the specific remarks which constituted the several acts of misconduct and carry with them the conviction that in their essence, aside from technical rules of legal practice, the assumed misconduct was in fact praiseworthy and in reality should be considered as entirely proper and wholly exempt from just, adverse, judicial censure, or other criticism.

[8] Another specification of error presented by appellant relates to misconduct on the part of the district attorney in that in addressing the jury he prejudicially assumed the existence in the evidence of the fact that the prosecuting witness was a virgin; and thereafter, based wholly on such assumption, made a dramatic appeal to the passion and prejudice of the jury. An illustration of each of several of the remarks made by the district attorney are the following:

(a) "* * * What did that telephone call show you or this court, or show in this case whether or not this man raped (the prosecutrix) on the night of August 9th? They put it there to do nothing more in God's world than to blame that girl's mother, to assassinate and destroy the character as that man destroyed her virginity and her body on the afternoon of August 9th, by insinuation, by indirection, by—under that guise and that camouflage. * * *"

(b) "* * * The girl sat there and finally, drive, drive, drive, when she came to the fact of the great moment of her life, and all that any woman holds dear is taken from her, not under the vows of the marriage bed, not under the vows of love given to her, but by brute force, at the hands of a fiend that afternoon, she finally broke down, and there wasn't a man or woman in this courtroom whose heart did not know that that girl broke down honestly and sincerely because of what had happened to her at the hands of this man with the polluted body and polluted soul on the afternoon of August 9th. * * *"

(c) "* * * This is the insanity that lurked in that man's polluted mind, that is the insanity, and that is the thought that was harbored by his filthy body as he struck that girl down from her girlhood and placed upon her brow, or attempted to place upon her brow, the crown of infamy by branding her a blackmailer. What do you want him to do? Are the American jurors of today, are men and women of this country, going to stand here and let that man with all of his power or authority in America cover up and brand with infamy, by reason of the very power and wealth and strength that he has, after taking this girl's virginity, after destroying her character, then to brand her with the infamy of being a blackmailer by reason of the very position he holds? That is the insanity that lurked in that man's mind that afternoon, and this jury knows in your hearts that that is the insanity that lurked in this man's mind that afternoon as he took that girl's body."

However, in connection therewith it should be noted that at the close of the case, the trial court instructed the jury that:

"* * * If counsel, upon either side, or the court have made any statements in your presence concerning the facts in the case, you must be careful not to regard such statements as evidence, and must look entirely to the proof in ascertaining what the facts are."

In the case of People v. Fong Sing, 38 Cal. App. 253, 266, 175 P. 911, 916, in dealing with an analogous situation, in part, the court used the following language:

"There is nothing we can add to what has been said in the former opinion filed herein, except to express hearty concurrence in the general animadversion of the learned lawyer upon the practice too often resorted to in criminal cases by public prosecutors of lugging into their cases in argument matters having vital bearing upon the case which have not been brought in by evidence and which are calculated to deprive an accused of that fair and impartial trial which is guaranteed to him by the Constitution and the statute laws of the state. * * * And it is equally a mistake for such an officer to suppose that it is proper for him to present to the jury anything but strictly legal evidence in support of the charge, or that it is within the sphere of legitimate argument to prejudice the standing of the accused in the minds of those who are to determine an issue so serious to him by insinuating in the course of his address that some fact bearing strongly against the accused which has not been proved by proper evidence in reality exists."

The language of the Supreme Court of this state, used by it in the case of People v. Lee Chuck, 78 Cal. 317, 328, 20 P. 719, 723, is indicative of the general view held by the several courts of last resort throughout the United States with reference to the duty of the district attorney in the prosecution of a criminal action. It is as follows:

"We have been called upon many times to caution, sometimes to rebuke, prosecuting officers for the overzealous performance of their duties. They seem to forget that it is their sworn duty to see that the defendant has a fair and impartial trial, and that he be not convicted except by competent and legitimate evidence. Equally with the court the district attorney, as the representative of law and justice, should be fair and impartial. He should remember that it is not his sole duty to convict, and that to use his official position to obtain a verdict by illegitimate and unfair means is to bring his office and the courts into distrust. We make due allowance for the zeal which is the natural result of such a legal battle as this, and for the desire of every lawyer to win his case, but these should be overcome by the conscientious desire of a sworn officer of the court to do his duty, and not go beyond it."

Without citing further authority, it may suffice to state that, particularly in criminal actions, the practice of indulging in inflammatory remarks to the jury, especially where, as here, they are founded upon facts not in evidence, is universally condemned by reviewing courts and frequently assigned as the sole cause for reversal of judgments and the award of new trials to defendants. In this connection it may be noted that the case of People v. Hail, 25 Cal. App. 342, 143 P. 803, although following a well-beaten path with reference to misconduct of the district attorney in the particular here in question, contains many appropriate comments and suggestions which well might be the subject of careful consideration. For further illustrations of the judicial attitude toward infractions of the rule, see People v. Clayton, 89 Cal. App. 405, 413, 264 P. 1105; People v. Alpine, 81 Cal. App. 456, 467, 254 P. 281; People v. Adams, 92 Cal. App. 6, 10, 267 P. 906, and cases there cited.

Although great allowance should be and universally is made by the courts for the zeal of the district attorney, especially as may be displayed by him in the heat of argument, and although, as is stated in the case of People v. Branch, 77 Cal. App. 384, 246 P. 811, 814, the remarks ordinarily made by a district attorney may be considered by the jury as "argumentative rather than evidentiary in their nature," nevertheless such an assumption regarding the effect of any and every remark made by a district attorney in his argument to the jury, wherein, either directly or by insinuation, he personally testifies to some vital fact in the case, should neither escape deserved adverse criticism from the bench as well as from the bar, nor be universally cured either by regarding it as "argumentative, rather than evidentiary," or by a general and all-inclusive instruction to the jury to disregard it.

Appellant specifies several other alleged acts of misconduct by the district attorney, or by his chief deputy, but as in principle they are more or less covered by what heretofore has been stated herein, it becomes unnecessary to devote the attention to them which otherwise they might well deserve.

[9-11] Prejudicial error is urged by appellant in that the trial court refused to permit defendant to cross-examine a witness produced by the prosecution relative to the motives or "state of mind" of such witness. It appears that the testimony given by such witness was of extreme importance to the prosecution, in that to a great extent it was corroboratory of the testimony given by the prosecutrix. In connection with the question thus presented, the record discloses that, as was indicated by admissions or statements of counsel representing defendant, and which were developed in argument had in the absence of the jury, defendant proposed to inquire of the witness whether he knew, or had information to the effect, or suspected that he had been indicted in the state of Texas on ten separate criminal charges, or on any such charge or charges; and assuming the existence of such fact or facts, what arrangements, or promises, if any, had been either expressly or impliedly made or held out to him, especially by the district attorney of the county of Los Angeles, or by any of his deputies, or by any member of the police department of the city of Los Angeles, or by the sheriff of the county of Los Angeles, or by any of his deputies, by or through which he was either told directly, or was given to understand, that by testifying in any respect favorable to the prosecution in the instant case he might expect some leniency, or at least more favorable action from the district attorney with reference to the possible extradition of the witness on the Texas indictments against him, than though his testimony were not so favorable to the prosecution. Furthermore, that in and by such proposed cross-examination, even in the total absence of any substantial foundation for the existence of any such anticipated action by the district attorney, defendant claimed the right to ascertain whether the witness had then, or ever had, a belief, or hope, or "state of mind," that by reason of his giving testimony favorable to the prosecution in the instant action he would secure, or might be likely to obtain, any favor or advantage whatsoever at the hands of the district attorney.

It should require neither argument nor authority as the basis for an assertion that if it be established as a fact that by the use of direct or even by veiled threats, or through insinuations, or innuendo, or intimidation, or menace of any sort, or by means of promises of assistance, or of influence to be exerted in his behalf, expressly made, or but ambiguously suggested by or through any one either actually or assumedly in authority in the premises, or even by an utter stranger or interloper in the proceedings, or by any way, method, or manner whatsoever, a witness be thereby induced either to give false testimony, or to color the truth of his sworn statements, the jury should be placed not merely in possession of the affirmative ultimate fact of the bias of the witness, or his denial thereof, but, if necessary, should hear the basic facts, if any, upon which such conclusion be founded. In connection with the question of law presented for consideration by this court, it appears that the only material questions which defendant was permitted to ask of and to have answered by the witness were as to whether, on the day on which the offense of which defendant was charged was committed, the witness knew that ten felony charges were pending against the witness in the state of Texas; also as to whether, prior to such date, he was aware of that fact. Each of such questions was answered by the witness in the negative. All other questions proposed to be asked of the witness by counsel representing defendant, which had any direct bearing on the motive, or "state of mind" of the witness, at the time he was giving his testimony, were excluded by the trial court. Illustrative of the questions propounded to the witness, and to which objections thereto presented by the prosecution were sustained by the trial court, is the following:

"Did you discuss with any member of the district attorney's staff, or of the police department who were connected with this case, the question as to whether or not there were ten felony charges pending against you in Texas?"

In claiming the right to cross-examine the witness concerning the alleged indictments which were then or had been pending against him in the state of Texas, defendant relied, not upon the provisions of section 2051 of the Code of Civil Procedure, which relate particularly to the impeachment of a witness, but rather upon that portion of section 1847 of the Code of Civil Procedure, which, in effect, provides that, notwithstanding the rule of law that a witness is presumed to speak the truth, such presumption may be repelled by evidence affecting "his motives" in giving his testimony.

As relates to the impeachment of a witness in such manner as is provided by section 2051 of the Code of Civil Procedure, authorities emanating from various jurisdictions throughout the United States are not in harmony, one with the other; but as concerns the situation hereinbefore outlined, where the motive or "state of mind" of the witness is the objective of the cross-examination, the several authorities in this state are unanimous in the declaration that questions which would have a tendency to show bias of a witness are not only competent, but that great latitude in cross-examination should be allowed in developing its existence. A situation analogous to, if not identical with, that which is presented by the record herein has heretofore received consideration in each of several cases decided by the appellate courts of this state.

In perhaps what may be termed the leading case of People v. Dillwood, 4 Cal. Unrep. Cas. 973, 39 P. 438, 439, it appears that a witness for the prosecution "admitted that he had 'pleaded guilty to stealing the Johnson cow,' and had been sent to the Whittier Reform School." Thereupon he was asked if felony charges were not then pending against him and were not pending against him before he was sentenced to the reform school. In passing upon the admissibility of the questioned evidence, the Supreme Court said:

"* * * Before the enactment of section 2051, Code Civ. Proc., the conviction of a felony could only be proved by the production of the record, if objections were made. That it may now be shown by the admission of the witness upon the stand is an exception to the general rule that the record, being the best evidence, must be produced. It is competent to show the fact that other criminal charges are pending in the same court against the witness at the time he testifies, not, however, as evidence of particular wrongful acts, for as to these he is presumed to be innocent, but as a circumstance tending to show that his testimony is or may be influenced by a desire to seek the favor or leniency of the court and prosecuting officers by aiding in the conviction of the defendant. These charges should, however, be proved by the record if objection is made to oral evidence of them."

In the case of People v. Bennett, 79 Cal. App. 76, 94, 249 P. 20, 27, the defendant was charged with the crime of murder. Touching the question of the admissibility of evidence regarding the pendency of criminal charges against a witness testifying in the case on trial, the following appears in the opinion of the court:

"The next assignment under this head arose as follows: Against the prosecution's witness Penning, there had previously been filed and were pending in the superior court of Butte county, at the time the instant case was called for trial, two criminal charges based, respectively, upon the sale and upon the possession of intoxicating liquor. Counsel for the defendant sought to bring out by the cross-examination of said witness that such charges were pending against him, and that one had been set for trial for a date some 2 weeks prior to the date fixed for the trial of the present case, but was postponed, on motion of the district attorney, to a date 2 weeks subsequent to the date fixed for the trial of the instant case. An objection by the district attorney to this proposed cross-examination was sustained by the court. The cross-examination, as the attorney explained, was designed to disclose a circumstance tending to show that the testimony of Penning for the people was or might be influenced by a hope on his part that he would or might be leniently treated by the prosecuting officers in the criminal case or cases pending against him by giving testimony which would contribute to the conviction of the defendant. We think the proposed inquiry involved a proper subject of cross-examination for the reasons stated by the Supreme Court as follows, in People v. Dillwood, 4 Cal. Unrep. Cas. 974, 39 P. 438, and that the defendant would be entitled to prove the fact by the record if the witness denied it. 'It is competent to show the fact that other criminal charges are pending in the same court against the witness at the time he testifies, not, however, as evidence of particular wrongful acts, for as to these he is presumed to be innocent, but as a circumstance tending to show that his testimony is or may be influenced by a desire to seek the favor or leniency of the court and prosecuting officers by aiding in the conviction of the defendant.' [Citing cases.] Such testimony goes to the question of the credibility of the witness. * * *"

A similar situation was involved in the case of People v. Blackwell, 81 Cal. App. 418, 253 P. 964, 965. There the court said: "* * * The fact that a criminal charge against the witness was then pending in the same court was competent evidence, not of the truth thereof, but as tending to show that the testimony of the witness was influenced by a desire to gain the favor of the district attorney by aiding in the conviction of the defendant and thereby escaping prosecution in her own case." (Citing cases.)

The principle is also recognized in the case of People v. Hoffman, 195 Cal. 295, 309, 232 P. 974. However, it was there held not error to refuse to admit evidence to the effect that a felony charge was pending against the witness in a county in the same state other than that in which he was giving testimony; the reason assigned therefor being that the fact that he gave "testimony for the prosecution" in one county could not have led him to expect favor or leniency from any official in the county in which the charge was pending against him. It is manifest that with reference to any possible "leniency" to the witness, such a situation as was presented in the Hoffman Case does not obtain in the instant case. On the trial of the action herein, in the course of the argument among respective counsel with reference to the admissibility of the questioned evidence, it was admitted by the prosecution in the absence of the jury that, although some time preceding the date of the trial of the instant action the witness had been placed under arrest by the Los Angeles police on suspicion of the commission by the witness of the crime of robbery, and although it was known to such police officers that several indictments were then pending against the witness in the state of Texas, regarding which some telegraphic correspondence had passed between the Texas officials and the police department of the city of Los Angeles shortly following the date of his arrest, the witness was released from custody and no "fugitive" or other complaint was ever filed against him, as might have been done in accordance with the provisions of law thereunto applicable. It is clear that if extradition of the accused witness had been sought or obtained by the Texas officials, many opportunities to extend "favor or leniency" to the accused would have been possible at the hands of the district attorney of this county.

But aside from what for convenience may be termed the assumed fact that, in exchange for favorable testimony by the witness, some one in actual or presumed authority in the premises had either directly promised some sort of advantage to the witness, or had led or permitted him to expect or hope that he would be the recipient of unidentified or unspecified favors, or material advantages, from the district attorney, authorities are not lacking in the view that however ungrounded in fact, or even if the "state of mind" of a witness be based upon pure delusion, nevertheless if such "state of mind" amount to an expectation, or even a lingering or forlorn hope, that in the event that his testimony, far from being distinctly favorable to the prosecution, be evasive, or never so slightly strained or colored in favor of the prosecution, he will or may receive some favorable consideration from the district attorney, such fact may and should be disclosed to the jury through either the channel of cross-examination, or by means of the introduction of other evidence. Indicative of such assertion of the law is the following excerpt taken from the case of People v. Thomson, 92 Cal. 506, 509, 28 P. 589:

"It is elementary law, supported by all authority, that the state of mind of a witness as to his bias or prejudice, his interests involved, his hostility or friendship towards the parties, are always proper matters for investigation, in order that truth may prevail and falsehood find its proper level. If the inner workings of a witness' mind are actuating his testimony, and the workings of that mind are brought forth to the light and held up in full view before the jury, results will be obtained much more in accord with truth and justice than though the witness' testimony is weighed and measured by his words alone. * * *"

And in Farkas v. United States (C. C. A.) 2 F.(2d) 644, 647, it is said:

"The prosecuting witnesses, before the time of the trial, had pleaded guilty to an indictment in the federal court; the verdict of guilt or innocence in the instant case depended primarily upon their credibility as against that of defendant who testified in denial of the demands and threats. As bearing upon their credibility, motive for false accusations, as well as bias, was vitally relevant, and testimony tending to show such motive was entirely competent. Concededly promises of immunity are admissible; they are, however, rarely made. Inasmuch as the question involved is the motive for testifying falsely and therefore the state of mind of the prosecuting witnesses, the relevant evidence is not alone the acts or attitude of the district attorney but anything else that would throw light upon the prosecuting witnesses' state of mind. It is therefore entirely proper, either by cross-examination of the witness himself, or otherwise, to show a belief or even only a hope on his part that he will secure immunity or a lighter sentence, or any other favorable treatment, in return for his testimony, and that, too, even if it be fully conceded that he had not the slightest basis from any act or word of the district attorney for such a belief or hope. The fact that despite a plea of guilty long since entered, the witness had not yet been sentenced, is proper evidence tending to show the existence of such hope or belief."

See, also, People v. Lee Ah Chuck, 66 Cal. 662, 667, 6 P. 859, and authorities there cited; People v. Homan, (Cal. App.) 284 P. 252; 27 Cal. Jur. 124, and cases there cited. It may also be noted that in volume 23 of American Digest (2d Dec. Ed.), and in volume 28, Third Decennial Digest, under key numbers 363, 372, and 374 of the title of "Witnesses," may be found references to many authorities which sustain the conclusion reached as to the question here under consideration.

[12-14] Further complaint is made by appellant in that the trial court refused to permit the introduction of evidence offered by defendant for the purpose of tending to show that on the date of the alleged attack herein the prosecutrix was not a virgin.

It is the contention of appellant that because the effect of all the evidence introduced by the prosecution, and especially the testimony given by the prosecutrix, was that the offense was committed, not by consent of the victim of the alleged outrage, but by force and violence used and exerted upon her person, and because the prosecutrix personally testified in great detail concerning the circumstances which, according to her testimony, surrounded the commission of the crime, and which testimony, among other things, included the statement that the last thing she remembered was the "pain" and that she "fainted," in the face of such circumstances, defendant was entitled to introduce evidence which would tend to establish the fact that on the date of the commission of the alleged offense the prosecutrix was not a virgin; from which facts appellant further contends that the jury would have the right to infer that the prosecutrix neither "fainted" nor suffered "pain" in the course of the claimed assault upon her; but, to the contrary, that her entire story of the alleged occurrence was false, and consequently that no crime was committed by defendant; or, failing in that conclusion, that if a so-called "statutory" rape of the person of the prosecutrix was committed by defendant on the date charged in the information, the act of defendant was had by consent of the prosecutrix; and which latter fact (in case the jury so found) became of great importance to defendant for the reason that by the provisions of section 264 of the Penal Code, in the event of a verdict of guilt of the defendant, the jury is charged with the duty of "recommending" to the trial court the place wherein the defendant shall be imprisoned.

Included within the corroboratory evidence which related to the commission of the offense of which defendant was accused was the testimony given by a policewoman who made statements concerning the physical appearance of the prosecutrix at a time supposedly within approximately one and one-half hours after the alleged crime had been committed. Among other things, she testified that on undressing the girl at that time, she noticed that there were spots on her dress and that as to "the appearance of her private parts, * * * the skin showed red through the hair; the hair was moist and sticky." A chemist testified that on four of the spots on the dress worn by the prosecutrix at the time when the alleged attack was made, he found "male sperm, known as spermatozoon."

Although the trial court admitted the testimony of one physician produced by defendant to the effect that a physical examination of the prosecutrix made by him within seventeen hours after the alleged attack had occurred disclosed the fact that the hymen of the prosecutrix was ruptured; that he found no "abrasions or irritations of the vagina—irritable spots"; that he saw no "signs of her (the prosecutrix) having had sexual intercourse during the preceding twenty-four hours"; that he found no "recent tear of the hymen"; nor any "tear of the perineum"—the trial court refused to permit that physician to answer either or any of the following questions which were propounded to him by counsel representing defendant, to wit: "Q. Was that a recent rupture or an old rupture? Q. Did you see any signs of any recent rupture? Q. Just describe the nature of the rupture you saw. Q. On the vagina, did you examine the vagina either before, in front of or anterior to the hymen or behind the hymen to discover whether or not there was any abrasions of any character? Q. Was there anything in your examination to indicate to you as a physician and surgeon whether or not that girl had had sexual intercourse with anybody 17 hours before or approximately 17 hours before you made your examination? Q. Are you able to tell whether a young girl of 17 years of age has been deflowered within 24 hours of a vaginal examination? Q. Describe this hymen that you discovered in this girl on the 10th day of August."

A second physician, who also had made a physical examination of prosecutrix, testified that in so doing he had used both a speculum and "two fingers." Thereupon he was asked by counsel for defendant each of the following questions, none of which, by order of the trial court, was he permitted to answer, to wit: "Q. Was there any pain or discomfort (referring to the digital examination and instrumental examination)? Q. How large size a speculum did you use, medium or small? Q. Did you find any new or any old ruptures of any kind? Q. Did you find any old ruptures of any kind?"

Similarly, by order of the trial court, a third physician, who likewise had made a physical examination of the prosecutrix, was not permitted to answer either of the following questions which were propounded to him by counsel for defendant: "Q. Did you discover any conditions, scars or broken hymen or anything that had been broken in your opinion within the last week preceding the examination? Q. Did you find any evidence that she had had intercourse within a month before? Q. Did you find any evidence that she had had intercourse before? Q. Did you find any old scars on the hymen? Q. Did you find any recent scars on the hymen? Q. What was the condition of the vagina?"

The authorities in this state appear to fairly establish the rule that on a charge of rape of a female person under the age of eighteen years, where the act is alleged to have been accomplished with the consent of the victim of the assault, evidence of previous acts of unchastity is inadmissible for the sole purpose of attacking her character. People v. Wilmot, 139 Cal. 103, 72 P. 838; People v. Johnson, 106 Cal. 289, 39 P. 622. But equally well established is the principle that where the defendant is charged with the crime of rape alleged to have been committed on the person of a woman over the age of eighteen years, accomplished by means of force or violence, it is error to exclude evidence which tends to show prior unchaste acts of the prosecutrix either with the defendant or with other men. People v. Shea, 125 Cal. 151, 57 P. 885; People v. Benson, 6 Cal. 221, 65 Am. Dec. 506; People v. Degnen, 70 Cal. App. 567, 590, 234 P. 129; People v. Biescar, 97 Cal. App. 205, 275 P. 851. See, also, Lusty v. State, 97 Tex. Cr. R. 167, 261 S. W. 775; Weaver v. United States, 55 App. D. C. 26, 299 F. 893; Fields v. State, 47 Ala. 603, 11 Am. Rep. 771. The distinguishing principle between the two lines of authorities is that, as to a minor female child under the age of eighteen years, she is legally incapable of giving her consent to the act; while as to a woman over the age of eighteen years no such legal restriction obtains; and as to the latter, the evidence is admissible, not for the direct purpose of impeaching her character, but for the purpose of discrediting her testimony relating to the use of force or violence by the defendant in accomplishing his purpose. As is said in People v. Johnson, 106 Cal. 289, 293, 39 P. 622, 623, and repeated in People v. Shea, 125 Cal. 151, 152, 57 P. 885: "This class of evidence is admissible for the purpose of tending to show the nonprobability of resistance upon the part of the prosecutrix; for it is certainly more probable that a woman who has done these things voluntarily in the past would be much more likely to consent than one whose past reputation was without blemish, and whose personal conduct could not truthfully be assailed. * * *"

It is easily perceivable that if previous acts of unchastity on the part of a woman over the age of eighteen years tend to discredit her testimony to the effect that force was used by the defendant in the commission of the act, likewise would evidence of previous acts of unchastity by a girl under the age of eighteen years tend to discredit her testimony that in accomplishing his purpose the defendant exerted force and violence.

But, as is indicated in the opinion rendered by the Supreme Court of this state in denying a petition for hearing in that court after judgment rendered by the District Court of Appeal in the case of People v. Jones, 76 Cal. App. 144, 157, 244 P. 101, 106, evidence of consent on the part of the victim of the assault, even though she be under the age of eighteen years, if she claim that the act was committed by force and violence, is admissible not only for the purpose of "impeachment as to the manner in which the act was accomplished," but as well for the purpose of laying a foundation "for impeachment as to whether the crime was committed at all." In that case, the defendant was convicted of the crime of rape of the person of his stepdaughter, of the age of fifteen years. On the trial of the action, by order of the trial court, the defendant was precluded from ascertaining by cross-examination of the prosecutrix whether the act of which complaint was made was accomplished with her consent. On appeal, the District Court of Appeal upheld the ruling thereon made by the trial court. Thereafter, in ruling on a petition for hearing of the appeal by the Supreme Court, in part the latter court used the following language:

"As a matter of law, however, we would be constrained to hold as error the ruling of the trial court sustaining objections to the cross-examination of the prosecutrix as to whether she consented to the act of sexual intercourse or whether it was committed by fear or force and against her will. We can well understand that, if she had claimed the act was committed by force, how her claim might have laid the foundation, not only for impeachment as to the manner in which the act was accomplished, but also under certain circumstances it might have laid the foundation for impeachment as to whether the crime was committed at all. * * * As an abstract question of law, however, we cannot approve of the court's ruling in sustaining the objections to the questions asked as to whether she resisted the defendant's acts, for the reason that the evidence sought to be elicited tended to disclose the circumstances of the crime, and it could not properly be excluded on the theory that the prosecutrix, being under the statutory age, all inquiry as to the circumstances of the crime was therefore cut off. This evidence was not offered as a justification or excuse for the commission of the offense, but was offered as constituting a part of the crime charged. * * *" See, also, People v. Fultz, 109 Cal. 258, 41 P. 1040.

In the instant case, the prosecutrix having testified to the effect that the alleged crime was accomplished by defendant by means of force and violence, this court is constrained to follow the suggestion made by the Supreme Court in the case last cited, in substance that evidence of consent on the part of the prosecutrix was admissible "not only for impeachment as to the manner in which the act was accomplished, but also * * * for impeachment as to whether the crime was committed at all." Although not conclusive evidence of unchastity, it is manifest that one of the items of evidence which would tend toward a conclusion that, prior to the date on which it was charged that defendant had committed the crime, the prosecutrix had been guilty of unchaste acts, would be that her hymen was ruptured, and that the scars, if any, were not of recent origin. But if with such and other evidence, which might possibly be introduced on the trial of the action, the jury should believe that preceding the alleged attack the prosecutrix was lacking in virtue, a conclusion that the testimony of the prosecutrix relating to the force and violence exerted by defendant was not to be believed, and consequently either that no crime was committed by defendant, or that, if committed, the prosecutrix consented thereto, might readily result. "* * * For it is certainly more probable that a woman who has done these things voluntarily in the past would be much more likely to consent than one whose past reputation was without blemish, and whose personal conduct could not truthfully be assailed." People v. Johnson, 106 Cal. 289, 293, 39 P. 622, 623; People v. Shea, 125 Cal. 151, 152, 57 P. 885.

[15] Assuming that the jury should so far discredit the story of the alleged attack as narrated by the prosecutrix as to produce the conviction in the "mind" of the jury that such testimony was wholly unworthy of belief, the acquittal of the defendant would naturally follow. On the other hand, if from the evidence in the case the jury should believe that under the provisions of the statute the person of the prosecutrix had been raped by defendant, but that the act was committed with the consent (in fact, if not in law) of the prosecutrix, in view of the provision of section 264 of the Penal Code that the crime of rape of the character of that here under consideration is punishable "either by imprisonment in the county jail for not more than one year or in the state prison for not more than fifty years," and that "the jury shall recommend by their verdict whether the punishment shall be by imprisonment in the county jail or in the state prison," evidence of the former unchastity of the prosecutrix became and was of vital importance to the defendant for the purpose, if possible, of ameliorating the punishment which the jury might recommend that defendant be obliged to suffer, that is, primarily, whether in the state prison or in the county jail. Furthermore, it will be remembered that the prosecutrix testified that when the act was being committed by defendant the last thing she remembered was the "pain" and that she "fainted." It is manifest that if evidence had been admitted which would have had a tendency to establish the fact not only that prior to the date of her alleged rape by defendant her hymen had been ruptured, but that theretofore she had been guilty of acts of unchastity, the question of whether on the occasion here under discussion she suffered any considerable pain, or that she fainted, would have demanded the careful consideration of the jury; and if the jury had disbelieved her statement as to the pain which she said she suffered, or that she fainted, under the provisions of subdivision 3 of section 2061 of the Code of Civil Procedure that "a witness false in one part of his testimony is to be distrusted in others," the jury might have cast aside her entire story, or adopted that part of it, if any, which from other evidence in the case it believed to be true, with a result or results similar to that hereinbefore indicated.

Adverting to the combined testimony given by the policewoman and the chemist, who were introduced by the prosecution, to the effect that four certain spots found on the dress of the prosecutrix contained "male sperm, known as spermatozoon," together with the further assumed fact, as later appears from the testimony of the same chemist, that such sperm came from the person of one about the age of defendant, it becomes plain that a third reason exists for the legal admission of the evidence proposed to be elicited by defendant with reference to the virginity of the prosecutrix. It should be apparent that defendant was not bound or concluded by the whole or any part of such testimony. Nor should his negations or disavowals, if any, necessarily be limited to a personal general denial on his part either of the commission by him of the offense of which he was accused, or to a specific denial that the "male sperm, known as spermatozoon," which assumedly were found on the dress of the prosecutrix, came from the defendant. In other words, defendant was entitled to combat and refute the effect of the evidence against him in any legitimate manner—either by direct or by circumstantial evidence—which, in its logical conclusion, either might or would imply either a direct contradiction of the damaging evidence, or amount to a denial thereof by way of inference. And so, if by establishing, if he could, that the ruptured hymen of the prosecutrix was not of recent origin; that the prosecutrix was not a virgin; and that circumstances existed in the comparatively recent life of the prosecutrix from which it legally might have been inferred that she had indulged in acts of unchastity with some person other than defendant—possibly the jury might have doubted that the questioned spots on the dress of the prosecutrix resulted from the alleged rape of the prosecutrix by defendant—which conclusion necessarily would have resulted in the destruction of an important link in the chain of circumstances tending to prove the guilt of defendant.

[16] It is also apparent that several of the questions to which reference hereinbefore has been had, which were asked of the physicians who were called as witnesses by defendant, and which questions, by order of the trial court, were not permitted to be answered, were proper for the reason that on the answers thereto might have depended a conclusion by the jury as to whether any penetration in fact had resulted from the alleged attack by defendant on the prosecutrix. If, from the evidence, the jury had believed that no penetration took place, at most, defendant could have been convicted of no greater offense than attempt to commit rape.

Several different specifications of error presented by appellant which are closely related to the question last hereinbefore given consideration by this court may be grouped together. They concern, first, the giving of several instructions which are to the effect that in trying issues of fact in the case, the jury should not be influenced by sympathy or pity for defendant; and that whether the victim of the alleged assault consent to the act, or resist the attack made upon her, is wholly immaterial; secondly, the question is presented whether, in the event of a verdict of guilty, for the purpose of enabling the jury to determine either the place where the defendant should be imprisoned, or, in effect, the extent of the punishment which he should suffer, the court erred in excluding evidence from which the jury would have had the right to infer that the act was not committed by or through the use of force and violence, but, to the contrary, was accomplished by and with the consent of the prosecutrix.

[17-19] In considering whether sympathy or pity of the jurors for defendant should be legally declared to have no part in a determination of the "issues of fact," in order that a better understanding of the situation may be had, it becomes advisable to more clearly define what is meant by the expression "issues of fact." Having reference to legal practice, an issue of fact arises from an allegation of an ultimate fact made by one of the parties to the controversy which is denied by the other. Ordinarily, the only manner recognizable in a court of law for the determination of an issue of fact is by the introduction of evidence made acceptable by the statutes or by established legal practice. Nowhere, at least in civilized countries, is a solution of the ultimate facts or the "issues of fact" upon which a judgment may rest made dependable upon human emotions, or particularly upon the sympathy or the pity for either of the litigants by any person who may be called upon to judicially decide the controversy. If such were the case, no necessity would exist for, nor convenience or social protection require, laws, rules, or regulations of any sort. The more needy or distressed the litigant, the more certain would be the assurance of a judgment in his favor; and the more affluent or powerful suitor would be an easy financial prey to his impecunious or afflicted legal antagonist. From a legal standpoint, it would appear plain that in performing the duty of determining the ultimate fact of either the guilt or the innocence of a defendant, the jury should be uninfluenced by, and unmindful of, either pity or sympathy.

[20-22] The relevancy of whether in the instant case the prosecutrix consented to the accomplishment of the act for which defendant herein went to trial in the lower court has hereinbefore received some attention. It is well settled that on the trial of a so-called "statutory" rape case, ordinarily the consent of the prosecutrix is not an issue; but, as was decided by the Supreme Court in its order denying a hearing therein in the case of People v. Jones, 76 Cal. App. 144, 157, 244 P. 101, 106, where the prosecutrix, although under the age of eighteen years, testifies that the rape of her person was accomplished by force or violence exerted upon her by the defendant, evidence of consent becomes admissible not only for the purpose of "impeachment as to the manner in which the act was accomplished," but also for the purpose of laying a foundation "for impeachment as to whether the crime was committed at all." It would follow that, at least as far as concerns "impeachment" in those respects to which attention has been particularly directed, it is not true, as stated in the instruction, that whether the prosecutrix "consented" to the accomplishment of the alleged act of which defendant was accused was "wholly immaterial"; and at least to that extent, the instruction in question was erroneous and prejudicial.

With reference to the point that, assuming a situation where, under the evidence relating strictly to whether the offense was committed by the defendant, the jury has unanimously agreed upon a verdict of "guilty," the question of whether thereafter, for the purpose of reaching a conclusion as to the place where the defendant shall be imprisoned, or, in effect, the extent of the punishment which shall be imposed upon him, the jury has the right to consider the circumstances which surrounded the commission of the act, remains for consideration.

[23-24] On examination of the language of section 264 of the Penal Code, it will appear that a defendant who is convicted of the crime of rape is punishable either by imprisonment in the county jail or by imprisonment in the state prison; that the term of imprisonment in each place is indeterminate, in that if it be in the county jail, it may be for any length of time not more than one year; and if in the state prison, it may be for any period of time not exceeding fifty years. Furthermore, that it becomes the duty of the jury to "recommend" by its verdict whether the imprisonment shall be in the county jail or in the state prison.

In considering the provisions of the statute, perhaps the first question which suggests itself is whether the "recommendation" is in fact a part of the verdict of the jury and as such is binding on the trial court. In a rape case, as far as concerns the exercise of discretion by the jury in its determination as to the place of punishment of the defendant, it is not unlike the "discretion" which is likewise conferred upon the jury where a verdict of "guilty in the first degree" has been reached in a murder case. Among other things, section 190 of the Penal Code provides that "every person guilty of murder in the first degree shall suffer death, or confinement in the state prison for life, at the discretion of jury trying the same. * * *"

On the trial of the action in the case of People v. Hall, 199 Cal. 451, 249 P. 859, the jury returned a verdict by which it found the defendant guilty of the crime of murder, but that it could not "come to an unanimous agreement as to degree of punishment." On appeal, it was held by the Supreme Court that, as returned, the verdict was incomplete; that necessarily a proper verdict in the premises should embrace two constituent elements, "first, a finding that the accused is guilty of murder in the first degree; and, secondly, legal evidence that the jury has fixed the penalty in the exercise of its discretion."

In the case of People v. Sachau, 78 Cal. App. 702, 248 P. 960, in returning a verdict of "guilty" against a defendant who was charged with the crime of rape, the jury failed to make any "recommendation" as to the place where the defendant was to be imprisoned. Held, that the verdict was so defective as to constitute it a nullity and that a new trial should be granted. To the same effect, see Weatherford v. State, 43 Ala. 320.

And in People v. Pratt, 67 Cal. App. 606, 228 P. 47, 48, in which it appeared that the appeal was taken from a judgment which followed a conviction of the crime of rape, in commenting on the language employed in section 264 of the Penal Code, it was remarked that "it will be observed that under this section a minimum sentence may be imposed by the jury"; also, that the last amendment by the Legislature of the statute "emasculated" from the former statute "the age of the female, leaving it discretionary with the jury to determine by their verdict whether in any case * * * an offense charged under subdivision 1 of section 261 was a misdemeanor or a felony."

That in a prosecution of a defendant for the commission by him of the crime of rape, the jury has power to "recommend" the punishment which shall be inflicted, and that such "recommendation" must be carried into execution, is decided in the case of People v. Rambaud, 78 Cal. App. 685, 248 P. 954.

From the foregoing authorities it may safely be deduced that in a prosecution of a defendant on the charge of rape, in the event of a verdict of guilty, the "recommendation" by the jury as to the place where defendant shall be imprisoned is an essential, inseparable part of the verdict and as such is conclusive and binding upon the trial court as far as the pronouncement by it of the ensuing judgment is concerned.

As hereinbefore indicated, the provisions of section 190 of the Penal Code which deal particularly with the discretion of the jury in determining the penalty which shall be inflicted upon a person found guilty of murder in the first degree, are not unlike those terms of the statute here under consideration which provide that "by their verdict" the jury shall recommend whether the punishment of a guilty defendant shall be by imprisonment in the county jail or in the state prison. In that connection it becomes relevant to consider the view taken by the courts of appeal of this state where the question submitted has had to do with murder cases.

In People v. Atherton, 51 Cal. 495, following a statement in substance that it is the duty of the jury to determine whether the defendant shall suffer the extreme penalty of the law, or imprisonment in the penitentiary, it is asserted in the opinion that in reaching a conclusion as to what penalty shall be inflicted the jury should be influenced by "a consideration of the degree of atrocity with which the particular murder has been attended."

The case of People v. Hong Ah Duck, 61 Cal. 387, among other questions, involved that of the admissibility of evidence of the fact that at the time the murder was committed the defendant was an inmate of the state prison where he was already serving a "life sentence." It was ruled that, in order that the jury might exercise the discretion vested in it by the statute "in a wise and intelligent manner, the jury should be put in possession of all the facts of the case," which included the particular evidence in question.

In the murder case of People v. Perry, 195 Cal. 623, 639, 234 P. 890, 897, in which was involved the question of the materiality of the assumed mental deficiency of a defendant on the punishment which, under the provisions of section 190 of the Penal Code, the jury was authorized to prescribe, among other things, the court said: "* * * It is the jury's right and duty to consider and weigh all the facts and circumstances attending the commission of the offense, and from these and such reasons as may appear to it upon a consideration of the whole situation, determine whether or not, in the exercise of its discretion, life imprisonment should be imposed rather than the infliction of the death penalty. * * *"

However, in People v. Troche, 206 Cal. 35, 47, 273 P. 767, 772, the rule is declared to be that the insanity of a defendant cannot be used for the purpose of reducing his crime from murder in the first degree to murder in the second degree; and in People v. Golsh, 63 Cal. App. 609, 219 P. 456, evidence of sunstroke of the defendant, which rendered him subject to "blinding fits of passion," was held inadmissible for the purpose of enabling the jury to determine what punishment the defendant should be compelled to suffer for the commission by him of the crime of murder; it being substantially declared in each case that if the defendant was mentally responsible, he should suffer the same penalty which any sane person would be obliged to suffer, and, if mentally irresponsible, he should be acquitted. But in the Troche Case the court repeated and affirmed the general rule that "the only evidence admissible for the purpose of enabling the jury to determine whether the death penalty or life imprisonment should be imposed in the event the defendant should be found guilty of murder in the first degree was the evidence which the court did admit, and which concerned 'the circumstances connected with the offense.' * * *"

In the case of People v. Dice, 120 Cal. 189, 202, 52 P. 477, 483, it appeared that in instructing the jury upon the two several degrees of murder, as well as upon the crime of manslaughter, the trial court stated to the jury the punishment which, upon a verdict of guilty as to either of such offenses, it would be the duty of the court to impose in pronouncing judgment. In commenting upon such practice, the Supreme Court said in part that "to do so is, of course, necessary in instructing the jury upon their power and duty in the event that they should render a verdict of guilty of murder in the first degree. * * *"

The only cases to which the attention of this court has been directed which in any manner militate against the rule that for the purpose of determining the extent of punishment which should be prescribed for a guilty defendant the jury should "be put in possession of all the facts in the case" are those of People v. Witt, 170 Cal. 104, 148 P. 928, 930, and People v. Clayberg, 26 Cal. App. 614, 147 P. 994. On examination of each of such cases it will be disclosed that the situation therein differs somewhat from that in the instant case, and that the principle of law therein announced may be distinguished from that announced in the authorities hereinbefore cited. On the trial of the action in the former case, in mitigation of any possible punishment for the commission of the offense, the defendant claimed the right to introduce evidence relative to his character and habits. It was not contended by the defendant that the offered evidence was relevant or material on an issue of either the guilt of the defendant, or the degree of the crime, but that it was offered on the theory that it was competent because the jury had the right "to assess the punishment." The ruling was that: "* * * We are of the opinion that our law does not contemplate any such independent inquiry on a trial for murder, and that the determination of the jury, under the provisions of section 190, Penal Code, as to death or life imprisonment, is necessarily to be based solely on such evidence as is admissible on the issues made by the indictment or information and the plea of the defendant. * * *"

In the instant case, the issues of the virginity of the prosecutrix, as well as of her consent to the act of which she complained, as hereinbefore has been declared, were particularly before the court by reason of the fact that the prosecutrix testified that the offense was committed by defendant by means of force and violence. (People v. Jones, 76 Cal. App. 144, 157, 244 P. 101); from which circumstance it would follow that the case of People v. Witt, 170 Cal. 104, 148 P. 928, far from being an authority against the rule by which the questioned evidence became admissible for the purpose of determining the punishment to be inflicted upon the defendant, is at least a negative statement of affirmance of the rule. In the latter case (People v. Clayberg, 26 Cal. App. 614, 147 P. 994, 997), which was a prosecution for "statutory" rape, the decision related to an instruction requested by the defendant to be given to the jury, but which was refused by the trial court. With reference thereto the following excerpt from the opinion of the appellate court will disclose several objectionable features which appear upon the face of the requested instruction, and which alone should have justified its refusal by the trial court, to wit: "* * * Said instruction related to the power vested in juries by section 264 of the Penal Code (Stats. 1913, p. 212), in cases arising under subdivision 1 of section 261 of said Code, to determine practically the nature and extent of the punishment which may be inflicted. By the terms of the former section, it is incumbent upon the jury, where the prosecution is based upon subdivison 1 of section 261, to determine whether the defendant, if convicted, shall be punished by imprisonment in the county jail or the state prison. The rejected instruction explained the law as it is declared in those sections of the Code, and proceeded to declare that it was the duty of the jury to consider all the circumstances of the present case with a view to a just determination of which mode of punishment authorized by said section 261 'will best conserve the interest of society and the interest of the defendant,' in the event that they found the defendant guilty. The instruction also had something to say about the policy of the law being opposed to the infliction of 'unusual or severe punishment,' etc., which statement could have no just place in the court's charge; it being argumentative in character. The instruction was properly refused. * * *"

However, after having decided that the defendant was not entitled to have the instruction, as offered, given to the jury, the appellate court made the following comment:

"* * * The court, in its charge, told the jury of the power and duty resting upon them by virtue of the provisions of section 264 of the Penal Code in the matter of designating the prison in which the defendant should be incarcerated in case of his conviction of the crime charged (the crime charged here being based on subdivision 1 of said section 261), and the jury, heeding that instruction, by their verdict, designated the state prison as the place of punishment. * * *"

It will thus be noted that the opinion contains no limitation upon the principle announced in People v. Hong Ah Duck, 61 Cal. 387, to the effect that (syllabus) "in order to exercise the discretion vested in them as to the penalty in a wise and intelligent manner, the jury should be put in possession of all the facts in the case. * * *"

Upon further examination of the language of section 264 of the Penal Code, it will appear that it provides that if a defendant should plead guilty to the accusation, the punishment for the commission of the offense "shall be in the discretion of the trial court"; similarly as the punishment therefor is vested in the jury where the defendant has been found guilty after trial by jury. It also may be remembered that under the provisions of section 7 of article 1 of the Constitution, "a trial by jury may be waived in all criminal cases." Assuming that a defendant charged with the crime of "statutory" rape should either plead guilty, or that he should waive a jury, and after trial by the court without a jury, should be found "guilty," it would seem unlikely that it would be seriously contended that for the purpose of determining the place where the defendant should be incarcerated, the trial judge would be powerless to inquire into "the degree of atrocity with which the particular (rape) had been attended" (People v. Atherton, 51 Cal. 495), or that in order to exercise the discretion vested in the trial court "in a wise and intelligent manner, the (trial court) should (not) be put in possession of all the facts of the case" (People v. Hong Ah Duck, 61 Cal. 387). If, in a murder case, in determining the penalty which should be imposed for the commission of the crime "the jury should be influenced by the degree of atrocity with which the particular murder has been attended," it is difficult to understand why in a rape case the same rule should not obtain; that is, why the jury in determining the place or extent of confinement should not be influenced by the degree of brutality, if any, which was exerted by defendant in the commission of the offense; or if there was no brutality, but, to the contrary, the "rape" was accomplished either by the consent of the prosecutrix, or by her solicitation, or by her insistence, or by her procurement in any way, why the jury should not properly be influenced by such a circumstance. It is apparent that in order that the jury may determine the matter "in a wise and intelligent manner," it should "be put in possession of all the facts of the case." People v. Hong Ah Duck, 61 Cal. 387. It is but reasonable that, if in the administration of justice it be desirable or essential that in determining the punishment which a defendant should suffer, the trial court should inquire into all the facts in the case, just so should the jury be likewise enlightened in order that its quasi-judgment be just to the defendant. Neither the judge nor the jury, acting in his or its several judicial capacity, should be either required or expected to act blindly in the premises. No relevant light, however small or apparently insignificant, which might aid the tribunal or the judicial arm of the court in the conscientious discharge of its respective duty should be withheld or denied. To the contrary, everything relevant and material to the inquiry should be placed before the judge or the jury in order that the proper judicial discretion may be wisely, fairly and intelligently exercised. Because no exact words may be found in the particular statute by which such a power is conferred on the judge or the jury, does not constitute a barrier or a sufficient reason why a reasonable and humane view should not be taken of the intent of the Legislature in enacting the statute. To say that with no knowledge of attendant circumstances the jury should be called upon to nominate the place, only, where the defendant should expiate his crime, would be not only unjust to the defendant, but would amount to the recognition of a principle in the administration of justice that would be founded upon pure conjecture.

Even though in length of time a county jail sentence, following a conviction for the commission of a given crime, might be equal to or even exceed a sentence in the state prison rendered in pursuance of conviction of a like offense, as a matter of statutory provision the one would amount to a misdemeanor only, while the other would be a felony. Section 17, Pen. Code. * * * The record in the instant case discloses the fact that the evidence introduced by the prosecution tended to prove that the act of which defendant was accused was accomplished by means of force and violence. In the "statutory" rape case of Lusty v. State, 97 Tex. Cr. R. 167, 261 S. W. 775, 776, in the course of the opinion it is remarked that "the proof of force tends to cause the jury to assess a high penalty, and when it is relied on by the state the accused should be permitted to combat by the evidence usual in force cases." * * *

On the petition for hearing it was urged by the respondent that the foregoing determination as to the right of the appellant to disclose the criminal proceedings pending against the witness Hale in the state of Texas, for the purpose of showing the state of mind and motive of the witness in testifying as he did for the prosecution, is in conflict with the case of People v. Hoffman, 195 Cal. 295, 232 P. 974. We do not so conclude. The Hoffman Case was a criminal prosecution in the county of Imperial and it was sought to show that the witness Cornelison, testifying on behalf of the state, was influenced in favor of the prosecution because of a criminal charge pending against him in the county of Orange and in the hope that he would be favored in so testifying by the authorities of Imperial county. It was held that the fact that the witness testified for the prosecution in Imperial county could not lead him to expect favor or leniency from any of the Orange county officials. The obvious reason behind the ruling was that the Orange county officials had no responsibility for, or duties to perform, or authority to exercise in connection with, the prosecution in Imperial county. In the present case the officials of Los Angeles county, including its peace officers and its district attorney, had certain duties to perform in connection with the detention, if necessary, of the witness Hale in the event extradition were demanded by the authorities in Texas as provided by sections 1548 to 1557 of the Penal Code. In fact, communications had passed between the Los Angeles authorities and those of San Antonio, Tex., and the witness Hale was actually under surveillance. The situation here is therefore quite different from that disclosed in the Hoffman Case.

[25, 26] From what has hereinbefore been stated with reference to the decision of this court in denying the petition for hearing in the case of People v. Jones, 76 Cal. App. 157, 244 P. 101, it should be understood that the prior unchastity of the prosecutrix may not be put in issue in a statutory rape case except when force and violence is claimed to have been used in the commission of the offense. The present holding is definitely confined to a case where such force and violence was claimed to have been used. Because of the great disparity between the punishments which may be meted out by the jury in rape cases under our present law and the abhorrence naturally entertained by jurors when force and violence is alleged or claimed to exist under the evidence, we think the sane, just, and reasonable rule to apply is to permit the accused to combat the showing of force and violence by the evidence usual in force cases when the prosecution is under subdivision 3 of section 261 of the Penal Code. It may be said that the cases relied upon by the respondent expressing the view that in statutory rape cases the prior unchastity of the prosecutrix may not be shown are cases where no discretion was vested in the jury as to the extent of the punishment, and that the cases in this state expressing the same view were decided before the amendment in 1923 of section 264 of the Penal Code vesting the jury with such discretion, or were cases where force and violence were not shown or claimed.

While it is our conclusion that this judgment must be reversed, we feel bound to state that the instances of misconduct of the district attorney hereinbefore set forth would not, standing alone, necessarily require such a result. The other errors, however, were in our opinion vitally prejudicial, and considered together with the misconduct complained of, warrant the conclusion that the defendant was not lawfully convicted.

Numerous additional contentions by way of errors of law and misconduct of the jury are urged by reversal, but as the same or similar situations are not likely to occur on a retrial, these points need not be further commented upon.

The judgment and the order denying the motion for a new trial are reversed and the cause remanded for a new trial. The appeal from the order denying the motion in arrest of judgment and the appeal from the order denying the defendant leave to file an application for probation are and each of them is dismissed.

We dissent: SEAWELL, J.; CURTIS, J.

WASTE, C. J.

I concur in the judgment of reversal because of the intemperate atmosphere in which the case was tried. The prosecution no doubt labored under the stress of public opinion and excitement, at times confronted with considerable provocation; but the testimony of the prosecutrix is so improbable as to challenge one's credulity, and the jury should have been permitted to consider the evidence uninfluenced by the incidents and errors discussed in the main opinion. At the same time, I desire to emphasize the assertion in that portion of the opinion of this court which has been added to the opinion of the District Court of Appeal in which it is held that the instances of misconduct of the district attorney would not, standing alone, necessarily require a reversal. Any seeming conflict or inconsistency in the two parts of the decision should be resolved in favor of the declaration of this court on that question.

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212 Cal. 100

HANSEN et al. v. BURFORD et al.

L. A. 10557.

Supreme Court of California.
March 30, 1931.

1. Joint adventures 🔑7.

Contract for sale of lots to persons agreeing to obtain loans and erect buildings thereon *held* to place construction of buildings under their control and management as independent contractors, though vendors visited property during construction.

2. Joint adventures 🔑7.

Contract for sale of lots to persons agreeing to construct buildings thereon *held* to show intent that vendors should not be liable for cost of labor and materials, though entitled to participate in profits from resale of buildings.

3. Joint adventures 🔑7.

Vendors' contractual right to participate in profits from resale of buildings erected on lots by purchasers *held* not right to real estate agents' commission.

> The agreement did not make payment of profits to vendors dependent on their procuring purchaser, but provided for their participation in profits in addition to receiving notes for price, none of which was paid in cash.

4. Joint adventures 🔑1.
Partnership 🔑56.

Evidence *held* insufficient to establish vendors' liability as partners or joint obligors for price of lumber, used in erecting buildings on lots, on theory that they permitted themselves to be held out as such to sellers.

> Vendee, who purchased lumber, testified that he told sellers that vendors were interested with him, but seller who handled transaction stated that such vendee's copurchaser was only person he could recall being mentioned as interested party, and lumber was charged to such vendee alone on sellers' books.

5. Joint adventures 🔑8.

Complaint asserting liability of all defendants in action for price of lumber *held* sufficient to charge joint liability (Civ. Code, § 1431).

6. Joint adventures 🔑1.

"Joint adventure" is special combination of persons jointly seeking profit in specific adventure, without actual partnership or corporate designation.

> [Ed. Note.—For other definitions of "Joint Adventure," see Words and Phrases.]

7. Joint adventures 🔑8.

Parties suing vendors and purchasers as joint obligors for price of lumber used in buildings erected on lots *held* not required to allege joint adventure.

8. Joint adventures 🔑8.

Proof of joint adventure by defendants *held* not objectionable as variance from allegations of complaint not alleging joint adventure in action against vendors and purchasers for price of lumber used in buildings erected on lots sold.

9. Joint adventures 🔑8.

Finding of joint adventure by defendants in action against vendors and purchasers for price of lumber used in buildings erected on lots sold *held* not outside issues, though not alleged.

10. Partnership 🔑11.

Mere arrangement for participation in profits is not conclusive of partnership.

11. Joint adventures 🔑1.

Enterprise evidenced by contract for sale of lots to persons agreeing to erect buildings thereon for resale and divide profits with vendors *held* "joint adventure."

12. Joint adventures 🔑7.

Joint adventurer, not known to be such by person contracting with coadventurer individually, is not liable to such person, if contracting adventurer exceeded authority.

13. Principal and agent 🔑155(1).

Undisclosed principal is not liable on contracts of one assuming without authority to act for him or contracts made by agent in excess of authority.

14. Joint adventures 🔑8.

Undisputed evidence *held* to show that purchaser of lots was not authorized to bind vendors personally to pay for lumber used in erection of buildings thereon.

15. Joint adventures 🔑1.

One suffering another to give credit or incur liability on strength of representations, made or permitted by him, that he is joint adventurer, cannot deny such representations thereafter.

In Bank.

Appeal from Superior Court, San Bernardino County, Charles L. Allison, Judge.

Action by Duff S. Hansen and another, copartners, doing business under the firm name and style of the Hansen Lumber Company, against C. O. Burford, Leonard Cole, J. S. Owen, and others. From a judgment for plaintiffs, defendants Cole and Owen appeal.

Reversed as to appellants.

Superseding opinion in 290 P. 602.

John T. Houser, of Long Beach, for appellants.

O'Connor & Findlay and R. Bruce Findlay, all of Colton, for respondents.

SEAWELL, J.

This cause is before us upon an order of transfer after decision by the District Court of Appeal, Fourth Appellate District, reversing the judgment.

In addition to our independent consideration, we have adopted a portion of the opinion of said District Court of Appeal, by Haines, J., pro tem., as expressing our view on the subject as to the sufficiency of the amended complaint, as well as for the argument and citation of authorities which it contains.

Plaintiffs Duff S. Hansen and Hans Hansen, copartners, doing business under the firm name of Hansen Lumber Company, sued in assumpsit to recover the price of lumber alleged to have been sold by them to defendants. Defendants V. B. Nowling, C. O. Burford, and Edith Burford, his wife, defaulted, but the action went to trial against defendants Leonard Cole and J. S. Owen.

The court gave judgment against all defendants for the sum of $3,116.09, based upon a finding that said defendants were engaged in a joint adventure and the lumber was sold and delivered to them as such joint adventurers. Defendants Cole and Owen appeal from the judgment on the ground that the evidence will not sustain a finding of liability against them on the theory of joint adventure or on any other theory. We are of the view that their contention must be upheld and the judgment reversed.

The evidence shows that Cole and Owen were real estate dealers and the owners of a 10-acre tract in Fontana, San Bernardino county. They approached defendant Nowling with the object of interesting him in the purchase of said tract. As a result of their negotiations, certain written agreements were entered into between Cole and Owen, on the one side, and C. O. Burford and Edith Burford, son-in-law, and daughter, respectively, of Nowling, on the other side. Under said agreements, two lots in said tract, each approximately 124 by 662 feet, were transferred to the Burfords. Nowling was not named as a grantee in the deeds or a party to the agreements, because he was involved by litigation, and, for that reason, might experience difficulty in obtaining loans, but it appears without conflict that he was interested with the Burfords. It was Nowling who negotiated for the purchase of the lumber for which plaintiffs herein seek to recover.

One lot was transferred to the Burfords in September, 1926, and the other in December, 1926. In each case agreements similar in form were executed at about the same time as the deeds. Each agreement recited the sale and transfer of a lot to the Burfords and the execution by them of a deed of trust upon the property to secure the payment of a note for $1,300 given for the purchase price. It was provided therein that the Burfords should, as quickly as could be done, procure a loan for the erection of "a five-room frame house, porch in front and rear, shingle roof, and garage 12′ x 20′, and a chicken unit for 1,000 chickens, 100′ x 20′ in size, paper roof, and all according to the plans and specifications of the Riverside Building and Loan Company," and that they should proceed diligently to construct said buildings. The deed of trust executed by the Burfords to Cole and Owen to secure the payment of $1,300 in each case was not to be placed of record until after the mortgage given to secure the building loan. No cash payment was made upon either of said lots.

The agreements further provided that, when the buildings were completed, the property should be sold to the best advantage, subject to the mortgage executed to a building and loan company as a first lien, and said trust deed as a second lien, and the profits from such resale should be equally divided between the first parties (Cole and Owen) and the second parties (the Burfords). Although the agreement did not so provide, it was understood that Nowling should share equally with the Burfords in the half of the profits to which they should be entitled. By a later provision the parties agreed to use their best efforts to sell the property, but the agreements contained no provision which made the right of Cole and Owen to participate in the profits conditional upon the sale being made to a purchaser procured by them.

Each agreement contained among its concluding provisions the following: "This contract shall not be deemed, held or construed anywhere as creating a copartnership between any of the parties to it, and shall be held to be merely the convenient means for recompensing each party for his share or interest in the property, there being no other practicable mode of division known to them at this time."

The construction of the buildings provided for was superintended by Nowling. He purchased the lumber for which plaintiffs here seek to recover the purchase price, and said lumber was charged to his name upon the books of the lumber company. It would appear that all parties believed that loans could be obtained upon each parcel sufficient to cover entirely the costs of construction, and the agreements were drawn with such a situation in contemplation. Smaller loans were obtainable than had been anticipated, and plaintiffs' lumber bill for more than $3,000 remained unpaid, except for certain trifling sums. Upon the refusal of their demands for payment, plaintiffs brought this action.

During the course of construction, $500 was obtained from Cole upon the representation, according to the testimony of Cole and Owen, that such a sum would complete payment of construction bills. The Burfords gave Cole their note for said sum. The second house was completed in April, 1927. According to Owen, Nowling refused to permit him and Cole to sell the houses, but gave a listing to another agent. Cole testified that the houses were later sold under the deeds of trust and purchased by plaintiffs.

[1] Nowling testified that he informed the lumber company that bills would be paid from the proceeds of loans upon the property, and also that his son-in-law, Burford, and Cole and Owen were interested with him. Plaintiff Duff Hansen testified that Nowling had stated that the price of the lumber would be paid from loans, and that others were interested with him, but he recalled only Nowling's son-in-law as having been mentioned as a party interested. Upon one occasion Cole and Owen drove Nowling to plaintiffs' lumber yard, but they did not participate in the discussion. By the terms of said agreements, it was made the obligation of the Burfords to obtain loans and proceed with the erection of the buildings on lots to which they held title, and in which the only interest of Cole and Owen was as beneficiaries under deeds of trust given to secure the price paid for the lots. It follows from a consideration of the agreements as a whole, as well as from the specific provision that they should not be interpreted as creating a partnership, that the construction of said buildings was a matter under the control and management of the Burfords and Nowling as independent contractors. The fact that Cole and Owen made visits to the property during the course of construction does not alter the relationship between the parties. They would naturally be interested in the project.

[2] We are further of the view that it is clearly to be implied from said clause negativing the existence of a partnership, and from the agreements considered apart from said clause, that it was the intention of the parties thereto that Cole and Owen should not be liable for any bills incurred for labor or materials in the construction of the buildings. A right to participate in profits does not, in the circumstances of this case, imply a liability for losses and expenses. Not only did Cole and Owen fail to assume liability for construction costs, but it is fairly inferable from the agreements that it was the obligation of the Burfords and Nowling to keep the construction costs within the amount to be realized from building loans upon each lot. There is no evidence that the agreements were subsequently modified. Nor is there evidence that Cole and Owen had any knowledge that a situation was arising in which practically the entire lumber bill for more than $3,000, representing one of the larger items in the construction costs, would be unpaid.

[3] The right of Cole and Owen to participate in the profits upon a resale cannot be viewed as a right to a real estate agent's commission, for the reason that payment to them is not made dependent upon their procuring the purchaser. Rather we are of the opinion that the right given Cole and Owen to share in the profits of a resale was a portion of the price charged by them to the Burfords for the two lots. They received no cash payments for said lots, and stipulated for the

right to participate in the profits of a sale, in addition to receiving the notes for $1,300. To adopt any other construction would be to make for the parties a contract contrary to their intention, as revealed in the instruments.

The cases of Leake v. City of Venice, 50 Cal. App. 462, 195 P. 440; Burks v. Weast, 67 Cal. App. 745, 228 P. 541; and Locke v. Duchesnay, 84 Cal. App. 448, 258 P. 418, strongly relied upon by respondents, differ too widely from the facts of the instant case to be authority for their contention.

[4] We find no circumstances in the purchase of the lumber by Nowling which would preclude us from giving effect to the actual agreement between the parties and require us to hold that Cole and Owen are liable on the theory that they permitted themselves to be held out to the plaintiffs as partners or jointly liable with Nowling and the Burfords, and plaintiffs sold the lumber in reliance upon said liability. Although Nowling testified that he told plaintiffs Cole and Owen were interested with him, plaintiff Duff Hansen, who handled the transaction, said that Nowling's son-in-law was the only person he could recall as having been mentioned as a party interested. Upon the books of plaintiffs the lumber was charged to Nowling alone. The evidence falls far short of establishing a basis for liability on such theory.

The District Court of Appeal, in its opinion as to the sufficiency of the pleadings and as to substantive matters, said:

"The court also found, inter alia: 'That at said time' (i. e., when the lumber was delivered) 'defendants, as shown by plaintiffs' exhibit No. 2, and defendants' exhibit No. "A" herein' (these being the two contracts) 'were engaged upon a joint adventure and that the title to said premises was delivered and transferred to defendants C. O. Burford and Edith Burford in compliance with said contract of joint adventure and that said goods, wares and merchandise were delivered to defendants as such joint adventurers.'

"It is claimed on behalf of the appellants that what is alleged is a book account, but that the evidence shows none except as against Nowling; that, inasmuch as the complaint does not set up any partnership or joint adventure between the defendants, evidence of such a relation was inadmissible, and that the finding that such a relation existed is outside the issues and cannot, therefore, be relied on to support the judgment; that the evidence is wholly insufficient to justify the finding that the appellants were engaged with the other defendants in a joint adventure, or that the appellants in any wise authorized the purchase of the lumber on their account, or agreed to pay for it; that the trial court should have granted them a nonsuit at the conclusion of the plaintiffs' evidence; and that, as against them, the judgment cannot be supported.

[5] "1. Appellants, as we saw, assert that, according to the pleadings, the account sued on is a book account to which they are strangers, since the proofs show that the only person charged on the plaintiffs' books was Nowling. The distinction, as a matter of pleading, between a book account and an ordinary contract debt not founded on a writing, is only important when, as in Wright v. Loaiza, 177 Cal. 605, 171 P. 311, the statute of limitations is involved and where the question arises whether suit may be commenced within four years, or must be begun within two years after the cause of action has accrued. In the present case, all the transactions were had within two years before the complaint was filed. In these circumstances the distinction between pleading a book account and pleading an indebtedness generally seems to us inconsequential.

"2. Appellants, quoting from 20 California Jurisprudence, 757, urge that: 'There is a material variance between a complaint against an individual for what is pleaded as an individual debt, and proof that the debt is that of a partnership of which he is a member'—citing Miner v. Rickey, 5 Cal. App. 451, 90 P. 718.

"While, therefore, as they say, they 'do not question the propriety of the common counts in the ordinary action against a debtor or joint debtors,' they 'do deny their sufficiency to hold the appellants as joint adventurers.'

"The situation in Miner v. Rickey was that an action was brought by the plaintiff Miner against Rickey alone, as the court said, at page 453 of 5 Cal. App., 90 P. 718, 719: 'Upon the theory that plaintiff was employed by and rendered services for the defendant (Rickey) individually. The defendant relied simply upon the denials in his answer of the material allegations of the complaint. * * * Defendant's evidence * * * tended to prove that whatever liability existed in favor of plaintiff was against a partnership of which the defendant' and another 'were the members.' The court went on to say that 'in this state it has been held that, when "several persons contract together with the same party for one and the same act, they shall be regarded as jointly and not individually or separately liable in the absence of any words to show that a distinct as well as entire liability was intended to fasten upon the promissors. Especially is this the rule as to the legal liability of partners upon their partnership obligations." '

"The language quoted by the court is taken, in substance, from Harrison v. McCormick, 69 Cal. 616, 620, 621, 11 P. 456, 458, where the Supreme Court, after making use of it, and citing sections 1430 and 1431 of the Civil Code as well as section 2442 of that Code and certain cases, goes on to say:

"'It is also well settled that parties to a joint contract must all be made defendants. "Of the parties to the action," the Code says, "those who are united in interest must be joined as plaintiffs or defendants." Section 382, Code Civil Proc. The plaintiff had the right to bring his action on the joint obligation of the parties to the contract against all the parties, or against the firm name by which they collectively contracted with him.'

"It is manifest that these cases lend no support to appellants' thesis. The liability asserted in the amended complaint is set up as the obligation, not of one person, as in Miner v. Rickey, but according to the pleading of several persons—that is, all the defendants—and therefore presumptively joint. Civ. Code, § 1431. The pleading is accordingly sufficient to charge that the liability is joint, and, as to that matter, no more would be affected had it been charged in terms that the defendants were joint adventurers. In Pike v. Zadig, 171 Cal. 273, 277, 152 P. 923, 925, following 15 Ency. Pl. & Pr. 920 and cases there cited, it was held that:

"'In an action against partners upon a partnership obligation, it is not necessary to allege a partnership between the defendants, but they may be declared against as any joint debtors.'

"The court added:

"'Indeed, a denial of the partnership, where it is alleged, does not raise a material issue'—citing Hunter v. Martin, 57 Cal. 365, where it is said: 'If they enter into that agreement, their liability did not depend upon their being partners.'

"Pike v. Zadig was followed by Shannon v. Calmus, 70 Cal. App. 652, 655, 234 P. 107, to the same effect.

[6] "A joint adventure has been defined as:

"'A special combination of two or more persons where in some specific adventure a profit is jointly sought, without any actual partnership or corporate designation.' 33 C. J. 841.

[7-9] "If, then, in suing partners on an obligation contracted by them as such, it is not necessary to allege the existence of the partnership, it would seem that the rule must apply a fortiori when the action is against joint adventurers, since a joint adventure is the looser form of association. We are therefore of the opinion that it was unnecessary for the plaintiffs, even though they claimed that the obligation of the defendants was that of joint adventurers, to allege the fact of the joint adventure. Proof of it, or that the obligation was incurred in the course of it, was not objectionable as a variance from the allegations of the complaint, and evidence of that relationship, in so far as it was a logical step in the plaintiffs' effort to prove, as against the defendants, what they had alleged as a joint obligation, was within the issues and properly admitted. Neither is the finding on the subject outside the issues, but it amounts really to the finding of a probative, rather than an ultimate, fact within the issues, and is, strictly speaking, unnecessary; the ultimate fact alleged and covered by another finding being the participation of all of the defendants jointly in the purchase of the lumber and their joint agreement, whether express or implied, to pay for it.

[10, 11] "3. Whether the findings of the trial court are supported by the evidence, however, is another question. Appellants stipulated in their written contracts with the Burfords that they should have half the net profits of the enterprise, and we think the meaning of that stipulation was that they were to have them as profits and not as resale commissions. By the provisions in the contract as to what should be done and how the project should be financed, and by their stipulation that the arrangement should not be construed as a partnership, they undertook to provide that the enterprise should be conducted in a certain way, that expenditures should be made in so doing, and, in effect, that, while they should receive half the profits, they should incur no liabilities. Whatever verbal directions they may, in conversations with Burford and with Nowling, have given the latter about going ahead with the work or ordering lumber or other materials for it, were, as we think the evidence shows without conflict understood by all of the defendants to be subordinate to this general scheme. There is no evidence that can be taken to mean that the appellants ever intended or were understood by Nowling or Burford to intend that any lumber should be bought except such as should be paid for from loans made in advance as provided for in the written contract. The mere arrangement for participation in the profits is by no means conclusive of the existence of a partnership. Coward v. Clanton, 122 Cal. 451, 55 P. 147. Partnership or none, indeed, there can be no doubt that the enterprise here involved was in some sort a joint adventure and that all of the defendants were participants in it. Appellants' contention that Nowling may have been engaged in a joint enterprise with the Burfords but that he was not a joint adventurer with the appellants seems to us a meaningless refinement. Taking it, then, as established that there was such a relation, how does this affect the responsibility for debts incurred by Nowling in pursuing the business of the association?

"In Leake v. City of Venice, 50 Cal. App. 462, 195 P. 440, 441, involving a voluntary unincorporated association engaged in promoting a racing enterprise, it was said that, 'conceding the association did not, as to the members thereof constitute a partnership in the full and generally accepted sense, nevertheless it appears that defendants were engaged in a joint venture in the nature of a partnership, to which the same rules for enforcing liability for debts incurred apply'—citing Ash v. Guie, 97 Pa. 493, 39 Am. Rep. 818.

"See, to the same point, Stitzinger v. Truitt, 81 Cal. App. 502, 506, 253 P. 971; Nowell v. Oswald, 96 Cal. App. 536, 537, 274 P. 423; Old River Farms Co. v. Roscoe Haegelin Co., 98 Cal. App. 331, 335, 276 P. 1047.

"The Supreme Court, speaking by Mr. Justice Henshaw, said in Westcott v. Gilman, 170 Cal. 562, 569, 150 P. 777, Ann. Cas. 1916E, 437:

" 'The all-important difference in construing partnership and relationships of this kind as between the parties themselves upon the one hand, and as between the parties themselves and those who have dealt with them upon the other hand, is this: That as between the parties themselves, when the rights of no third persons are involved, the question is one of determination merely upon the letter of the contract and the conduct of the contracting parties to each other under it. When, however, the rights of third parties are involved, the basis of the inquiry shifts materially, and the fundamental question is, What had those third parties the right to believe from the language of the contract and from the conduct of the parties to it as affecting them? and not as affecting each other.'

[12] "It is, as we think correctly, laid down in 33 C. J. 872, title, 'Joint Adventurers,' that 'one who is a member of a joint adventure but who is not known to be such at the time by a third person who enters into a contract with another member individually is not rendered liable to such third person for services rendered under such contract, or for damages for the breach thereof, by the fact that the contract relates to the business of the joint adventure, if the contracting member in making such contract exceeded his authority and had no power to bind his associates thereby.'

[13] "That, indeed, follows from the like rule of the general law of agency thus stated in the same work (2 C. J. 842):

" 'In the absence of estoppel or ratification an undisclosed principal is not liable on the contracts of one assuming without authority to act for him, or on contracts made by his agent in excess of his authority or not in the course of his employment.' Harder v. Continental Printing Co., 64 Misc. Rep. 89, 117 N. Y. S. 1001.

[14] "If there is one thing undisputed upon the testimony, taken as a whole, it is that, though the enterprise was in some sort a joint one, and, though there is in the testimony of Nowling and Burford much loose talk, largely in the nature of conclusions of the witnesses, about what Nowling was authorized to do, it was clearly understood by all the associates that all the material bills were to be paid from the mortgage loans, and that they all understood the writings to negative any idea that appellants should be holden for them.

"We think it clear from the record that Nowling had no actual authority from the appellants to bind them to any personal liability for lumber bills. As between the parties, their arrangements will be given effect.

[15] "If, then, there is any basis for the trial court's finding that appellants participated in ordering from the plaintiffs the merchandise mentioned in the complaint and agreeing to pay for it, it must rest on some apparent authority to Nowling to represent appellants in so doing. While appellants admit having originally gone with Nowling when he first talked to the Hansens, and while one of the Hansens, who so far as appears is the only one with whom Nowling talked, as we saw, testified that Nowling, in negotiating with him, said that there were 'others' interested, and while Nowling says that in such negotiations he specified Cole and Owen as responsible men interested with him, yet, as Hansen testifies that he did not even recollect that Nowling had mentioned appellants by name, it is clear that in furnishing the lumber the plaintiffs could have placed no particular reliance on appellants' association with Nowling, or on appellants' responsibility. They may have understood generally that there was a group of persons involved, though no group name was used and no individuals were apparently considered by them, other than Nowling and Burford, whose names alone seem to have made any impression on them. It seems clear that this evidence is too tenuous to support any claim of estoppel, or any theory that the plaintiff is entitled to recover as against the appellants by reason of reliance by the latter on any ostensible agency. It was said in Nofsinger v. Goldman, 122 Cal. 609, 614, 55 P. 425, 427, with respect to an ostensible partnership, and it may be said by analogy with respect to an ostensible agency claimed to result from a joint enterprise, that 'the rule of responsibility and liability declared in section 2444 of the Civil Code is founded upon the equitable principle of estoppel. One who has suffered another to give credit or incur a liability upon the strength of his representations, made or permitted, that he is in fact a partner, will not thereafter be allowed to deny those representations. But, as is declared in the succeeding section of the Code (2445), no one is liable as a partner who is not such in fact, excepting as provided in section 2444.'

"It is apparent from the testimony of Mr. Hansen that credit was not given to Nowling by reason of his statement, if he made any, of the relation of the appellants to the enterprise.

"In these circumstances the finding of the trial court, in so far as it determines that the appellants participated in the purchase of the goods, wares, and merchandise from the plaintiffs and in the agreement to pay for the same, is, it seems to us, without any substantial support in the evidence."

Respondents did not, by their own admission, part with their goods on the faith of payment by the appellants. We may also add that the equities of the transaction, so far as all the parties are concerned, are not known to us.

The judgment, as it respects Cole and Owen, is reversed.

We concur: WASTE, C. J.; SHENK, J.; LANGDON, J.; PRESTON, J.; RICHARDS, J.

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212 Cal. 94

NELSON v. LAKE HEMET WATER CO.

McDOWELL et al. v. SAME.

L. A. 8305.

Supreme Court of California.
March 30, 1931.

Rehearing Denied April 27, 1931.

1. Judgment ⚷668(1).

Supreme Court's judgment annulling commission's order and holding that irrigation corporation was not public utility and was liable on water certificates *held* res adjudicata even as to nonappealing certificate holders.

> It appeared that corporation in question sold several hundred tracts of land, together with perpetual water rights evidenced by water certificates; that Railroad Commission held that corporation was public utility, and was entitled to increase its rates; that only part of protesting certificate holders who had appeared before commission sought review by Supreme Court, which annulled order of commission, and held that corporation was not public utility, and that commission had no jurisdiction over it; and that corporation then took attitude that Supreme Court's judgment was binding only on those certificate holders who had sought review of commission's order.

2. Judgment ⚷713(2).

Questions and proof which could have been presented before judgment are conclusively deemed to have been presented.

3. Waters and water courses ⚷257(1).

Payments of increased rates by orchardists dependent on irrigation, being compulsory, *held* not abandonment of right to enforce contract rates.

In Bank.

Appeals from Superior Court, Riverside County; J. W. Curtis, Judge.

Separate actions by John G. Nelson and by Edgar E. McDowell and others against the Lake Hemet Water Company, the actions being tried together. From an adverse judgment in each case, defendant appeals.

Affirmed.

Rehearing denied; SHENK, J., dissenting.

Hunsaker, Britt & Cosgrove, of Los Angeles, for appellant.

Henry Goodcell, of San Bernardino, and W. G. Irving and Fred L. Hamblin, both of Riverside, for respondents.

PRESTON, J.

We have been led to a conclusion on a simple question of law which disposes of the appeals in both of the above causes, which were tried together, and renders superfluous a discussion of the various other questions so ably urged by appellant. This conclusion is that the respective rights of the parties to this litigation have been previously determined and settled by a judgment of this court; hence the doctrine of res adjudicata has thereby intervened. We refer, to the case of Allen v. Railroad Commission, 179 Cal. 68, 175 P. 466, 8 A. L. R. 249, hereinafter called the Allen Case for convenience. Reference is made to said case for a complete history of defendant corporation, its manner of doing business, together with a description of the rights and claims of Allen and others, all of whom, including respondents, were in an identical situation; therefore only a brief recital of the facts is required.

Appellant and an allied corporation acquired ownership of a large area of agricultural lands along the San Jacinto river in Riverside county, together with a water supply from said river and its tributaries. Between the years 1889 and 1915 it subdivided said lands and sold them in small areas, selling likewise with each tract a perpetual water right appurtenant thereto, evidenced by a contract in the form of so-called water certificates, which provided for one-eighth of a miner's inch of water per acre for each of said tracts during the irrigation season at an annual rate of $2 per acre. Several hundred of these tracts were sold and a corresponding number of water certificates were issued. In the course of time, the weight of these contracts at so low a figure bore heavily upon the corporation. Accordingly, in 1915

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

it came before the Railroad Commission and petitioned, alleging itself a public utility with respect to the service to the owners of these water certificates, and praying to be allowed to abrogate said contracts and that each holder be required to pay an increased charge for his water supply. The commission entertained the petition; presumably all the legal steps, such as notice and publication, were duly taken, and the parties were brought before the commission regularly for the hearing. The hearing was held, evidence taken, and the proceeding resulted in an order of the commission, made in 1916, granting the prayer of the petitioner and declaring it a public utility, and attempting to increase the water rate of each holder from $2 to $3, directing a compliance therewith. Respondents themselves or their predecessors in interest were thus legally before the commission as parties in the matter of this hearing.

Following this order of the commission, a rehearing was denied, and thereafter petition was made to this court by some of the certificate holders only for a review and annulment of the order. Other of the certificate holders in like situation, for reasons which we can only surmise, did not become actual parties by name to the proceedings in this court. Respondents and their predecessors were of this latter class. Said proceedings terminated in the order and judgment in the Allen Case, above cited.

This court held that the water supply of the corporation had not been dedicated to a public use at the time of the issuance of said water certificates; that the water right vested in the landowner, and was made appurtenant to his private property; that these water rights constituted easements attached to the respective lands, and impressed a corresponding servitude upon the source of supply and distributing system of the corporation; that in the making of said contracts both parties to each thereof acted as of right in their private capacities.

Notwithstanding this holding, appellant immediately took the position that the Railroad Commission order was in full force and effect as to all parties who had not actually participated in the proceeding for review by this court; in other words, only such parties as actually petitioned this court received the benefit of the annulment of said order of the commission by the judgment in the Allen Case. Acting upon this contention, appellant required respondents in this action to pay the increased charge fixed by the commission, which said charge respondents reluctantly paid for a time.

Later, and in the year 1920, another hearing was had before the Railroad Commission, in which still another increased rate was allowed as to certain utility services being rendered by the corporation. Appellant again assumed that this rate was applicable to the respondents, and required that they conform to it; this, too, in the face of the fact that by the order of 1920 the commission expressly declared that it was without jurisdiction to fix the rate to be paid by the certificate holders. In other words, the commission expressly declared the Allen Case to be a test case and to have settled the rights of all the certificate holders and the status of appellant toward them, whether or not they were participants in the special proceedings for review by this court.

The result of this situation was that the two actions now before us were instituted in the year 1920 to compel appellant to respect the water certificates originally issued and to supply respondents with the water called for therein at the rate therein specified. Issue was joined on the complaints; several special defenses were interposed; trials were had, followed by findings of fact, conclusions of law and judgments in full accord with the allegations and prayers of the complaints, from which defendant prosecuted these appeals, each of which is primarily predicated upon the contention that the Allen Case left the order of 1916 in effect as to all the respondents, and as a consequence the Superior Court was without power to overthrow or modify it in this action. It is this contention which we shall now discuss.

[1] After a consideration of the proceedings before the commission and opinion and judgment of this court sitting in review thereof, we are forced to conclude that the fixing of the status of appellant under the utility law was the primary task undertaken by both tribunals. The judgment in question rested solely upon the conclusion that appellant was not a public utility, by reason of which fact the Railroad Commission was without authority or jurisdiction over it. No other important question was before the court.

This fact seems to classify this holding at once as a species of in rem judgment, binding upon appellant and all others who were before the commission and who were in the like situation of petitioners in said Allen Case. Decrees of divorce or annulment, which settle the marital status of persons, decrees establishing residence, sanity, insanity, or heirship, seem analogous, as do also decrees in probate, bankruptcy, or admiralty. It would be illogical, indeed, to hold that appellant was not a public utility in its relationship with a vast number of the certificate holders, but that in its relationship with some others it was a public utility, administering a public service; in other words, to charge certain holders of certificates of appellant of like issue, purpose, and tenor upon a private contract one rate and others upon a contract affected by a public interest at another rate is thoroughly incongruous. The decree of the Railroad Commission of 1916 must therefore be held to have been overthrown entirely by the judgment in the Allen Case, and in so doing appellant was established as and declared to be a private corporation as to the services being rendered the said certificate holders.

The situation must be held to be the same as if the Railroad Commission had decided the issue presented to it differently by holding that the certificate holders contracted with appellant in its private capacity only. No one would say that such a holding would not have bound appellant in its relationship with all said certificate holders. The fact that this adjudication was made by review and annulment of the decree, instead of by affirmance thereof, does not prevent it from being final so long as it is clear that an adjudication of the disputed question was intended.

[2] In this view of the cause, the Allen decree could have been sought by one petitioner alone, and, when secured, it would have been binding upon appellant as to all the class of certificate holders to which he belonged. It is therefore not germane to review the events transpiring prior to this adjudication, as all questions which could have been raised prior to the judgment are conclusively deemed to have been presented, and all proof that could have been presented is conclusively presumed to have been received. Price v. Sixth District, 201 Cal. 502, 258 P. 387.

Likewise it is of no avail to make even a successful assault upon the doctrine of the Allen Case, for it could in no event avail appellant as against respondents, for all rights between appellant and respondents were there finally adjudicated as of that date.

[3] The contention that, by paying the rate prescribed by the Railroad Commission for one or two seasons, respondents acquiesced in the claim of appellant that it was a utility, need receive but little consideration. The court found these payments to have been made under compulsion. Respondents, being orchardists, had to have water, and there was no other supply; appellant refused to respect the contract, and respondents' payments must therefore be considered as compulsory. It is certainly not a situation upon which to predicate the abandonment of a private right of property.

The claim that respondent McDowell's certificates postdated the judgment in the Allen Case is met by the undisputed finding that the certificates held by him were reissues of certificates which antedated the Railroad Commission hearing, and whose holders were, constructively at least, before the commission at said hearing.

We are confirmed in the views we have expressed by the holding of the commission itself that the Allen Case was a test case, and settled the status of appellant as to all certificate holders before the commission, and in accord with this declaration it refused to fix any rates in 1920 between appellant and respondents.

It follows that the judgment in each case is hereby affirmed.

We concur: WASTE, C. J.; SHENK, J.; LANGDON, J.; SEAWELL, J.; RICHARDS, J.

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212 Cal. 113

SMALLBERG v. STATE BAR OF CALIFORNIA.

L. A. 12466.

Supreme Court of California.
March 30, 1931.

Rehearing Denied April 27, 1931.

1. Attorney and client ⚷53(2), 58.

Attorney *held* guilty of knowingly and intentionally aiding and abetting unlicensed persons to "practice law," justifying one year's suspension.

> The acts of the unlicensed person in interviewing client with view to procuring agreement enabling such unlicensed person to control negotiations and litigation, and in procuring complaints to be drawn, verified, and filed, procuring appointment ex parte of guardian ad litem, and causing process to be issued, all before attorney had ever seen or interviewed parties whom he was supposed to represent and all done with knowledge, consent, and connivance of attorney constituted "practice of law." In a larger sense, "practice of law" includes legal advice of counsel, and preparation of legal instruments and contracts by which legal rights are secured, although such matter may or may not be depending in a court, as well as generally understood meaning of performing services in court.
>
> [Ed. Note.—For other definitions of "Practice of Law," see Words and Phrases.]

2. Attorney and client ⚷53(2).

Attorney *held* properly found guilty of accepting professional employment as result of activities of unlicensed person who for compensation controlled, directed, and influenced such employment.

3. Attorney and client ⚷38.

Attorney *held* guilty of willfully violating rules of professional conduct in advising commencement and prosecution of actions without having been consulted by plaintiff.

In Bank.

The Board of Governors of the State Bar of California recommended the suspension of Alfred J. Smallberg as an attorney at law, and he applies for review of such recommendation.

Affirmed.

E. A. Klein and Edward J. Cotter, both of Los Angeles, for petitioner.

William C. Mathes and Philbrick McCoy, both of Los Angeles, for respondent.

PER CURIAM.

The petitioner applies to this court for a review of the proceedings had before the State Bar of California in the matter of an accusation presented before the local administrative committee of said body in and for the county of Los Angeles, wherein the petitioner was accused of the violation of certain of the rules of professional conduct adopted by the State Bar of California with the approval of this court, and which are specifically set forth in said accusation. A hearing was had thereon before said committee in the course of which much evidence was presented pro and con at the conclusion of which the committee made and presented to the board of governors of the State Bar certain findings and conclusions, with its recommendation that the petitioner be disbarred. The latter body upon an examination of the record thus presented before it approved certain findings of the committee, but proceeded to make certain other and further findings, and having done so recommended to this court the suspension of the petitioner for the period of one year. The record of the hearing had before the administrative committee and of its findings and recommendation thereon, as well as the findings and recommendation of the board of governors of the State Bar, have been presented to us upon this application and hearing had thereon; we have carefully examined this record and have reached the following conclusions: The facts as presented in this proceeding do not differ materially from those which were presented to and considered by us in the case of Townsend v. State Bar of California, 291 P. 837, recently decided, and the proceedings in Shaw v. State Bar of California, 297 P. 532, in which our decision has just been filed.

The petitioner was on or about August 7, 1929, engaged by one Nathan Balkin to act in his capacity as an attorney and counselor at law and to advise with and cooperate with said Balkin in the matter of the commencement and prosecution of two actions to be brought against one B. H. Morgan to recover damages on behalf of two certain parties named Angelita Mena and Cruz Mena for personal injuries sustained in an automobile accident. Nathan Balkin was at the time and for some time prior thereto had been engaged in the business of soliciting and adjusting personal injury cases under the fictitious name of "General Claims Bureau of Southern California." He was not an attorney and counselor at law, but he claimed the right to engage in said business under and by virtue of a license issued to him under the provisions of section 633e of the Political Code, as added by St. 1925, p. 421. He was, in the terms of modern parlance, an ambulance chaser and was well known by the petitioner herein to have been such at the time of the accident and at the time when he sought to enlist the services of the petitioner as an attorney and counselor at law, and to have obtained in that capacity a contract in writing from the aforesaid two persons much similar in its scope and content to the contracts which were given consideration by this court in the cases of Townsend and Shaw, supra, and as to the substance of which the petitioner herein was fully advised at the time he entered into his engagement with Balkin. Among the provisions of said contract was one by which Balkin was to receive a one-third interest in whatever amounts were recovered in the adjustment of or litigation upon said claims. Balkin was authorized to employ attorneys to assist him in effecting such adjustment or conduct such litigation, with the proviso that all attorney's fees were to be paid out of his share in the outcome. On August 5, 1929, the accident in which the parties were injured occurred. On August 6th the parties injured were interviewed by a clerk of Balkin and their signatures were obtained to said contract. On August 7th relations were established between Balkin and the petitioner herein and on that day the latter was instructed to prepare complaints in two actions to be brought against Ben H. Morgan on behalf of said injured parties. The petitioner prepared the two complaints, attached to each his signature as attorney of record for the plaintiff in each case and delivered the same to Balkin, who took them to Orange county and there procured the verification thereof by Manuel Mena, the husband of Angelita and the father of Cruz. Cruz Mena being a minor, the petitioner also prepared an application for the appointment of Manuel Mena as guardian ad litem for her, which he delivered to Balkin, who attended both to the verification of said complaints and their said petitions and to the appointment of Manuel Mena as guardian ad litem of the minor. He also attended to the filing of the complaints in the superior court of Orange county and to the issuance and service of process thereon. The petitioner did not see or have any communication with Manuel Mena or with either of the parties in said actions until several days after the complaints therein were filed. He then went to the home of Manuel Mena for the first time and in talking with the latter learned that he had in the meantime been advised by friends to consult other attorneys with a view to their substitution for the petitioner in the cases which had theretofore been filed. He thereupon and within the next day or two, of his own motion, caused the two actions to be dismissed without prejudice, but immediately after doing so was served with notice of substitution of other attorneys, who presently came into court and caused the dismissal of said causes to be set aside. Thus ended the petitioner's connection with said cases, but did not end the inquiries of the parties concerned as to the manner in which the connection of the petitioner with the causes had been brought about and the conduct of the same prior to their dismissal. The record in this proceeding may well be said to illustrate the evils of ambulance chasing in their most vicious and aggravated forms. On the day after Manuel Mena and his family were involved in an automobile collision in which several members thereof, including his wife and minor daughter, were seriously injured, Nathan Balkin, who describes his business as that of "Just Personal Injury Claims" and who had been engaged in that business in Los Angeles for a period of five years, operating under the fictitious name of "General Claims Bureau," having learned of said accident through a communicative police officer, went to the home of Manuel Mena at Yorba Linda, a little town in Orange county, together with his "clerk," so called, who conducted the main negotiations with Mena. They took with them the printed forms of four contracts, which they importuned Mena to sign. They exhibited to him the card of the petitioner and stated that he was the attorney who was to be employed to handle the several cases which Balkin was authorized to commence and prosecute under the terms of the contracts. Mena was an ignorant Mexican, speaking the English language indifferently and being barely able to read and write. He was prevailed upon to sign these contracts, although, as he states, he did not read them and they were not read over to him, the contents thereof being stated in general terms. Having obtained his signature the pair hurried back to Los Angeles to the office of this petitioner there, where they laid the facts rather imperfectly before him and directed him to prepare the two complaints and the papers providing for the appointment of a guardian ad litem for the minor child. The petitioner prepared these papers and on the following day Balkin and his clerk went to the home of Mena, where the latter was shown the papers and told generally as to their contents, after which he was taken to the office of a notary public in Orange, where he signed the verification to each of said complaints; whereupon the parties went immediately to the courthouse where Balkin's clerk attended to the filing of the complaints and the issuance of the process thereon. He also attended to the service of such process and to the obtaining of such ex parte order as was required for the appointment of Manuel Mena as guardian ad litem of his minor child. All of these details were attended to by Balkin or his clerk before the petitioner had ever seen or held any interviews with any member of the Mena family, and it was only after the petitioner had learned from Balkin or his clerk that the Menas were dissatisfied and were contemplating a change of attorneys that the petitioner held his first interview with the Menas at their home in Yorba Linda, as above stated, immediately after which he of his own motion dismissed said actions.

Shortly thereafter the local administrative committee of the State Bar entered upon the investigation which resulted in the presentation of three separate charges against the petitioner for alleged willful breaches of certain of the rules of professional conduct which had theretofore been adopted by the State Bar. By the first of these the petitioner was charged with having aided and abetted an unlicensed person or persons to practice law in connection with the claim of Angelita Mena and Manuel Mena against Ben H. Morgan. By the second accusation it was charged that the petitioner had on or about August 8, 1929, accepted professional employment in the aforesaid cases as a result of the activities of an unlicensed person, to wit: Nathan Balkin or General Claims Bureau of Southern California, who for compensation controlled, directed, and influenced such employment. Each of the foregoing allegations were alleged to constitute a willful breach of rule 3 of the rules of professional conduct of the State Bar of California. By the third of said accusations the petitioner was charged with having advised the commencement and prosecution of the two actions above referred to without having been consulted by the plaintiffs therein with reference thereto, and which was alleged to constitute a willful breach of rule 10 of the rules of professional conduct of the State Bar of California. At a later stage in the proceeding the further accusation was added to the effect that the petitioner had also violated the provisions of subdivision 3 of section 287 of the Code of Civil Procedure.

After a quite full hearing upon the foregoing charges before the local administrative committee that body made findings thereon setting forth substantially and in detail the facts above recited, and as its conclusion thereon it decided as to the first of said charges that it was not true that the petitioner had aided or abetted an unlicensed person to engage in the practice of the law. This conclusion, however, the board of governors of the State Bar, upon the submission of the record upon said hearing, refused to adopt, but on the contrary expressly found and concluded that in said cases and in approximately ten other cases similarly initiated and handled by the accused he had knowingly and intentionally aided and abetted unlicensed persons to practice law. As to the other charges the board of governors approved the findings and conclusions of the administrative committee, confining its recommendation, however, to the suspension of the petitioner from the practice of the law for the period of one year.

[1-3] Upon the examination of the entire record herein we are satisfied that the board of bar governors was correct in its conclusion to the effect that the petitioner, with relation to the cases above referred to was guilty of having knowingly and intentionally aided and abetted an unlicensed person or persons to practice law as that term was defined by this court in the recent case of State Bar of California v. Superior Court, 207 Cal. 323, 278 P. 432, wherein this court adopted the definition of that term contained in the case of Eley v. Miller, 7 Ind. App. 529, 34 N. E. 836, 837, to wit: "As the term is generally understood, the 'practice' of the law is the doing or performing services in a court of justice, in any matter depending therein, throughout its various stages, and in conformity to the adopted rules of procedure. But in a larger sense it includes legal advice and counsel, and the preparation of legal instruments and contracts by which legal rights are secured, although such matter may or may not be depending in a court." In the case of People v. Merchants' Protective Corp., 189 Cal. 531, 535, 209 P. 363, 365, this court gave extended consideration to the question as to what was embraced within the term, "practice of the law," in the course of which it held that, "counsel and advice, the drawing of agreements, the organization of corporations and preparing papers connected therewith, the drafting of legal documents of all kinds, including wills, are activities which have long been classed as law practice. The Legislature is presumed to have used the words as persons generally would understand them, and not being technical or scientific terms 'to practice as an attorney at law' means to do the work, as a business, which is commonly and usually done by lawyers here in this county. [Citing numerous cases.]"

In the instant matter the record sufficiently shows that a number of acts were done and performed by Nathan Balkin and his clerk which were clearly within the foregoing category, such as the interviewing of Manuel Mena with a view to the procurement of such written agreements as would enable Balkin, an unlicensed person, to control the conduct of whatever negotiations or litigation might ensue with respect to the aforesaid claims for damages for personal injuries to the several members of his family, including the right to make settlements, employ attorneys, physicians, and to "institute any proceedings in my behalf that you may see fit to effect a recovery." Pursuant to such employment Balkin procured the complaints to be drawn by the petitioner and proceeded to have the same verified and filed, procured the appointment ex parte of a guardian ad litem, to cause the process to be issued upon the filing of said complaints, and to proceed to make service of the same, all before the petitioner herein had ever seen or interviewed the parties whom he was supposed to represent as attorney of record in said cases. In other words, every essential step in the procurement of said business, in the ascertainment of the facts which were to form the basis of whatever complaints were to be prepared and filed, the presentation of such complaints to the parties who were supposed to verify and who did in fact verify the same, the procurement of the notary to take and certify to such verification, the presentation for filing of the complaints when thus verified, and the issuance and service of the process thereon—all of these things were done by Balkin or his clerk with the knowledge, consent, and connivance of the petitioner herein. We are of the opinion that the aforesaid succession of acts in connection with the cases of Angelita Mena and Cruz Mena v. Ben H. Morgan constituted the practice of the law as that term has been defined in the foregoing decisions of this court, and this being so we are constrained to hold that the petitioner was properly found guilty of having willfully aided and abetted an unlicensed person or persons to practice law, contrary to the provisions and inhibition of rule 3 of the rules of professional conduct adopted by the State Bar. We are also satisfied that the petitioner was properly found guilty of a further violation of the provisions of said rule through his acceptance of professional employment on behalf of the plaintiffs in the two personal injury cases above referred to and which professional employment was offered to him as a result of the activities of an unlicensed person or persons who for compensation controlled, directed and influenced such employment. We are further satisfied that the petitioner was properly found guilty of a willful violation of the provisions of rule 10 of the rules of professional conduct of the State Bar in that he advised the commencement and prosecution of the two actions above referred to without having been consulted in reference thereto by the plaintiff in either of said actions when, as shown by the record herein, he should have come into such relation of personal contact with the plaintiffs to said actions or with some one other than an ambulance chaser, authorized to represent them, as would have caused the relation of attorney of record of the aforesaid plaintiffs to properly and legitimately be created. As to the alleged violation by the petitioner of the provisions of subdivision 3 of section 287 of the Code of Civil Procedure, we make no finding and are required to make none, since the aforesaid findings and conclusions of the board of governors of the State Bar are sufficient to fully justify the recommendation of that body that the petitioner should be suspended from the practice of the law for the period of one year.

It is therefore ordered that the petitioner shall be and he is hereby suspended from the practice of the law within the state of California for the period of one year.

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212 Cal. 142

JAMES v. HALEY et al.

L. A. 10905.

Supreme Court of California.
March 31, 1931.

1. Landlord and tenant 🔑180(3).

In tenant's action against landlord for eviction, finding as to quantity of land leased *held* supported.

2. Landlord and tenant 🔑130(3), 132(2), 180(3).

Findings against landlord on issue of eviction, deprivation of tenant of light and air, and breach of covenant of quiet enjoyment, *held* supported.

3. Landlord and tenant 🔑180(4).

Tenant evicted by landlord, may recover any resulting damages.

4. Damages 🔑222.

When plaintiff pleads special damage, which is denied by defendant, and offers evidence to support it, that issue becomes material one on which losing party is entitled to finding.

5. Trial 🔑391.

Findings are required on all material issues raised by pleadings and evidence, unless they are waived.

6. Appeal and error 🔑1071(6).

Where plaintiff was not entitled to recover on three of the four items of damages pleaded, findings entirely silent as to each issue raised in reference to damage *held* insufficient, requiring reversal of lump sum award.

In Bank.

Appeal from Superior Court, Los Angeles County; Samuel R. Blake, Judge.

Action by George F. James against John O. Haley and others. From a judgment for plaintiff, the named defendant appeals.

Reversed.

Winterer, Combs & Ritchie and McComb & Hall, all of Los Angeles, for appellant.

Adams & Peck, E. C. Peck, Francis D. Adams, and W. J. McNichols, all of Los Angeles, for respondent.

PER CURIAM.

This is an appeal from a judgment of the trial court in an action brought by a tenant against his landlord for damages alleged to have been suffered by reason of the breach, by the landlord, of the covenant of quiet enjoyment, and by reason of the eviction by the landlord of the tenant from a portion of the leased premises. The case was tried before the court without a jury, resulting in a verdict in plaintiff's favor in the sum of $2,700. From this judgment, defendant John O. Haley appeals; the action having been dismissed as to all other defendants. Respondent on this appeal has not seen fit to aid this court with any briefs, nor did he respond to an order to show cause.

The facts out of which this controversy arose, and most of which were found by the trial court, are as follows:

[1] On September 28, 1920, defendant Haley and Adelaide Corbley, as lessors, leased to T. C. Larter and associates for the period of two years certain real property located at the southwest corner of Sunset boulevard and McCadden place, in the city of Los Angeles. It appears that at that time defendant owned or controlled three lots, designated as lots 1, 2, and 3, at that corner. It is admitted that the lease in question was of a certain portion of lot 1, then unimproved. The exact portion of lot 1 that was so leased was one of the main questions presented to the trial court. Both parties had lost their copies of the lease, so that its contents had to be proved by parol. On the question of the extent of the lease, it is admitted that it was contemplated by the parties that Larter was to build a real estate office on the premises leased and use and occupy the same for real estate purposes. Defendant contends that all that was leased was the property actually covered by this building, and an entrance thereto. The plaintiff, who is the assignee of Larter and

associates, contends, and the trial court found, that there was leased at this time a rectangular strip 52.81 feet by 60 feet, for the purpose of conducting a real estate office thereon. This finding, although based on conflicting evidence, is amply supported by the record.

After taking possession of the property, Larter erected a real estate office thereon and proceeded to grade and plant in lawn the portion of the premises here in dispute. In addition, Larter erected, with materials furnished by defendant, a decorative fence in back of the office, on the line where he deemed the southerly boundary of the leased premises to be. There can be no doubt that these acts were all done with the knowledge, consent, and approval of the landlord, and that all of the premises so graded and planted, and bounded by the fence, were treated by the parties thereto as included within the lease. The portion of the premises immediately east and west of the office, and which had been graded and planted in lawn by Larter, was used by Larter and his assignees for advertising purposes.

Near the expiration date of this lease, defendant Haley, at the request of Larter, extended the term thereof until September 28, 1924. On October 1, 1922, Larter and his associates sold to plaintiff their interest, both in the real estate office and in the lease. Plaintiff immediately took possession, with the express approval and consent of defendant, and paid all installments of rent as they fell due, all of which were accepted by defendant.

It then appears that in December of 1922, defendant leased to one R. F. Meyers all of lots 1, 2, and 3 above mentioned, save that portion occupied by plaintiff. The defendant and Meyers then attempted to induce plaintiff to vacate the premises occupied by him, but he refused so to do. In November of 1923, after these negotiations had failed, Meyers, with the consent and approval of defendant, entered upon the property leased by plaintiff east of the real estate office and erected thereon a building, flush with the sidewalk. The west wall of this building was within 18 inches of the east wall of the plaintiff's office, and effectually blocked light and air from that side. On January 17, 1924, Meyers, again with the consent and approval of defendant, entered upon the property leased by the plaintiff, west of the real estate office, and erected thereon a building flush with the sidewalk. The east wall of this building was within 18 inches of the west wall of plaintiff's office, and effectually blocked light and air from that quarter. Not content with these acts in violation of plaintiff's rights, on January 22, 1924, Meyers again entered upon plaintiff's premises, and with the consent and approval of defendant dismantled the decorative fence in the back and to the south of the real estate office, and erected a fence 9½ feet high within 18 inches of the south wall of the office. By these acts of Meyers, acting with the consent and approval of defendant, not only was plaintiff deprived of portions of the leased property used by him for advertising purposes, but his office was so boxed in that it was no longer visible, except from directly in front. It likewise appears that the advertising boards of plaintiff were torn down and certain electric light standards used to illuminate the office at night were removed.

[2] We have no hesitancy in holding that the findings in reference to the eviction, deprivation of light and air, and breach of the covenant of quiet enjoyment are amply supported by the record.

The trial court, however, failed to make any findings at all as to damages suffered by reason of these acts, but simply rendered judgment against defendant in the sum of $2,700. The theory upon which the trial court proceeded is not clear. The trial court, after making findings as to the facts in reference to the eviction, stated, "as a conclusion of law from the foregoing findings of fact, the court finds that the plaintiff, George F. James, is entitled to judgment against the defendant John O. Haley in the sum of twenty-seven hundred ($2,700.00) dollars and for his costs, and that judgment be entered accordingly." No findings as to special or general damage were made at all. Assuming that the above-quoted conclusion could be treated as a finding of fact, it would not be a sufficient finding upon the issues presented by the pleadings. The plaintiff pleaded that he had been damaged in four particulars:

(1) That he had been deprived of advertising space formerly enjoyed by him, to his damage in the sum of $500 a month.

(2) That he had expended on additional billboards the sum of $500.

(3) That, by reason of the fact that he has been cut off from the view of the public and his office rendered dark and insanitary, he has lost patronage, to his financial damage in the sum of $25,000.

(4) That, by reason of being excluded from three-quarters of his leased premises, he has been injured in the sum of $500 a month.

[3-5] Each allegation as to damage was specifically denied by defendant, so that an issue was formed in reference to each of these allegations. It is of course clear that, when a tenant is wholly or partially evicted by the acts of his landlord, he may recover any damages that he may suffer as a result of the eviction. Hamer v. Ellis, 40 Cal. App. 57, 180 P. 30. It is also clear, however, that, when a plaintiff pleads special damage, which is denied by defendant, and offers evidence to support it, that issue becomes a material one on which the losing party is entitled to a finding. Here the findings are entirely silent as to each and every issue raised in reference to damage. Ever since the adoption of the Codes, it has been the rule that findings are required on all material issues raised by the pleadings and evidence, unless they are waived, and, if the court renders judgment without making findings on all material issues, the case must be reversed. 24 Cal. Jur., p. 935, § 183, and p. 940, § 186.

In Klein v. Milne, 198 Cal. 71, at page 76, 243 P. 420, 422, this court, in discussing a similar situation, stated: "The denials of the cross-defendants specifically put in issue these averments as to both the special and the general damages sustained by the cross-complainant Hovis. The findings of the trial court upon the issues thus presented are general and to the effect that Hovis was damaged to the extent of $786.50. We think the trial court was in error in thus making a general finding upon the foregoing separate and specially averred items of damage alleged to have been sustained by the cross-complainant Hovis. Where a complainant or cross-complainant does not in his pleading rely upon a general averment of damages, but pleads both general and special damages, and particularizes the items wherein each consists, and where the defendants or cross-defendants put these specifically in issue, they are entitled to special findings upon the issues as thus presented in order that they may point out the precise errors of the trial court upon motion for a new trial and upon appeal."

[6] The importance of this rule, as applied to the facts of this case, becomes apparent when the following facts are considered. The complaint is framed on the theory that plaintiff, as an individual, is suing the defendant for damages suffered by himself as an individual, because of the wrongful acts of defendant. At the trial it developed, evidently to the surprise of both counsel, that, although the plaintiff had purchased the building and assignment of the lease as an individual, at all time subsequent to October 1, 1922 (the date plaintiff's assignment took effect), the real estate business, situated on the leased property has been operated as a partnership under the name and style of James Realty Company, consisting of plaintiff and one other individual; the other member of the partnership changing at different intervals. All of the first three items of damage set forth above were not suffered by plaintiff as an individual, but were losses or expenditures suffered or made by the partnership. It is clear that plaintiff as an individual is not entitled to recover in this action for damages suffered by a partnership, and therefore, if the lump sum awarded to plaintiff included any allowance for these items, it would be unsupported by the evidence, and would constitute reversible error. It is true that plaintiff sought to prove at the trial an oral assignment from the other partner to himself of all claims against defendant, but this assignment was neither pleaded by the plaintiff nor a finding in reference thereto made by the trial court.

If it were not for the question in reference to the partnership, we would be inclined to reverse the case only on the question of damages, but with that question interjected into the case, it may appear on a new trial that plaintiff has pursued the wrong remedy, and that the only cause of action that exists is on behalf of the partnership. For that reason, in fairness to all concerned, we feel that the entire case should be retried.

For the foregoing reasons, the judgment appealed from is reversed.

BARR LUMBER CO. et al. v. PERKINS et al.*

Civ. 4231.

District Court of Appeal, Third District, California.

March 20, 1931.

Rehearing Denied April 18, 1931. Hearing Granted by Supreme Court May 18, 1931.

1. **Mechanics' liens** ⚷72.

Lessee of premises under lease indicating premises were to be mined, *held* agent of owner as respects mechanic's lien (Code Civ. Proc. § 1183).

2. **Mines and minerals** ⚷112(3).

Oil locations *held* within category of "mining claims" within meaning of mechanic's lien statute respecting agents of owner (Code Civ. Proc. § 1183).

3. **Mechanics' liens** ⚷277(2).

In mechanic's lien foreclosure action, where allegation was as to amount of contract, proof only that contract was fully completed *held* sufficient; no question being made regarding value of services performed.

4. **Mechanics' liens** ⚷161(4).

In mechanic's lien foreclosure, allowing interest prior to entry of judgment *held* error.

Appeal from Superior Court, Los Angeles County; William Hazlett, Judge.

On rehearing.

Former opinion modified, and judgment of lower court modified, and, as modified, affirmed.

For former opinion, see 295 P. 552.

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Hearing granted 6 P.2d 948.

Ray W. Bruce, of Los Angeles, for appellant.

Frank G. Swain, of Whittier, for respondents.

PER CURIAM.

Upon further consideration of this cause, we conclude and hereby approve all that was said in the opinion filed herein on January 19, 1931, and reported in 295 P. 552, making some modification of the judgment and adding thereto as follows:

[1, 2] Under the provisions of section 1183 of the Code of Civil Procedure, the owner of the premises involved in this action is held to be the principal actor, and the person or persons to whom the premises were leased were at all times acting as agent or agents for the owner, in so far as the lien law of this state is concerned. The second paragraph of section 1183, Code of Civil Procedure, after providing for liens in favor of persons performing labor upon or furnishing property consumed in mining claims, reads as follows: "And every contractor, subcontractor, superintendent or other person having charge of any mining or work or labor performed in and about such mining claim or claims or real property worked as a mine, either as lessee or under a working bond or contract thereon shall be held to be the agent of the owner for the purposes of this chapter."

The case of Berentz v. Belmont Oil Mining Co., 148 Cal. 577, 84 P. 47, 113 Am. St. Rep. 308, expressly held that oil locations are brought within the category of mining claims, within the meaning and intent of the paragraph of section 1183, Code of Civil Procedure, from which we have quoted. The opinion in the Berentz Case, with reference to the application of section 1183, Code of Civil Procedure, is too long to be quoted, but a reading of that case shows clearly that the premises involved in this action is a mining claim, within the terms of the lien law, and therefore, the premises upon which development work is performed, or structures erected for the purposes of development work, are subject to mechanics' and laborers' and materialmen's liens, and the owner of the premises cannot avoid liability by posting notices. See, also, the case of Arctic Lbr. Co. v. Borden (C. C. A.) 211 F. 50.

Appellant calls our attention to the case of Cortelyou v. Baker, 182 Cal. 168, 187 P. 417, where the court held that the provisions of section 661 of the Civil Code are inapplicable to claims prospected for oil. This may be admitted, but we do not perceive how a reference to sluice boxes and kindred articles has any bearing upon this case. The lease of the premises involved in this action, among other provisions, contains the following: "Together with the exclusive right and privilege to explore for, mine, excavate and obtain oil, asphaltum, petroleum, natural gas, tar, and any and all other hydrocarbon substances and kindred products from, upon, in and under the said premises," etc.—a clear recognition that the premises were to be mined, and mineral products extracted therefrom.

[3] It is further contended that the allegations and proof relative to the claim of De Priest are insufficient, in that the allegation is as to the amount of the contract, and the proof only that the contract was fully completed. However, nothing appearing to the contrary, and no question being really made as to the value of the services performed, the following cases show that such proof is sufficient:

In Wood v. Niemeyer, 185 Cal. 526, 197 P. 795, 799, it is said: "Since the memorandum in question was a memorandum of the agreement of the parties concerning the property to be conveyed, the statements therein contained were some evidence of the value of the personal property transferred"—citing a number of cases. No evidence was introduced by the defendants to contradict or offset these statements.

To the same effect is the case of Sanders v. Austin, 180 Cal. 664, 182 P. 449, 450, where the contract was for a certain sum, the allegation that it had been fully performed, etc., in the absence of contradictory testimony, the contract was held sufficient evidence of value. The court said: "But the testimony being in, it has sufficient probative value in the absence of any counter testimony whatever to sustain the finding of the court." The finding of the court was as to value.

In Union Hollywood W. Co. v. Los Angeles, 184 Cal. 535, 195 P. 55, 56, the court said: "The cost of a thing is evidence of its value, especially where it appears that it is comparatively new and where it has no established market value," etc.—citing a number of cases, including those to which we have referred. See, also, the case of Bringham v. Knox, 127 Cal. 40, 59 P. 198, 199, where it is said: "It is urged that since the contract between Knox and Bowen was void, and since for that reason the plaintiff could claim his lien only for the value of the materials furnished by him, and not for the contract price agreed on with Knox (Code Civ. Proc. § 1183), therefore both the claim of lien and the complaint are insufficient, in failing to allege the value of plaintiff's materials. It was, however, stated in the claim that the agreed price was 18 cents apiece for the ties. This statement was a sufficient showing, prima facie, of their value."

[4] It is further contended by the appellant that the court erred in allowing interest prior to the entry of judgment. This contention is well taken. On the first cause of action, to wit, the claim of the Barr Lumber Company, the court allowed the sum of $240.45 as inter-

est, preceding the day of judgment. On the second cause of action, to wit, the claim of W. E. De Priest, the court allowed the sum of $115.03 as interest, preceding the day of entry of judgment. This was error. American-Hawaiian, etc., Co. v. Butler, 17 Cal. App. 764, and cases cited on page 768, 121 P. 709; Mabrey v. McCormick, 205 Cal. 667, 272 P. 289; Grass v. Rindge Co., 84 Cal. App. 750, 258 P. 673; Macomber v. Bigelow, 123 Cal. 532, 56 P. 449.

It is therefore ordered that the sum of $240.45 be stricken from the amount allowed in the first cause of action, and interest allowed only on $1,463.90 from the date of the entry of judgment.

It is further ordered that $115.03 be stricken from the second cause of action, and interest allowed on the sum of $690 at the rate of 7 per cent. per annum from the date of the entry of judgment.

In all other respects the judgment is affirmed. The appellant will be awarded his costs.

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112 Cal. App. 615

PEOPLE v. ROGERS.

Cr. 2029.

District Court of Appeal, Second District, Division 1, California.

March 17, 1931.

Rehearing Denied March 30, 1931.

Hearing Denied by Supreme Court April 16, 1931.

1. Constitutional law ⇨42.

Defendant charged with possessing blackjack could not claim act prohibiting possession denied due process because prohibiting possession of blackjack as curio, where evidence excluded claim of possession as curio (St. 1923, p. 696, § 1, as amended by St. 1925, p. 542).

2. Constitutional law ⇨42.

Defendant, prosecuted for possessing blackjack, could not claim act prohibiting possession was unconstitutional as interfering with federal government's right to regulate commerce between states (St. 1923, p. 696, § 1, as amended by St. 1925, p. 542).

3. Criminal law ⇨406(6).

Admissions to officers by defendant charged with possessing weapon was admissible to show defendant was in possession of weapon, where evidence indicated possession by defendant or another (St. 1923, p. 696, § 1, as amended by St. 1925, p. 542).

4. Criminal law ⇨1169(3).

Erroneous admission of evidence of fact subsequently admitted by defendant's testimony is harmless.

5. Criminal law ⇨200(1).

Record of murder prosecution in which weapon was exhibited was properly excluded to show former jeopardy in prosecution for possessing weapon not included in murder charge (St. 1923, p. 696, § 1, as amended by St. 1925, p. 542).

6. Criminal law ⇨292(1).

Record merely showing pleas of "once in jeopardy" and "not guilty by reason of former acquittal" *held* insufficient (Pen. Code, § 1017).

Pen. Code, § 1017, provided that plea of former conviction should recite conviction or acquittal of offense charged by judgment of court rendered at named place on certain date, and that plea of once in jeopardy should specify time, place, and court.

7. Witnesses ⇨337(5).

Defendant testifying in own behalf could be questioned concerning conviction for felony to affect credibility, regardless whether appeal was pending.

8. Criminal law ⇨1137(1).

Counsel approving forms of verdict before given to jury could not object to forms on appeal.

9. Criminal law ⇨1172(7).

Instruction more favorable to defendant than it would have been without language objected to could not be complained of by defendant.

10. Criminal law ⇨1144(14).

Where instructions were refused except as covered in instructions given, and complete instructions were not brought up, it will be presumed that other instructions given properly covered same subjects.

Appeal from Superior Court, Los Angeles County; B. Rey Schauer, Judge.

Glenn A. Rogers was convicted of violating the act prohibiting possession of a blackjack and the like, and he appeals.

Affirmed.

Ralph D. Paonessa and Alexander L. Oster, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

CONREY, P. J.

It is provided by statute that "every person who within the state of California * * * possesses any instrument or weapon of the kind commonly known as a black-jack, slungshot, billy, sand-club, sand-bag or metal knuckles * * * shall be guilty of a felony. * * *" Stats. 1923, pp. 695, 696; Deering's General Laws Supp. 1925–1927, Act No. 1970. The foregoing quotation, which is from section 1 of the act as amended by Statutes 1925, p. 542, specifies certain exceptions of police and other officers from the operation of the act, in relation to the carrying of a wooden club, baton, or other authorized equipment. The defendant, having been convicted of a violation of this act, appeals from the judgment and from an order denying his motion for a new trial.

[1, 2] Appellant contends that said section 1 is unconstitutional, in that it provides for deprivation of property without due process of law. He claims that by making mere possession a felony it is attempted to make it unlawful to possess one of the described articles even as part of a collection of curios. He suggests the further point that the section is unconstitutional in so far as it attempts to prohibit the importation of the enumerated weapons into this state, and so constitutes an interference with the right of the federal government to regulate commerce with foreign nations, and among the several states. At the trial appellant testified with respect to the blackjack or sap, which he was charged with having in his possession, that he bought it as a curiosity in Colon, Panama, during his time of service in the navy. In his testimony, however, he admitted that on the day of the arrest he had the said blackjack or sap and a gun, together with some articles of clothing, in a traveling bag which he carried from his place of residence in Los Angeles to the house where, on the same day, he was arrested. It appears from other evidence that about midnight on that day, together with one Miss Cooley, he had carried said bag and contents to the home of Miss Cooley where he was arrested later in the day; that at the last-named time and place and in the presence of the defendant and Miss Cooley, the officers opened the bag and found said blackjack or sap in the bag. Miss Cooley testified that she heard one of the police officers say, "Oh, you carry a blackjack around," and that the defendant, who was present there at the time, did not make any reply. From the evidence thus produced showing the circumstances under which the weapon was found in the possession of the defendant, we think that he is not entitled to the benefit of the points presented by him on the constitutionality of the act, although it may be that under other circumstances there might be some merit in these points. A. F. Estabrook Co. v. Ind. Acc. Com., 177 Cal. 767, 177 P. 848. The defendant is not prosecuted for importing the weapon into California. The circumstances under which the weapon was found in his possession are sufficient to exclude the claim of possession as a curio at the time, even if when originally purchased by the defendant he had only intended to keep it as a curio.

[3, 4] Appellant further contends that the verdict of the jury in finding him guilty of possession of a sap is not sustained by the evidence. He claims that there was no evidence, independent of the defendant's admissions, to prove possession, and that therefore the corpus delicti was not established; that, in the absence of proof of the corpus delicti, testimony concerning admissions made to officers was not admissible and could not properly be considered by the jury. In the first place, we think that, by evidence independent of the admissions made to the officers, the corpus delicti was established. The testimony of Miss Cooley had shown the transportation of the weapon from the defendant's house to her own house by the defendant, in company with said witness. The bag and its contents, including said weapon, were therefore in the possession either of the defendant or Miss Cooley or of both of them, and such possession was on its face a violation of the statute. It only remained to determine which one of the two was the actual possessor of the weapon. The admissions made by the defendant to the officers were admissible in evidence for the purpose of showing, as apparently they did, that the possession was that of the defendant and not that of Miss Cooley. Moreover, as we have seen, the defendant in his own testimony admitted that he had the bag at the Cooley residence and that the sap or blackjack was in the bag. Erroneous admission of evidence of a fact subsequently admitted by a defendant's testimony is harmless. People v. Booth, 72 Cal. App. 161, 166, 236 P. 987.

[5, 6] Appellant contends that it was error for the court to rule that the record in the case of People v. Rogers, wherein the defendant was charged with the crime of murder and thereafter acquitted, was not to be admitted in evidence. From further comments of counsel it appears that defendant intended to show that this blackjack or sap had been used as an exhibit in the murder trial, and that defendant expected thereby to establish former jeopardy with respect to the offense constituting the subject of the present action. There was no error in the ruling. It may be noted here that defendant claims that he had before the court in this case not only pleas of "not guilty," but pleas of "not guilty by reason of former acquittal" and "once in jeopardy." It does not appear that the crime of possession of the weapon at the time and place stated in the information herein was or could have been in any way included in the charge of murder for which the defendant had been

tried. Moreover, there was no sufficient plea of former acquittal or once in jeopardy. The only pleas shown in the record are found in the minutes of the court as set out in the clerk's transcript as follows: " 'Once in jeopardy;' 'Not guilty by reason of former acquittal;' 'Not guilty.' " Concerning the first two of these pleas it is provided in section 1017 of the Penal Code that every plea must be oral and entered upon the minutes of the court in substantially the following form: "3. If he plead a former conviction or acquittal: 'The defendant pleads that he has already been convicted (or acquitted) of the offense charged, by the judgment of the court of ——— (naming it), rendered at ——— (naming the place), on the ——— day of ———.' 4. If he plead once in jeopardy: 'The defendant pleads that he has been once in jeopardy for the offense charged (specifying the time, place, and court).' " In People v. O'Leary, 77 Cal. 30, 18 P. 856, 857, the pleas actually entered upon the minutes of the court were as follows: "First, defendant pleads not guilty of the offense charged; second, a former acquittal; third, once in jeopardy." The jury found the defendant guilty, but did not find on the issues of former acquittal and once in jeopardy. The Supreme Court held that the pleas entered upon the minutes were insufficient as not complying with section 1017 of the Penal Code. The court said: "The object of these forms is plain. The people should be informed of the circumstances as to time, place, and court." The court held that the pleas not being in the form required by the Code, it was not necessary for the jury to find on them, and the judgment was affirmed. To like effect, see Rebstock v. Superior Court, 146 Cal. 308, 315, 80 P. 65.

[7] Appellant claims that it was error for the court to overrule his objection to the following question put to him by the district attorney: "Q. One week ago last Friday you were convicted of the crime of robbery with a gun were you not?" Counsel for defendant objected to this question on the ground that the case referred to was now pending on appeal. A sufficient reply to this objection would be that defendant did not offer any evidence to prove that any appeal was pending. And, even if an appeal was pending, the objection would not have been good. Defendant having offered himself as a witness, the cross-examiner had the right to show that the witness had been convicted of a felony. The question related solely to the defendant as a witness and his credibility as a witness. The defendant having voluntarily testified in his own behalf, it was competent for the prosecution to show, either by his cross-examination or by the record of the judgment, that he had theretofore been convicted of a felony. People v. Soeder, 150 Cal. 12, 21, 87 P. 1016. It has been held that a witness may be asked upon cross-examination whether he had been convicted of a felony, where a conviction had been had by the verdict of a jury, but sentence had not yet been pronounced. People v. Ward, 134 Cal. 301, 307, 66 P. 372. Since such evidence of conviction is only for purposes of impeachment and goes only to the matter of credibility of the witness, we see no reason why the mere pendency of an appeal should affect the question of admissibility of the impeaching evidence.

[8] Concerning the contention of appellant that the court erred in submitting to the jury certain modified forms of verdict, with the modifications showing on the face thereof, it is sufficient to say, first, that the items of objection are trivial; and, second, that it is shown in the reporter's transcript that the forms of verdict were submitted to counsel and approved by them before they were given to the jury.

[9, 10] Concerning the specification of error in a certain instruction given to the jury, we find that the language used by the court and criticized by appellant was more favorable to appellant than the instruction would have been without such language. Therefore he has no ground of complaint. Concerning the three refused instructions requested by appellant, it appears upon the face of said instructions that they contained errors that justified the refusal. In addition to this we note that the instructions were "refused except as covered in instructions given." Inasmuch as the complete instructions have not been brought up, it will be presumed that the same subjects of instruction were properly covered by other instructions given by the court.

Due attention has been given to the assignments of misconduct of the district attorney. They appear to be without substantial merit. We think that appellant was given the benefit of a fair trial.

The judgment and order are affirmed.

We concur: HOUSER, J.; YORK, J.

113 Cal. App. 150

SCHEINBAUM et al. v. DRIVER et al.

Civ. 6663.

District Court of Appeal, Second District, Division 2, California.

March 31, 1931.

1. Appeal and error ⚷1011(1).

Judgment based upon trial court's version of conflicting evidence will not be disturbed upon appeal.

2. Appeal and error ⚷981.
New trial ⚷104(1).

Question of granting new trial for newly discovered evidence which was merely cumulative lay within trial court's judicial discretion, and its determination was conclusive.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by A. M. Scheinbaum and another against E. R. Driver and another. From a judgment for plaintiffs and an order denying a new trial, defendant named appeals.

Appeal from order denying new trial dismissed, and judgment affirmed.

Hugh E. Macbeth, of Los Angeles, for appellant.

Louis Feinstein, of Los Angeles, for respondents.

CRAIG, Acting P. J.

The defendant E. R. Driver appeals from a judgment based upon a lease of real property, for alleged unpaid rent, and from an order denying a new trial.

[1] The principal contention of appellant is that a successor to the tenancy assumed the obligation upon which the action was founded, but we are not concerned with the veracity of witnesses, and a judgment based upon the trial court's version of conflicting evidence will not be disturbed upon appeal. Badover v. Guaranty Trust & Savings Bank, 186 Cal. 775, 200 P. 638. The lease was received in evidence, bearing the signatures of the defendants, and the plaintiff testified that appellant entered into possession, and did not vacate until the instant suit was commenced; that he did not lease the premises to a third person, nor let such third person into possession at any time.

[2] The only other contention is that the trial court erred in denying a new trial when certain asserted newly discovered evidence was produced. This evidence, however, was merely cumulative as tending to show by affidavits that a third person was in fact occupying the premises at times, but an affidavit of the plaintiff also averred upon information and belief that this party was not a tenant by the plaintiff's consent, and merely was present with the defendants. There is no allegation that such information could not have been elicited at the time of the trial from the same witnesses, nor that the appellant used any diligence to ascertain the facts prior to rendition of the judgment. This question, also, lay within the judicial discretion of the court, and its determination thereof is conclusive.

There being no appeal from an order denying a new trial, the appeal therefrom is dismissed. The judgment is affirmed.

We concur: IRA F. THOMPSON, J.; ARCHBALD, Justice pro tem.

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112 Cal. App. 680

In re SMITH'S ESTATE.

Civ. 7781.

District Court of Appeal, First District, Division 2, California.

March 19, 1931.

Rehearing Denied April 18, 1931. Hearing Denied by Supreme Court May 18, 1931.

1. Executors and administrators ⚷105.

Bank acting as executor may, in proper case, deposit trust funds in own savings department and pay usual interest on savings account (St. 1909, p. 93, § 25, as amended).

> Bank Act, St. 1909, p. 93, § 25, as amended by St. 1913, p. 151, St. 1915, p. 1109, and St. 1921, p. 1372, provided that trust department of bank could make deposits of trust or any other funds under its control with commercial or savings department of same corporation, and excluded bank from prohibition against mingling of funds.

2. Executors and administrators ⚷102.

Executor serves in fiduciary capacity and has powers and obligations similar to trustee, except that primary duty is to preserve estate until distribution, rather than invest funds (Code Civ. Proc. §§ 1613, 1614, 2261).

3. Executors and administrators ⚷102.

Executor need not invest money of estate, but investment in government securities is permitted under court order (Code Civ. Proc. § 1592).

4. Executors and administrators 🔑105.

Executor may deposit funds of estate in commercial or savings department of responsible bank (Code Civ. Proc. § 1552).

5. Executors and administrators 🔑105.

Funds held for short time or required for immediate needs of administration should be deposited by executor in commercial account, but substantial sum exceeding immediate requirements should be deposited in savings account (Code Civ. Proc. § 1592).

6. Executors and administrators 🔑105.

"Proper case" for bank acting as executor to deposit funds of estate in own savings department depends on circumstances authorizing individual executor to deposit funds in savings account (Code Civ. Proc. § 1592; St. 1909, p. 93, § 25, as amended).

[Ed. Note.—For other definitions of "Proper Case," see Words and Phrases.]

7. Executors and administrators 🔑105.

Bank acting as executor may deposit funds of estate in own savings department as general deposit commingled with other funds (St. 1909, p. 95, § 32, as amended by St. 1913, p. 155).

8. Banks and banking 🔑153.

"Special deposit" is mere bailment in which title remains in depositor, and cannot be commingled with other funds.

[Ed. Note.—For other definitions of "Special Deposit," see Words and Phrases.]

9. Executors and administrators 🔑105.

Act permitting bank trustees to deposit funds of estate in own savings department and mingle funds *held* not unconstitutional as discriminating in favor of bank trustees (St. 1909, pp. 93, 95, 105–109, §§ 25, 32, 90, 96–98, 101, 103, 105, 106).

10. Executors and administrators 🔑510(12).

Decree allowing final account of executor objected to only as to amount of interest could be corrected.

Appeal from Superior Court, Yuba County; K. S. Mahon, Judge.

In the matter of the estate of Edwin McCord Smith, deceased. From a decree settling the account of the executor, the Bank of Italy National Trust & Savings Association, the executor, appeals.

Modified and affirmed.

Rich & Weis, of Marysville, and Emerson W. Read, of Sacramento, for appellant.

Morrison, Hohfeld, Foerster, Shuman & Clark, of San Francisco, for California Bankers' Ass'n, amicus curiæ for reversal.

Keyes & Erskine and Charles Josef Carey, all of San Francisco, amici curiæ for reversal.

Warren Steel and Homer Lingenfelter, both of Marysville, amici curiæ for affirmance.

SPENCE, J.

This appeal and the appeals in the Estate of Brenhart (Cal. App.) 297 P. 931, and Estate of Slingsby (Cal. App.) 297 P. 931, are presented upon separate records, but upon one set of briefs, pursuant to an order of consolidation. Each appeal is taken from the order and decree settling the final account of the executor and appellant.

We deem it unnecessary to set forth in detail the facts in each case. The essential facts are the same and the identical question is involved in all three cases. The court found in each case that the executor was transacting its business through three departments, to wit, a commercial department, a savings department, and a trust company department, as provided by law; that upon its appointment as executor and from time to time thereafter, the bank deposited money coming into its hands as such executor in the savings bank department of said bank in the name of the estate and of itself as executor of the estate; that in the final account said executor acknowledged as cash received and charged itself with a certain sum as accrued interest on the funds so deposited, said interest being calculated at the rate of 4 per cent. per annum compounded semiannually. It further found and concluded that upon the deposit of said funds the bank did thereupon commingle the funds of the estate with its own, used the funds of the estate in carrying on its own business and made a profit thereon, and did thereby become liable to said estate for interest at the legal rate, to wit, 7 per cent. per annum from the time of deposit up to the date of the final account. The court thereupon approved and settled the account in all particulars except that it allowed interest at the rate of 7 per cent. on said funds and charged the same against the executor in lieu of interest at 4 per cent. compounded semiannually. There is no evidence to indicate that the executor did not in all other respects perform its duties and obligations as required by law. So far as the evidence showed it was proper in each case to deposit the funds of the estate in a savings bank, and it appeared that the interest accounted for was computed at the usual rate of interest allowed by said bank to its depositors and was a fair and reasonable rate. No findings were made to the contrary and there was neither evidence nor findings to the effect that this was not the usual rate of interest paid to depositors in savings banks. No objections or exceptions to the final account, written or otherwise, were made or taken by any persons interested in the estates. In fact, in the Estate of Smith the residuary legatee filed a written approval of the account and requested that it be settled and allowed. In that estate interest was allowed only to the last semiannual payment date and not up to the filing of the account. This was done with the consent of and by agreement with the residuary legatee, who desired the money to remain in the savings bank department until the next interest date. The trial court in each case apparently applied the general rules applicable to the commingling by an executor of trust funds with funds of his own and ordered and decreed that the executor be charged with interest at the increased rate. Code Civ. Proc. §§ 1613, 1614; Miller v. Lux, 100 Cal. 609, 615, 35 P. 345, 639; Estate of Cousins, 111 Cal. 441, 446, 44 P. 182; Wheeler v. Bolton, 92 Cal. 159, 28 P. 558; Estate of Clark, 53 Cal. 355; Estate of William Stott, 52 Cal. 403; In re Hilliard, 83 Cal. 423, 23 P. 393; Estate of McQueen, 44 Cal. 584.

[1] These appeals are directed solely to those portions of the orders and decrees settling the final accounts relating to the interest charged. Appellant concedes that the foregoing authorities correctly apply the law relating to individuals acting as executors, but takes the position that the rule there laid down is inapplicable to the facts before us on these appeals. The only question involved is whether a bank acting as executor and doing a departmental banking business may, in cases where it is proper to deposit the funds of the estate in a savings bank, deposit said funds in its own savings bank department and pay the usual rate of interest paid to depositors in savings banks. In other words, did the court err in charging the executor with interest at the rate of 7 per cent. per annum solely for the reason that the money had been deposited in its own savings bank department rather than in some other savings bank? Appellant contends that question should be answered in the affirmative, and we are of the opinion that appellant's position must be sustained.

Preliminarily we may state that although we find no cases in this state dealing with the facts here involved, similar questions have been before the courts of other jurisdictions. Herzog v. Title Guarantee & Trust Co., 148 App. Div. 234, 132 N. Y. S. 1114; In re Demmerle's Will, 130 Misc. Rep. 684, 225 N. Y. S. 190; In re People's Trust Co., 169 App. Div. 699, 155 N. Y. S. 639; In re Moore's Estate, 211 Pa. 348, 60 A. 991; Knagenhjelm v. Rhode Island Hospital Trust Co., 43 R. I. 559, 114 A. 5; Hayward v. Plant, 98 Conn. 374, 119 A. 341. In the recent case of In re Reed's Estate, 37 Wyo. 107, 259 P. 815, 55 A. L. R. 941, involving an individual executor who had commingled the funds of the estate with those of his own, the court said at page 817 of the opinion in 259 P.: "It has been held that where a bank or trust company is expressly authorized by law to act as executor, administrator, or trustee, it is not compelled to deposit trust money in another institution, and is not responsible for a higher rate of interest, while the money is in its hands, than paid on other deposits in its own institution. [Citing cases.] But aside from such cases, in which the Legislatures of various states have attempted to meet an apparently modern need, and which we need not consider in greater detail, the rule is still inflexible, reiterated again and again by the courts, that a trustee, including an executor, administrator, and guardian, cannot mingle trust money with his own, cannot invest it in his own business, and cannot make a profit from the trust money committed to his care."

Proceeding to a consideration of the legislative enactments of this state, we find that prior to 1913 a departmental bank acting as trustee or executor could not deposit trust funds in its savings bank department and the general rule prohibiting a trustee or executor from mingling trust funds with his own was applicable to such departmental banks. Bank Act, Stats. 1909, chap. 76. Section 25 provided: "No department shall receive deposits of any other department of the same corporation." And section 32 provided: "Any bank receiving trust funds in accordance with the provisions of this act relating to trust companies must not mingle such trust funds with the other assets of the corporation." However, in 1913 (St. 1913, chap. 104), section 25 was amended to provide an exception as follows: "except that a trust department may make deposits of trust or any other funds under its control with the commercial or savings department of the same corporation." And section 32, prohibiting the mingling of funds, was amended (St. 1913, p. 155) by adding the words "except as otherwise provided in section twenty-five of this act." Again, in 1915 (St. 1915, chap. 608), the exception in section 25 was amended to read "except that a trust department, in proper cases, may make deposits of trust or any other funds under its control with the savings department of the same corporation and may, upon order, previously obtained, of any court having jurisdiction of any trust or fund, make deposits of moneys belonging thereto with the commercial department of the same corporation." Further change in section 25 was made in 1921 (St. 1921, chap. 780), when the exception was amended to read, "except that a trust department, in proper cases, may make deposits of trust or any other funds under its control with the savings department or the commercial department of the same corporation."

[2-5] In our opinion section 25, as amended in 1921, clearly permits the trust department

of a bank in proper cases to deposit the funds of an estate for which it is acting as executor, in the savings department of the same bank. A brief reference to the general powers, duties, and obligations of executors and administrators clarifies the meaning of the words in "proper cases," as used in that section. An executor serves in a fiduciary capacity and his powers, duties, and obligations are in many respects the same as those of a trustee. Code Civ. Proc. §§ 1613, 1614; 11 Cal. Jur. 211 and 981 et seq. However, unlike a trustee whose duty it is to invest all trust funds as soon as possible (Civ. Code, § 2261), the primary duty of an executor is simply to preserve the estate until distribution. 11 Cal. Jur. 1021. He is placed under no statutory obligation to invest money belonging to the estate, but investment in securities of the United States or of this state is permitted under prior order of court upon good cause shown therefor. Code Civ. Proc. § 1592. Ordinarily there is no investment in the ordinary sense of that term of the funds coming into the hands of an executor, but it is customary and proper for him to deposit those funds in either a commercial or savings department of a responsible bank. 11 Cal. Jur. 1023. His authority to so deposit funds of the estate arises from his obligation to safeguard and protect the funds and not from any obligation to invest them. Where funds are to be in his hands for a very short time or where practically all of the funds will be required for the immediate needs of administration, deposit in a commercial account subject to check is proper. On the other hand, in cases where there is a substantial sum in excess of the immediate requirements, which sum is to be held over a period which will permit the accrual of interest on a savings bank deposit, he should be required to safeguard and protect these funds in a manner most advantageous to the estate, and to that end it is proper that he should deposit the funds in a savings account rather than in a noninterest-bearing commercial account.

[6] From what has been said we believe that the meaning of the phrase "in proper cases" is apparent. The time within which the estate may be distributed, the time of the receipt of the funds, and the immediate need for funds in order to meet the requirements of administration, are all factors in determining whether it is proper for the executor of a particular estate to deposit the funds in a commercial account or a savings account. In the estates here involved we must assume from the evidence and findings that each presented a proper case for the deposit of funds in a savings account. No contention to the contrary is made in the argument for affirmance. We therefore conclude that under section 25 of the act the action of the bank in depositing the funds of these estates in its own savings bank department was expressly authorized.

[7, 8] Counsel appearing as amici curiæ for affirmance argue that even assuming that deposit in the savings bank department in the same bank is permitted by section 25, it must be construed to permit a special deposit without mingling or use of the funds and not a general deposit. We cannot follow counsel's reasoning. Such construction would render meaningless the amendment to section 32 above set forth whereby the mingling of trust funds with other assets is permitted as provided in section 25. A special deposit is a mere bailment for safe-keeping in which the title remains in the depositor and the bank cannot mingle such deposit with other funds. 4 Cal. Jur. 189. It is obvious that no interest would accrue on special deposits, as the bank cannot put them to use. Unless the amendments to section 25 and section 32 are construed to refer to a general deposit permitting the mingling and use of the funds in the same manner as other general deposits, interest would not accrue to the benefit of the estate and the deposit of the estate funds in the savings bank department would serve no purpose whatsoever.

[9] Counsel further contend that if section 25 is construed to permit not only deposit but also mingling and use, it would be unconstitutional, being class legislation and creating a discriminatory preference in favor of departmental bank trustees and against all other trustees. We find no merit in this contention. It is conceded that this classification would be valid if based upon some natural and intrinsic difference between departmental banks as trustees and others acting in the same capacity. It has been heretofore decided that where legislation affects banking corporations doing business as testamentary trustees as a class and such classification is not unreasonable, there is no valid constitutional objection to such legislation. Estate of Barnett, 97 Cal. App. 138, 275 P. 453. We find nothing unreasonable in such classification here and, in our opinion there is a natural and intrinsic difference between departmental bank trustees and other trustees. The various sections of the Bank Act relating to capital, surplus, reserves, securities, inspection, and the like (Bank Act, §§ 90, 96, 97, 98, 101, 103, 105, 106), surround every activity of departmental bank trustees with safeguards not required of trustees generally.

In arguing for affirmance counsel dwell at some length upon the policy involved in permitting departmental banks to deposit trust funds in their savings bank departments to be used in the same manner as other deposits. We deem it unnecessary to discuss the policy involved, for it is upon this question of policy that the Legislature has spoken and it acted within its province in so doing.

[10] For the foregoing reasons we are of the opinion that the final account of the executor in each of these estates should have been settled and allowed as filed and that the trial court erred in charging the executor with interest at the rate of 7 per cent. instead of 4 per cent. compounded semiannually as set forth in the account. As no other exception is taken to the orders and decrees, there is no necessity for reversing these orders and decrees, but directions to the trial court to correct them will suffice (Estate of Machado, 186 Cal. 246, 199 P. 505; Estate of Adams, 131 Cal. 415, 63 P. 838), and under the circumstances we believe it proper that the parties should bear their own costs.

In the Matter of the Estate of Edward McCord Smith, No. 7781, the trial court is directed to correct the order and decree in accordance with the views herein expressed by charging the executor with interest in the sum of $706.13 as set forth in the final account and no more, and as so corrected and modified said order and decree are and each of them is affirmed without costs.

We concur: NOURSE, P. J.; STURTEVANT, J.

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112 Cal. App. 766

In the Matter of the Estate of Anna Bell BRENHART, Deceased. Bank of Italy National Trust & Savings Association, Executor and Appellant.

Civ. 7782.

District Court of Appeal, First District, Division 2, California.

March 19, 1931.

Rehearing Denied April 18, 1931.

Appeal from Superior Court, Yuba County; County; K. S. Mahon, Judge.

Rich & Weis, of Marysville, and Emerson W. Read, of Sacramento, for appellant.

Morrison, Hohfeld, Foerster, Shuman & Clark, of San Francisco, for California Bankers' Ass'n, amici curiæ for reversal.

Keyes & Erskine and Charles Josef Carey, all of San Francisco, amici curiæ for reversal.

Warren Steel and Homer Lingenfelter, both of Marysville, amici curiæ for affirmance.

SPENCE, J.

The facts and questions involved herein have been discussed in the opinion in Estate of Smith (Cal. App.) 297 P. 927, this day filed, and this appeal may be decided upon the authority of that opinion. The trial court is directed to correct the order and decree appealed from in accordance with the views expressed in that opinion by charging the executor with interest in the sum of $141.18 and no more, and so corrected and modified said order and decree are and each of them is affirmed without costs.

We concur: NOURSE, P. J.; STURTEVANT, J.

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112 Cal. App. 76"

In the Matter of The Estate of Mary SLINGSBY, Deceased. Bank of Italy National Trust & Savings Association, Executor and Appellant.

Civ. 7783.

District Court of Appeal, First District, Division 2, California.

March 19, 1931.

Rehearing Denied April 18, 1931.

Appeal from Superior Court, Yuba County; K. S. Mahon, Judge.

Rich & Weis, of Marysville, and Emerson W. Read, of Sacramento, for appellant.

Morrison, Hohfeld, Foerster, Shuman & Clark, of San Francisco, for California Bankers' Ass'n, amici curiæ for reversal.

Keyes & Erskine and Charles Josef Carey, all of San Francisco, amici curiæ for reversal.

Warren Steel and Homer Lingenfelter, both of Marysville, amici curiæ for affirmance.

SPENCE, J.

The facts and questions involved herein have been discussed in the opinion in Estate of Smith (Cal. App.) 297 P. 927, this day filed, and this appeal may be decided upon the authority of that opinion. The trial court is directed to correct the order and decree appealed from in accordance with the views expressed in that opinion by charging the executor with interest in the sum of $128.57 and no more, and, so corrected and modified, said order and decree are, and each of them is, affirmed without costs.

We concur: NOURSE, P. J.; STURTEVANT, J.

KASTEL v. STIEBER et al.*

Civ. 4168.

District Court of Appeal, Third District, California.

March 19, 1931.

Rehearing Denied April 18, 1931.

1. Automobiles ⚿181(2).

Automobile guest taking minor in her custody for automobile ride against minor's wishes was not fully "in loco parentis" toward minor as regards minor's recovery against driver for injuries (St. 1923, p. 517, § 141¾, as added by St. 1929, p. 1580).

> Facts showed that the minor had been placed in the custody of the guest in a city in another state for the purpose of care and maintenance, that the mother was paying for the support of the minor and retained the right to direct and control the minor, but that against the mother's direction, automobile guest and driver, against the minor's will and protest, took the minor by automobile from such city to a point within the state where an accident occurred, in which the minor was injured.

2. Automobiles ⚿244(20).

Facts *held* not to show that minor plaintiff, suing driver, "accepted" ride on which she was injured (St. 1923, p. 517, § 141¾, as added by St. 1929, p. 1580).

> The word "accept" is defined as to admit and agree to, to accede to or consent to, to receive with approval, to adopt, to agree to; while the word "agreement" means a coming or knitting together of the minds, a coming together in opinion or determination, etc.
>
> [Ed. Note.—For other definitions of "Accept" and "Agreement," see Words and Phrases.]

3. Automobiles ⚿181(2).

Where automobile guest having limited custody of minor unauthorizedly compelled minor to take long ride, minor was not "guest" within Vehicle Act as to driver (St. 1923, p. 517, § 141¾, as added by St. 1929, p. 1580).

> [Ed. Note.—For other definitions of "Guest," see Words and Phrases.]

4. Appeal and error ⚿656(3), 1122(1).

Where appellate court is of the opinion that substantially nonconflicting testimony warrants different finding material to support of judgment rendered, appellate court must make such finding or amend trial court's finding (Code Civ. Proc. § 956a).

5. Automobiles ⚿244(35).

That automobile passed over curbing and struck and broke 18 inches thick trolley pole strongly corroborated testimony that automobile was then traveling at 40 miles per hour.

6. Negligence ⚿11.

Intent to do act constituting negligence being present, act need not be willful or wanton to constitute "gross negligence."

> [Ed. Note.—For other definitions of "Gross Negligence," see Words and Phrases.]

7. Automobiles ⚿181(7).

Automobile driver striking trolley pole behind curb in city street at speed of 40 miles per hour *held* grossly negligent, authorizing recovery for injuries sustained by minor guest (St. 1923, p. 517, § 141¾, as added by St. 1929, p. 1580).

> California Vehicle Act (St. 1923, p. 517, § 141¾, as added by St. 1929, p. 1580) provides that person accepting a ride in any vehicle without giving compensation therefor cannot recover against the owner or driver for any injuries sustained, except injuries approximately resulting from "gross negligence" of owner, driver, or person responsible for operation of the vehicle.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by Mary Alice Kastel, a minor, by her guardian ad litem, Leo B. Baisden, against Mrs. John L. Stieber and Edith M. Swan. From the judgment, Edith M. Swan appeals.

Affirmed.

Ernest T. Hall, George A. Work, and Roy A. Bronson, all of San Francisco, for appellant.

Downey & Chester, of Sacramento, for respondent.

PLUMMER, J.

The plaintiff had judgment against the defendant Edith M. Swan for and on account of personal injuries sustained in an automobile accident which occurred in the city of Sacramento, on the 10th day of October, 1929. From this judgment the defendant appeals.

It is not claimed in this action that the damages awarded are excessive. The only issue tendered is that under the provisions of section 141¾ of the California Vehicle Act of 1929 (St. 1929, p. 1580), the plaintiff is not entitled to any judgment.

The record shows that Mary Alice Kastel was a minor of the age of 8 years, and for some 4 years preceding the 10th day of Oc-

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⚿For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Hearing granted 8 P.(2d) 474.

tober, 1929, had been living with her aunt in Longview, Wash. The father of said minor was deceased; the mother had married again, but was furnishing for the support of said Mary Alice Kastel the sum of about $20 per month, had never surrendered her legal right to the control and custody of said minor, and in the language of the findings, retained the "say-so" as to said minor.

A short time prior to the 10th day of October 1929, the appellant, Edith M. Swan, conceived the idea of driving to Riverside, in the state of California, and invited Mrs. John L. Stieber to accompany her, and to take the plaintiff along. The plaintiff, having suffered a minor injury in an automobile accident that had occurred previous to this proposed trip, strenuously objected to riding in the automobile, but was compelled by the defendants to accompany them on the proposed journey, the record showing that the plaintiff wished to remain with Mr. Stieber in Longview, or make the journey by train, and protested so strenuously that when the defendant started from Longview, Wash., it was necessary for the defendant, Edith M. Swan, to hold the plaintiff in the automobile which the parties were using in starting on their trip.

The record further shows that the two defendants alternated in driving the car, and in making the journey from Longview to Sacramento, drove at a very high rate of speed; that after reaching Sacramento they resumed their journey southward at about 1 o'clock in the afternoon, and proposed making the city of Fresno in time to have their hair dressed and attend a theater at the latter city. As the defendants were leaving the city of Sacramento by way of Stockton boulevard, the accident occurred which led to the injury of the plaintiff. It appears that the defendant Stieber was at the wheel, and that the automobile, along the section of the boulevard designated as a business section, and where the signs limited the speed to 15 miles an hour, was being driven at the rate of about 25 miles an hour; that as defendants approached what counsel admit to be a residential section or a section where the speed limit is 20 miles an hour, the speed of the car was considerably accelerated. An eyewitness, who saw the car after it had speeded up and witnessed the accident to which we shall refer, testified that the car was moving at the rate of 40 miles an hour, or more. The defendant Stieber testified that at the request of the defendant Swan, she speeded up the car. This speeding up took place after driving at the rate of 25 miles per hour, as heretofore stated. This witness, however, testified that she did not think she was going 40 miles an hour at the time of the accident, but did not know how fast she was going. The eyewitness to whom we have referred was a motorman in charge of a street car at the time of the accident, and testified that he saw the car coming from a distance of about a block away. The scene of the accident may be described as follows: Stockton boulevard is a paved highway leading out of the city of Sacramento in a southerly direction. Along the east side of the boulevard are street car tracks belonging to the P. G. and E. Company. These street car tracks, after extending along the easterly side of the boulevard, upon reaching Fourth avenue, make a right-hand turn to the west, crossing the boulevard and extending on toward the main portion of the city of Sacramento. At the time of the accident a street car was moving slowly southward preparatory to crossing the boulevard. As it reached the track of what is known as and called the "California Traction Company's" lines, which likewise extend along the easterly side of the boulevard, the street car stopped. The driver of the automobile, the defendant Stieber, observing the motion of the street car, according to her testimony, turned to the right to avoid striking the street car, apparently not noticing that the street car had come to a complete stop. In so turning the automobile to the right, Mrs. Stieber drove the car across the right curbing of the boulevard and struck a trolley pole 18 inches in thickness, breaking the pole in two and throwing the plaintiff through the windshield onto the pavement, injuring her severely. The map introduced in evidence showing the scene of the accident discloses that the automobile driven by the defendants might very readily have been turned westward on Fourth avenue, if such had been necessary to avoid colliding with the street car. Mrs. Stieber testified that she did not see the trolley pole against which she drove the speeding automobile.

This recital shows that the automobile in which the defendants were riding was being driven at a very high rate of speed within the corporate limits of the city of Sacramento, past intersecting streets, and we may here add that the testimony shows that the defendants had passed a few cars on their way southward, as well as passing the intersecting streets, at a speed greatly in excess of that permitted by the California Vehicle Act. So far as the record shows, it does not appear that the defendants made any effort whatever to stop the progress of the car, but maintained the same high rate of speed until striking the trolley pole. The pole in question was a few feet west of the west curb of the boulevard.

The action was tried by the court sitting without a jury, and from the findings of fact made by the court, we make the following summary: That at the time and place the said Mary Alice Kastel was being driven by the defendants in said automobile, Mary Alice Kastel had not accepted a ride therein from both or either of said defendants, was not in said automobile of her own volition, but was riding therein entirely under the direction, dominion, and control of the defendants. That after the death of the father of Mary Alice Kastel, the defendant Stieber undertook, on her part, to take care of and support the said Mary Alice Kastel; that the mother of said Mary Alice Kastel agreed to pay said Stieber, for the support of Mary Alice Kastel, the sum of $20 per month, and set apart the income from a certain residence in the state of Minnesota for such purpose; that the income from said house had averaged $20 per month, and had been paid to said Mrs. Stieber by the mother of said Mary Alice Kastel; that during all of the period which we have heretofore mentioned, Mary Alice Kastel had lived with the said Mrs. John L. Stieber; that Mrs. Stieber had made arrangements for her schooling, and during said time stood in the place of a parent to said Mary Alice Kastel; that said Mary Alice Kastel had always been afraid to ride in an automobile; that this fear was increased by reason of a prior minor automobile accident occurring to the automobile in which she was then riding; that Mary Alice Kastel wanted to stay at Longview with the husband of Mrs. Stieber instead of going to Riverside, but stated that if she went to Riverside she wanted to go by train; that said minor entered said automobile of the defendants at the command and under the direction of said Mrs. John L. Stieber, and after she was put in said automobile, tried to get out; that at the time of the accident, Mary Alice Kastel was being transported from Longview, in the state of Washington, to Riverside, in the state of California, for the benefit of said minor's health; that said minor entered said automobile unwillingly; that because of the age and dependence of said Mary Alice Kastel she did not and could not accept a ride in said automobile; that at said time, the mother of Mary Alice Kastel retained the "say-so" as to said minor; that prior to the taking of said Mary Alice Kastel from the state of Washington on the proposed trip, the mother of said Mary Alice Kastel told Mrs. John L. Stieber that Mary Alice Kastel would be all right in Washington; that said Mrs. Stieber did not obtain the consent of the mother of Mary Alice Kastel to bring her to the state of California, and did not tell the mother of said minor that they were going to California; that said Mrs. John L. Stieber was at all times riding as a guest of Edith M. Swan, in said automobile; and that the said Mary Alice Kastel, at the time of the accident, was an involuntary guest riding therein.

The court further found: "That at the time and place mentioned in said complaint, the defendants so negligently and carelessly operated said automobile that they caused said automobile to collide with the trolley-pole at the northwest corner of the intersection of Stockton boulevard and Fourth avenue, in the city of Sacramento, California; that the negligence of said defendants was not gross." Findings were then made as to the injuries suffered by the plaintiff, damages awarded, and judgment entered against the defendant Edith M. Swan. Judgment was not entered against the defendant Stieber, for the reason that the court concluded as follows: "That defendant Mrs. John L. Stieber stood in loco parentis to the said minor at the time of said accident."

Do the facts which we have epitomized warrant a judgment against either of the defendants in view of the "guest" law of this state, and do the undisputed facts necessitate the amending of the findings by striking the word "not" from finding No. 4 which we have quoted, so as to make the concluding words read, "That the negligence of the defendants was gross?"

[1] While the court found that at the time of the accident the defendant Mrs. John L. Stieber was occupying the relationship of a parent to the plaintiff in this action, it is evident that such relationship was not full and complete in the ordinary meaning of the words "in loco parentis." The findings show that the plaintiff had been placed in the custody and care of Mrs. Stieber in Longview, Wash., not for the purpose of being transported to some other city in a distant state, but for the purpose of care and maintenance at the city of Longview; that the mother was paying for the support of said minor, the sum of $20 per month; that at all times the mother retained the right to direct as to the custody and control of the plaintiff, the language of the finding being, "retained the say-so," which we interpret to be a colloquial expression of the right to direct and determine what should be done with respect to the minor. The mother in this case had expressed her judgment that the minor would be all right in the city of Longview, Wash.; that notwithstanding this direction, the defendants, against her will and against her protest, took the minor by automobile from Longview, Wash., and reached the city of Sacramento, Cal., on their journey to Riverside. Thus, only to a very limited extent can it be said that the defendant Stieber stood in "loco parentis" toward the plaintiff. In other words, it shows an act without right and without the knowledge and consent of the mother.

[2] The court found that the plaintiff did not accept a ride in the automobile, which is equivalent to a finding that a ride in the automobile was forced upon the plaintiff. The word "accept" has a definite meaning. In 1 C. J. p. 377, it is thus defined: "To admit and agree to; to accede to, or consent to; to receive with approval; to adopt; to agree to. In the past tense the word is commonly used to signify assent and agreement."

The meaning of the word "agreement" is thus set forth in 2 C. J. p. 979: "In its broad and comprehensive sense, demonstrated by general usage, a coming or knitting together of minds; a coming together in opinion or determination; the coming together, in accord, of two minds, on a given proposition. * * * In law, a concord of understanding and intention, between two or more parties, with respect to the effect upon their relative rights and duties of certain past or future facts or performances; the consent of two or more persons concurring respecting the transmitting of some property, rights, or benefits, with the view of contracting an obligation, a mutual obligation," etc.

So far as the plaintiff is concerned, the record shows that she did nothing from which a conclusion can be drawn that she accepted a ride, nor are there any facts in the record to support any such inference. As heretofore stated, the person with whom the plaintiff was staying in Longview, Wash., had no permission from the mother, who had the legal right to determine whether the minor should or should not be taken from Longview, in the state of Washington, to Riverside, in the state of California, but proceeded without any authority so to do. It thus appears that Mrs. Stieber had no right, by reason of the mere custody of the plaintiff, in Longview, Wash., to enter into any contractual relations with Mrs. Swan affecting the rights of the plaintiff. Her control and custody was limited to Longview, Wash., and she could not, by reason of not having permission from the mother who retained the "say-so," to accept, for and on behalf of the minor, a ride in an automobile, so as to relieve the owner of the automobile from acts of negligence. The law in relation to the protection of minors is explicit and direct. Thus, as said in 46 C. J. p. 1317: "The parent has no authority, merely because of the parental relation, to waive, release, or compromise by or against his child. The rule applies to a waiver, settlement or release of the child's right of action for a personal injury or other tort." Likewise, in actions against the minor where service of process is necessary, there can be no waiver. The rule is stated in 31 C. J. p. 1155, as follows: "Where personal service upon an infant is required, he cannot waive such service by voluntary appearance, nor can any other person do so for him."

[3] Counsel for respondent have cited a number of California cases supporting the text of Corpus Juris from which we have quoted, but the rules set forth in the text are so fully established that we do not deem it necessary to cite further authorities.

We do not question the correctness of the rule set forth in 20 California Jurisprudence, p. 410, that: "The parent is the natural guardian of the person and property of the child, responsible to the state for the child's well-being, and accountable to third persons for the child's wrongful acts. Hence, the parent is accorded authority to control the child and to administer restraint and punishment, whereby to compel obedience to reasonable and necessary commands." But it does not follow from this that Mrs. Stieber was within her legal rights as a parent in directing the plaintiff to take the motor trip. As we have shown, her custody, control, and dominion were limited, and did not extend to taking the child on a long and hazardous trip. Therefore, any defense built upon such a premise fails to reach a logical conclusion of nonliability. The plaintiff was an involuntary occupant, not a guest within the meaning of the Vehicle Act.

There being no substantial conflict in the testimony as to the manner in which the automobile was being driven at the time of its collision with the trolley pole, should the findings of the trial court be amended so as to characterize the acts of the defendants as gross negligence? Many cases have been cited by the appellant in support of the contention that findings of the court cannot be amended by an appellate tribunal; however, all of the cases holding that appellate courts have no power in this respect were decided prior to the adoption of section 956a of the Code of Civil Procedure, and no longer state the correct rule. The precise question argued by the appellant came before this court and was decided in the case of Burch v. Hartford Fire Insurance Co., 85 Cal. App. 542, 259 P. 1108. This court there said: "Under section 956a of the Code of Civil Procedure, the appellate court, in a case where a trial by jury has been waived, may order that certain findings and conclusions of law be amended and enter judgment in accordance with the evidence, which is without conflict on any material point, and terminate the cause without further litigation."

In the recent case of Le Blond v. Townsley, 290 P. 1051, 1053, where the trial court had failed to make the necessary findings to support the judgment, the District Court of Appeal of the Fourth District used the following language: "This court therefore finds that the allegations of the affirmative defense of the answer, charging the plaintiff with contributory negligence, are untrue. With this addition to the findings the judgment is affirmed."

In Kirk v. Culley, 202 Cal. 501, 261 P. 994, the Supreme Court, speaking of the amendment to the Constitution, and also the adoption of section 956a, Code of Civil Procedure, said: "It was intended to broaden the powers of the Supreme Court and the district courts of appeal in the disposition of appeals in cases where a jury trial does not exist as a matter of right, or where, if the right does exist, it has been waived; and those courts are expressly authorized to make findings of fact contrary to, or in addition to, those made by the trial court, either upon the evidence heard in the trial court, or in the appellate court," etc. The court then proceeded to make additional findings.

In the recent case of Tupman v. Haberkern, 208 Cal. 256, 280 P. 970, 974, the Supreme Court, after a full and careful review of the power conferred upon appellate courts by section 4¾ of article 6 of the Constitution, and section 956a of the Code of Civil Procedure, thus points out the rule to be followed: "In the light of the history of the constitutional amendment and the phraseology of the legislation adopted pursuant thereto, and having in contemplation the evils or defects in practice and procedure thus attempted to be remedied, we perceive the primary and principal purpose of the change in the law to be that, whenever possible, and the interests of justice would seem to require, the reviewing court should have the power to make new findings contrary to or in addition to those made by the trial court, either on the record presented or on new evidence to be taken under the direction of the court, all with reference to material issues framed by the pleadings, to the end that the judgment or order appealed from may be affirmed and further litigation terminated, and where otherwise under the old practice the judgment or order would have to be reversed."

[4] It necessarily follows from these decisions that where there is no substantial conflict in the testimony, and the appellate court is of the opinion that the testimony warrants a different finding, and such finding is material in support of the judgment rendered, it is the duty of the appellate court to make such finding or to amend the finding of the trial court.

[5] Does the testimony warrant a finding of gross negligence? It is admitted by the appellant that the automobile was being driven in excess of the legal limit. The testimony of the motorman, who witnessed the approach of the speeding car, was to the effect that the automobile was traveling at the rate of 40 miles per hour. The driver of the car stated that she did not know how fast she was driving, but did not think she was driving 40 miles an hour. The evidence shows, however, that after she had been driving 25 miles an hour, she was directed to and did speed up the momentum of the automobile. There is one physical fact which indicates almost incontrovertibly that the testimony of the motorman was absolutely correct. The speeding automobile passed over the curbing on the west side of the boulevard, struck and broke in two a trolley pole which was 18 inches in thickness. This of itself, we think, is strong corroborative testimony if not an absolute demonstration of the correctness of the testimony of the motorman. During all the time the automobile was being driven upon Stockton boulevard, it was passing intersecting streets. It is true the testimony does not show that it passed any cars between Third and Fourth avenues, but it was speeding past intersecting streets, as we have stated, and along the side of the street car track, upon which a street car was moving slowly was plainly visible. That it is extremely hazardous to propel an automobile at a speed beyond the legal limit, and approaching the speed testified to in this case, past intersecting streets, within the corporate and built-up limits of a city, we think is beyond question. In this case the speeding was an intentional act. That such speeding on the streets of a city can only be done without regard to the rights or safety of persons and property who may at any time be expected to use the same streets, or coming thereon from intersecting streets, seems to us likewise beyond contradiction. There was nothing to prevent the occupants of the automobile in question from seeing the trolley pole with which the automobile collided. We are unalterably of the conclusion that no private automobile, and no automobile not excepted by the terms of the Vehicle Act can be propelled upon built-up streets within the corporate limits of any city where there are intersecting streets, at a speed of 40 miles per hour, or at a speed approaching that excessiveness, without an indifference as to the rights and safety of others who may have occasion to use the same, and therefore, with a greater or less indifference to the safety of the persons riding in the automobile so being driven along the streets of a city.

That the defendants were violating a statute of the state stands admitted; therefore, the language of the Supreme Court in Benjamin v. Noonan, 207 Cal. 279, 277 P. 1045, 1046, is pertinent, to wit: "While it is undoubtedly correct to say that the act of driving a vehicle over a street or public highway beyond the speed limit established by a municipal ordinance or a statute merely constitutes evidence of negligence in cases where damage has followed the infraction of such an ordinance or law, the rule in this state is, however, that it is conclusive evidence of negligence (citing cases). Therefore, the statement that such an act is 'of itself negligence,' or 'negligence as a matter of law' or 'negligence per se' (equivalent expressions) is, in this state, strictly correct." (Citing a number of authorities.)

[6] In 45 C. J. p. 678, the rule is thus stated: "Violation of a statute or ordinance does not of itself constitute willfulness or wantonness, but it may be considered as a circumstance tending to show that the act or omission in question was wilful or wanton, as be-

ing entirely regardless of the law and the safety of others." In this state gross negligence does not involve the elements of either wilfulness or wantonness. If the intent to do the act constituting negligence is present, it is not necessary that it be willful or wanton in order to conclude that the circumstances surrounding the performance of the act establish gross negligence.

In the recent case of Malone v. Clemow et al. (Cal. App.) 295 P. 70, 71, we find the meaning of the words "gross negligence" considered. It is there said: "Gross negligence has been defined to be 'the want of slight diligence.' Redington v. Pacific Postal Telegraph Cable Co., 107 Cal. 317, 40 P. 432, 434, 48 Am. St. Rep. 132; Walther v. Southern Pacific Co., 159 Cal. 775, 116 P. 51, 37 L. R. A. (N. S.) 235; Shearman & Redfield on Negligence, § 49; Krause v. Rarity et al. (Cal. Sup.) 293 P. 62, 66; Coit v. Western Union Telegraph Co., 130 Cal. 657, 63 P. 83, 53 L. R. A. 678, 80 Am. St. Rep. 153; Helme v. Great Western Milling Co., 43 Cal. App. 416, 185 P. 510, 512; 19 Cal. Jur. 554. In the recent case of Krause v. Rarity, supra, the Supreme Court, in considering the meaning of the phrase 'gross negligence' as used in section 141¾ of the California Vehicle Act, said: 'In many jurisdictions the division of negligence into degrees is not countenanced (20 R. C. L. 21); the concept being that such phrases as "gross negligence" and "slight negligence" are misnomers. In this state the degrees of negligence have been frequently recognized. The term "gross negligence" has been defined as "the want of slight diligence," as "an entire failure to exercise care, or the exercise of so slight a degree of care as to justify the belief that there was an indifference to the things and welfare of others," and as "that want of care which would raise a presumption of the conscious indifference to consequences."' We should not confuse 'gross negligence' with 'wilful misconduct,' because there is a clear distinction between the two terms. In Helme v. Great Western Milling Co., supra, the court said: '"Wilful misconduct" means something different from and more than negligence, however gross. * * * The mere failure to perform a statutory duty is not, alone, willful misconduct. * * * To constitute "willful misconduct" there must be actual knowledge, or that which in the law is esteemed to be the equivalent to actual knowledge, or the peril to be apprehended from the failure to act, coupled with a conscious failure to act to the end of averting injury.' See, also, Tognazzini v. Freeman, 18 Cal. App. 468, 123 P. 540; Eylenfeldt v. United Railroads of San Francisco, 28 Cal. App. 56, 151 P. 293; Figlietti v. Frick, 203 Cal. 246, 263 P. 534. Appellants argue that some act of willfulness and wantonness must be shown to constitute gross negligence; or, in other words, that either willfulness or wantonness is a necessary element of gross negligence. It is clear from the foregoing authorities that this is not correct, for, whenever the element of knowledge and willfulness enters into the act, it ceases to be negligence, and becomes at least 'willful misconduct,' and this is true no matter what degree of negligence is being considered." In the Clemow Case the record shows that the driver of the automobile was proceeding along one of the streets of Berkeley, upon a clear night, where the streets were artificially lighted, so that an object on the street was clearly distinct at a distance of 200 feet or more; that the course of the automobile was not obstructed by any other automobile; and that the automobile was driven into the rear of a parked truck upon which there was a red light; that the automobile had been traveling for several blocks at a speed of from 30 to 35 miles per hour. No explanation was offered why she did not see the parked truck and its tail-light until within about 12 feet distant therefrom. The court held that the facts established gross negligence. In the instant case the driver of the automobile simply said that she did not see the trolley pole. In the Clemow Case, just cited, the automobile was being driven at a speed of from 30 to 35 miles per hour, which of course was negligence per se, being contrary to the California Vehicle Act. Under the facts in the case of Malone v. Clemow, supra, and the law there announced, we think the facts in the instant case demanded a like finding on the part of the trial court.

The appellant relies upon a number of Washington cases where the subject of gross negligence has been considered. The Supreme Court of Washington, in its definition of "gross negligence," follows the definition given by the Supreme Court of Wisconsin, which differs very materially from the definition adopted by the courts of this state.

In Bentson, Administrator, etc., v. Brown, 186 Wis. 629, 203 N. W. 380, 381, 38 A. L. R. 1417, we find that Wisconsin holds gross negligence to be defined as follows: "It is the settled law of this state that in order to constitute gross negligence there must be either a willful intent to injure, or that reckless and wanton disregard of the rights and safety of another or of his property, and that willingness to inflict injury, which the law deems equivalent to an intent to injure." This definition is supported by a number of authorities. In that case the driver of an automobile drove past a schoolhouse just as the pupils were emerging therefrom. The rate of speed of the automobile was about 20 miles per hour. A boy dashing suddenly in front of the automobile was stricken down. It was held by the trial court that gross negligence was not shown. Even in that case there was a dissenting opinion based upon the fact that the legal limit was exceeded by the driver of the automobile. One sentence is to some extent pertinent here. It is: "The act of the defendant in driving at an unlawful rate of speed by school grounds was intentional, willful, utterly reckless, and in disregard of human life." If we eliminate the reference to "willfulness" and "utter recklessness," the quotation would be strictly applicable, as the rate of speed in the instant case was intentional, and as we have shown, also in disregard of the rights of others who might be expected to emerge from the intersecting streets.

In the recent case of Craig v. McAtee et al., 295 P. 146, 148, we find the Supreme Court of Washington approving the definition of gross negligence announced by the Supreme Court of Wisconsin, to wit: " 'Gross negligence' has been defined to be the want of even slight care. Saxe v. Terry, 140 Wash. 503, 250 P. 27; Blood v. Austin, 149 Wash. 41, 270 P. 103. The Supreme Court of Wisconsin, in the case of Bentson v. Brown, 186 Wis. 629, 203 N. W. 380, 384, 38 A. L. R. 1417, refers to its definition of gross negligence as ' "such a degree of rashness or wantonness * * * as evinces a total want of care for the safety" of others.' " (Citing Ryan v. La Crosse City R. Co., 108 Wis. 122, 83 N. W. 770.) And again, as "reckless and wanton disregard of the rights and safety of another or of his property, and that willingness to inflict injury, which the law deems equivalent to an intent to injure," etc. As repeatedly stated by our own courts, the element of wantonness, rashness, and recklessness do not enter into the definition of gross negligence.

Following the definition which we have just stated, the Supreme Court of Washington, in the case of Dailey v. Phoenix Investment Co. et al., 155 Wash. 597, 285 P. 657, 658, held that the following facts did not constitute gross negligence: After stating that a party by the name of Twohy was driving, the opinion goes on to state: "The road to the city, at least for a considerable distance from the clubhouse, was an ordinary gravel road about 20 feet in width. A short distance from the clubhouse, the road became what is referred to in the testimony as the 'straightaway,' of about three-quarters of a mile to a mile in length. At approximately the end of this 'straightaway' another road crossed at right angles the road upon which the parties hereto were proceeding. The right-angle turn, however, had been done away with by a curve, which left an unimproved triangular space between the old right-angle turn and the new curve which formed a connection between the road upon which the parties were driving and the crossroad. In this space, which is referred to in the testimony as 'the triangle,' there stood a telephone pole, and also some large rocks, or boulders, which had been thrown into the 'triangle'; that area being a little below the surface of the road. Testimony introduced by appellant tended to show that there was considerable loose gravel on the road at and near the curve; the gravel being thicker on the right-hand portion of the road, facing toward Yakima, than in the middle thereof. As the automobile entered upon the 'straightaway,' it attained a speed of approximately 40 miles an hour, and appellant signalled to a couple of cars ahead of him, in which were riding persons who had also been to the dance, that he desired to pass them. This was safely accomplished, and the car continued on its way. As the car entered upon the curve in the road above referred to, it left the roadbed, and collided with some of the debris in the 'triangle,' the shock throwing respondent from the car and inflicting upon her the injuries of which she complains."

Following the same rule, the Supreme Court of Washington, in Blood v. Austin, 149 Wash. 41, 270 P. 103, 104, held that the following facts did not constitute gross negligence: "Mrs. Blood testified that during the first 20 miles on the return trip the respondent was cautioned several times by others in the car about driving too fast. That he was thus cautioned was denied by him and his wife. In this respect, however, as well as others, we accept the testimony most favorable to the appellant. The weather was cold, below freezing, and appellant testified that the respondent drove rather fast, by spurts. About two miles further on the accident happened, on a right-hand curve in the highway. All along, the road was in good condition. It was a graveled road; the traveled portion being 20 feet wide. Two hundred and fifty feet from the curve there was the usual caution sign of 'Curve 250 feet.' Appellant testified that the respondent started to speed up about 100 to 200 feet from the sign, at which time his speed was estimated at 30 to 40 miles an hour, at which time her husband asked him to go slow. * * * The curve was 75 to 100 feet in length, around a hillside on the right. The car ran against a railing on the left, which gave way about the center of the curve, causing the car to topple down an embankment, resulting in the death of Mr. Blood. Upon approaching the curve, and within it, the right-hand side of the road had chuck holes or ice pockets, as they were called by different witnesses, and in taking the curve the car was driven along the center of the roadway. The roadway was frozen and covered with loose, round gravel or rocks, as different witnesses described it, similar to the situation in the case of Saxe v. Terry, 140 Wash. 503, 250 P. 27, causing a lateral skidding or sliding on the pebbles of the wheels of the car to the left, until the railing was struck. Upon examination it was found that the posts supporting the railing were rotten. There was no other traffc in the vicinity at that time."

The same rule is followed in Heiman v. Kloizner, 139 Wash. 655, 247 P. 1034, the facts of which need not be recited, but which show that the court had in view that gross negligence included an idea of the heedless and reckless disregard of the rights of others, merging upon wantonness and wilfulness.

In the case of Adair v. Newkirk, 148 Wash. 165, 268 P. 153, 154, the Supreme Court of Washington held an act of an automobile driver, when turning out to pass a car traveling in the same direction, misjudging the distance of an approaching car and causing a collision, to be gross negligence. A portion of the opinion in that case, somewhat approaching the facts in the case at bar, shows facts constituting gross negligence: "Newkirk while admitting that he overtook and passed a car going 30 or 35 miles per hour, that he attained a speed of at least 40 miles an hour in doing so, and that he saw the lights of the approaching car at all times, seeks to justify his act by his own testimony to the effect that the lights on the approaching car were dim and yellowish, and he was thereby misled as to its nearness and was guilty only of an error of judgment. There was little, if any, corroboration of his testimony in this respect, and the trial court found against him on the facts. That finding being well supported by a preponderance of the testimony, we are content to adopt it and with it the conclusion that Newkirk was guilty of gross negligence. In so concluding we have in mind what was said in Heiman v. Kloizner, supra, * * * to the effect that varying degrees of negligence or of required care cannot be differentiated with any sort of precision. The difference is not in principle, but in degree only. Therefore where, as here, there is shown that no care whatever was exercised, in a situation obviously involving great danger, the conclusion of gross negligence follows."

The Washington cases, as to their facts, are further distinguished from the circumstances surrounding the instant case in that the Washington cases all took place on the open highway, and it is not stated in any of them that the speed law was being violated, while in the instant case, the facts relate to circumstances which took place within the limits of an incorporated city, where the speeding automobile was passing intersecting streets at approximately twice the legal limit.

In Pepper v. Morrill, 24 F.(2d) 320, 321, 57 A. L. R. 750, the United States Circuit Court of Appeals for the First District held the following facts, which are in many respects similar to the facts in the instant case, sufficient to establish gross negligence: One of the witnesses testified that the car was speeding along at about 50 miles per hour; that the driver had been warned not to drive so rapidly; that once or twice he had gone around a curve so as to give the automobile the sensation of tipping over. The accident occurred at the fork of two roads. We take from the opinion the following: "At the fork in the road there was a wooden fence and two or three lamp posts. As the defendant attempted to turn to the left from the Ware road, the right-hand side of the car collided with the fence and one of the lamp posts, breaking down both, and bringing up against a telegraph pole, which was pushed to one side, but not broken off. The plaintiff's husband was instantly killed, she was seriously injured, and the defendant was rendered unconscious. A member of the state constabulary, who was doing police duty in the vicinity of the accident, proceeded there immediately after it occurred, and testified that there was a hill just before reaching the scene of the accident from West Brookfield; 'that the hill was straight about halfway down, and a curve started to the left about halfway down to the bottom; * * * that there is a fork in the road, one road going to Ware, and the other to Springfield. At this fork in the road the hill was still descending; not so much, but still a grade. On the Ware road it continues to be a hill; on the Springfield road, just a slight grade; that at the fork in the road there was a state fence—white fence made of wood—and at the corner, the junction of the two roads, the Y, there were two or three lamp posts. This car had broken the fence, and also one of the posts, and sideswiped the fence and one of the posts at the same time. There was a big telegraph pole, which was pushed to one side to a certain extent, but was not broken off.'" This was held to constitute gross negligence. The speeding in this instance was on the open highway. Whether it was beyond the legal limit does not appear from the opinion. At the time the automobile involved in this action struck the pole, the facts in the record indicate that the street car was on the other side of a broad street at least 50 feet away, and at a complete stop; that there was nothing in front of the automobile to prevent its traveling on its course.

As further indicating the peril of driving an automobile on city streets, it may be stated that the speed, indicated by the testimony in this case, at which the automobile was traveling, the time consumed from intersection to intersection, was approximately five or six seconds, which certainly indicates the intent of the defendants to get by without due regard to the obvious danger of driving at such a high rate of speed. The appellant in this case did not take the stand to contradict or vary, in any particular, the testimony of the motorman as to the speed of the car, which we have stated, in view of the physical facts, appear to be practically incontrovertibly corroborated as a truthful estimate. It must always be borne in mind that a state of facts relating to an automobile accident out on the open highway cannot be controlling as to the conclusions to be reached upon a corresponding state of facts occurring within city limits. The former might only reasonably be held negligence, while in the latter, owing to the difference in the hazardousness of the situation, gross negligence would only be the right conclusion.

[7] In view of what we have stated and the uncontradicted facts in this case, we conclude that the trial court was in error in not finding gross negligence.

It is therefore ordered that the word "not" be stricken from the last clause in finding No. 4, so as to make the finding conclude as follows: "That the negligence of said defendants was gross."

We do not deem it necessary to further amend the findings relative to the acceptance of the ride by the plaintiff in this action, as what we have said sufficiently covers that question.

The judgment is affirmed.

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113 Cal. App. 118

SMITH v. PICKWICK STAGES SYSTEM.

Civ. 7479.

District Court of Appeal, First District, Division 2, California.

March 31, 1931.

1. Appeal and error 🔑1024(3).

Trial court's determination of truth of affidavits on motion for order permitting amendment of complaint was conclusive on appeal.

2. Parties 🔑95(5).

Where president of true defendant was served with summons and complaint and corporation named as defendant was holding company owning all stock of true defendant, amendment of complaint to show true name of defendant was permissible (Code Civ. Proc. § 473).

> It could easily be ascertained from examination of original complaint that it was intention of plaintiff to sue P. Stages System, since complaint stated that defendant operated stages between certain cities; that it maintained a terminal at certain address; and that on certain date it employed person named as stage driver. Such facts did not apply to any other corporation, so that any officer of P. Stages System who read complaint must have known exactly what corporation was intended as defendant, and the answer showed that defendant that appeared was in fact P. Stages System, and not P. Corporation, which was named in the original complaint as defendant.

3. Limitation of actions 🔑121(2).

Amendment of complaint correcting name of real party defendant related back to time of filing original complaint, as regards statute of limitations.

4. Appeal and error 🔑910.

Where defendant did not contend its stage driver lacked authority to grant plaintiff privilege of entering stage to look for passenger's purse, driver's authority would be presumed.

5. Negligence 🔑32(2).

One in loading room and also in stage at express invitation of driver and for purpose of aiding in looking for passenger's purse was "invitee."

> [Ed. Note.—For other definitions of "Invitee," see Words and Phrases.]

6. Negligence 🔑32(1).

Invitee in loading room of stage company was entitled to ordinary care at hands of stage company's servant.

7. Negligence 🔑32(1).

Where stage driver unloading baggage threw down piece of baggage which hit invitee, who had gotten out of stage after looking for passenger's purse, negligence was shown.

8. Master and servant 🔑332(2).

Evidence *held* sufficient to support conclusion that stage driver throwing baggage which struck invitee was acting within scope of employment in unloading baggage from stage.

9. Negligence 🔑32(1).

Stage driver hitting invitee with baggage being unloaded *held* negligent in failing to look and in failing to give warning.

10. Master and servant 🔑300.

Master is liable for servant's torts committed within scope of employment.

Appeal from Superior Court, City and County of San Francisco; Edmund P. Mogan, Judge.

Action by Mildred Vera Smith against the Pickwick Stages System. From a judgment for plaintiff, defendant appeals.

Affirmed.

Barry J. Colding, Theodore Hale, and Carroll B. Crawford, all of San Francisco, and B. P. Gibbs, of Los Angeles, for appellant.

Charles W. Fisher, of Oakland, and Leicester & Leicester, of San Francisco, for respondent.

PRESTON, Justice pro tem.

This is an appeal by the defendant, Pickwick Stages System, a corporation, from a judgment entered against it upon the verdict of a jury in the sum of $1,500.

Plaintiff, Mildred Vera Smith, brought this action for damages, charging that she was severely injured in the Union stage station of defendant in San Francisco, through the carelessness and negligence of the driver of one of defendant's stages.

The facts necessary for a correct understanding of the questions involved on this appeal, and which are practically uncontradicted, may be thus briefly stated: On the morning of January 15, 1927, the plaintiff went to the depot of defendant in San Francisco for the purpose of meeting her mother, who had written plaintiff that she would arrive in San Francisco from Los Angeles on a Pickwick stage. Her mother arrived in one of appellant's stages, and was met in the waiting room of said station by plaintiff. Mrs. Dobson, the mother, had lost her purse and thought she had left it in the stage. Plaintiff and Mrs. Dobson went through a door which separates the waiting room from the part of the station where the stages enter and discharge their passengers, called "the unloading room," and through which Mrs. Dobson and the other passengers from Los Angeles had just come. Plaintiff saw the stage driver standing at the rear end of the stage, unloading baggage from it, and after telling him they were looking for a purse, they were instructed and invited by the driver to look in the stage for the purse. This they did, and while plaintiff was in the stage, the driver climbed on the roof of the stage and continued to unload baggage therefrom; he threw down two suitcases to a sailor, who was waiting for them beside the stage. After plaintiff had gotten out of the stage, and had taken a step or two towards the waiting room, the driver threw down a third piece of baggage and it hit plaintiff on the head, inflicting serious injury and rendering her unconscious. The driver jumped off of the stage and helped to carry plaintiff into the waiting room. As he was carrying her into the waiting room he stated to a friend of Mrs. Smith that he had hit her on the head with a sailor's dunnage bag. This same stage driver, however, testified at the trial, which took place about three years after the accident, that the sailor hit plaintiff with the bag, but this testimony was contradicted by the statement made by the driver at the time of the injury, and also by the testimony of Mr. Aubrey, who was an eyewitness to the accident. The sailor did not testify at all in the case. At the time of the injury, the driver was the only one on the top of the stage, and the bag which hit plaintiff came from the top of the stage. The jury found by its verdict that the driver was the one who threw the bag down on plaintiff's head.

Appellant's first contention is this: "The trial court erred in granting plaintiff's motion to amend her complaint, over the objection of appellant, by substituting 'Pickwick Stages System, a Corporation' as defendant herein for 'Pickwick Corporation, a Corporation,' for the reason that any right of action plaintiff might once have had, if any, was barred by the terms of subdivision 3, section 340, Code of Civil Procedure."

This contention is based upon these facts: The original complaint, which was filed on June 30, 1927, named "The Pickwick Corporation, a Corporation, D. G. Vaio (the driver of the stage) and John Doe" as defendants. Summons was issued on June 30, 1927, commanding "The Pickwick Corporation, a Corporation, D. G. Vaio and John Doe," to appear and answer within the statutory time. The return on the summons, made by the sheriff, shows service on "C. F. Wren, President of The Pickwick Corporation, a Corporation, of a copy of summons and complaint." "The Pickwick Corporation, a Corporation" demurred to plaintiff's complaint on September 8, 1927, and answered on October 4, 1927. On June 26, 1929, two years and five months after the accident, the plaintiff filed a motion to "amend her complaint by correcting a mistake in the name of the defendant wherever it occurs therein from the Pickwick Corporation to Pickwick Stages System, the correct name of the defendant herein." Said motion was made upon the following grounds: "(1) That the true name of the defendant is Pickwick Stages System, instead of Pickwick Corporation; (2) That a mistake was made in the name of the defendant in said complaint; (3) That in furtherance of justice the plaintiff should be allowed to amend her complaint by correcting the mistake in the name of the defendant; (4) That Pickwick Stages System has been properly served with the summons and a copy of the complaint herein."

The motion was heard, and the court made the order permitting the amendment, upon the affidavit of Charles W. Fisher, one of plaintiff's attorneys, and the counteraffidavit of C. F. Wren, the president of the Pickwick Corporation, and also president of Pickwick Stages System.

[1] These two affidavits are in direct conflict in every important particular. The trial court accepted the affidavit made on behalf of plaintiff as true. This action of the trial court in determining whom to believe is con-

clusive on appeal to this court; therefore, the statements in the Fisher affidavit, in favor of plaintiff, must control. Patterson v. Keeney, 165 Cal. 466, 132 P. 1043, Ann. Cas. 1914D, 232; Nelsen v. Joseph, 78 Cal. App. 743, 248 P. 754; Brown v. DeWaard & Sons, 99 Cal. App. 222, 278 P. 257; Doak v. Bruson, 152 Cal. 19, 91 P. 1001; Flood v. Goldstein Co., 158 Cal. 248, 110 P. 916; Corgiat v. Realty Mortgage Corp., 86 Cal. App. 37-40, 260 P. 573.

[2] From the Fisher affidavit, two very essential facts were established: (1) That the president of Pickwick Stages System was actually served with a copy of the summons and complaint in this action, thus giving the court jurisdiction of that corporation; and (2) that, while there were two corporations—one the "Pickwick Corporation" and one "Pickwick Stages System"—nevertheless, they used these names interchangeably throughout California, and that "The Pickwick Corporation" was the holding company and owned all the capital stock of "Pickwick Stages System"; also that "Pickwick Stages System" specifically advertised the stage business under the name of "Pickwick Corporation."

Such an amendment is specifically permitted by section 473 of the Code of Civil Procedure. The case at bar is essentially identical with and governed by such cases as Nisbet v. Clio Mining Co., 2 Cal. App. 436, 83 P. 1077; Thompson v. Southern Pacific Co., 180 Cal. 734, 183 P. 153; Walsh v. Decoto, 49 Cal. App. 737, 194 P. 298; Craig v. San Fernando Furniture Co., 89 Cal. App. 168, 264 P. 784; Lindsey v. Superior Court, 100 Cal. App. 37, 279 P. 837.

In the case of Thompson v. Southern Pacific Company, supra, the original complaint named the defendant as the "Southern Pacific Railroad Company." Five years after the accident out of which the action arose, the pleader discovered that the defendant against whom he had his cause of action was really a corporation by the name of "Southern Pacific Company." Two separate corporations existed—one incorporated under the laws of California, and the other incorporated under the laws of Kentucky. From the outset the plaintiff in that case was pursuing the concern that operated the train with which he collided, and when he discovered he had designated the defendant by a misnomer the court granted him permission to amend to correctly state the name of the defendant he urged his claim against. The Supreme Court held the amendment to be proper. There were, in fact, no new defendants brought in.

The same question was involved in the case of Walsh v. Decoto, supra. In the original complaint in that case the "Blue Taxicab Corporation" was named as the defendant, and was described in the caption of the complaint as a corporation and in the body of the complaint appeared the usual allegation that the defendant was a corporation. Two years after the accident out of which the action arose, and after an answer had been filed on behalf of the Blue Taxicab Corporation, as defendant, the plaintiff discovered that he was in error in designating the concern against whom he was asserting his claim as a corporation; in fact, it appeared that the Blue Taxicab Corporation was not a corporation, but was merely a fictitious name under which one Ezra W. Decoto conducted his business. The court permitted the plaintiff to amend his complaint so that the defendant was designated as Ezra W. Decoto, doing business under the name and style of the Blue Taxicab Corporation. The Court of Appeal sustained the lower court in permitting the amendment, and in that case the change or departure was much more marked than in the case at bar.

In the case at bar, it can be easily ascertained from an examination of the original complaint that it was the intention of the plaintiff to sue "Pickwick Stages System," for the complaint states that the defendant operated stages between Los Angeles and San Francisco; that it maintained a terminal at 75 Fifth street, San Francisco; and that on January 15, 1927, it employed D. G. Vaio as a stage driver. Every one of the facts alleged were and are true as regards the "Pickwick Stages System," but did not apply to any other corporation, so that any officer of the Pickwick Stages System who read the complaint must have known exactly what corporation was intended as defendant. Furthermore, the answer shows that the defendant that appeared was, in fact, the "Pickwick Stages System," and not the Pickwick Corporation, for in the answer to the original complaint not only is a general denial set up, but also a separate defense is interposed, in which the defendant pleads "that the injury was due to the carelessness and negligence of plaintiff and this carelessness and negligence of plaintiff was the sole proximate cause of the injury and damage," etc. This answer was verified so the defendant must surely have known all about the injury when it filed this verified answer, for the facts are not alleged on information and belief, but are stated as absolutely true. It would be very difficult for a defendant who was not a party to the accident to secure such positive information as to the cause thereof. The only corporation which could truthfully swear to such a defense would be the one whose employees and servants had actually participated in the events leading up to the accident. This, of course, was the Pickwick Stages System.

We conclude, therefore, that the trial court did not err in permitting the amendment to be made.

[3] Appellant also contends that the demurrer to the amended complaint, and the plea in the answer raising the statute of limitations,

should have been sustained. There is no merit in this contention. The same contention was made in the case of Thompson v. Southern Pacific Co., supra; and also in Walsh v. Decoto, supra, and in both cases the court decided the point adversely to appellant's contention. It clearly appears from a reading of the original and amended complaint that the plaintiff at all times was urging her claim for damages against the corporation or concern operating the stage line and stage depot, and that had in its employ as a stage driver one D. G. Vaio. The amended complaint does not state a new and different cause of action, or bring in any new or different party defendant, but merely corrects the name of the real party defendant where a misnomer had occurred. Under such circumstances, the rule is elementary that the amendment relates back to the time of filing the original complaint, so far as the statute of limitations is concerned. Cox v. San Joaquin Light, etc., Co., 33 Cal. App. 522, 166 P. 578; United States Farm Land Co. v. Bennett, 55 Cal. App. 299, 203 P. 794; Alexson v. Steward, 55 Cal. App. 251, 203 P. 423; 16 Cal. Jur. 547 and cases there cited.

It is next contended by appellant that the evidence is insufficient to support the verdict, and under this contention it states that the facts disclose: "(1) That the accident was unavoidable; (2) that plaintiff was at the time of the injury a trespasser, or at the best a bare licensee, as to whom the appellant had only a duty to abstain from wilfully inflicting injury."

We find no merit in any of these contentions.

[4-6] Appellant admits that the plaintiff was an invitee while in the waiting room of its depot, but claims that she was a trespasser when she entered the part of the depot called the "loading room" and the stage for the purpose of searching for the purse. In entering the "loading room" and the stage, plaintiff was there as one of three classes of persons: A trespasser, licensee, or an invitee. If there without the knowledge or consent of the master or servant, she was a trespasser; if there without the knowledge of the master, but with the knowledge of the servant who had no authority to invite her, she was a mere licensee; but if there with the consent of the master or with the consent of the servant, having authority, express or implied, to grant the privilege, she was an invitee. Dyer v. McCorkle, 208 Cal. 216, 280 P. 965.

The uncontradicted evidence shows that plaintiff was in the "loading room" and also in the stage at the express invitation of the driver, who had charge of the driving and unloading of the stage, and there is no contention by appellant that the driver lacked authority from it to grant plaintiff the privilege of entering the "loading room" and stage. The driver's authority will, therefore, be presumed. Plaintiff's legal status was, therefore, that of an invitee in the "loading room" of appellant at the time of her injury, and, as such, she was entitled to ordinary care at the hands of the servant of appellant, and an omission in this particular would be binding upon the master for at the time of the infliction of the injury the servant was engaged in accomplishing an object in the line of duties assigned to him by such master. Dyer v. McCorkle, supra; Ingledue v. Davidson, 102 Cal. App. 697, 283 P. 837; Thompson on the Law of Negligence, p. 146; Madigan v. O. A. Hale & Co., 90 Cal. App. 151, 265 P. 574; Goldstein v. Healy, 187 Cal. 206, 201 P. 462; Oles v. Kahn Bros., 81 Cal. App. 76, 253 P. 158.

We think that plaintiff's status was that of an invitee for another reason, to wit: It was the duty of appellant to give its passengers a reasonable opportunity to remove their baggage, and when plaintiff aided in looking for the lost purse, a duty which rested on the stage driver, she was also aiding the appellant; or, in other words, plaintiff, at the time she was injured, was engaged in a matter which was to the mutual advantage of appellant and its passenger, and was therefore an invitee on the premises. O'Grady v. Chicago, B. & Q. R. Co., 90 Neb. 339, 133 N. W. 426; Little Rock & Ft. S. Ry. Co. v. Lawton, 55 Ark. 428, 18 S. W. 543, 544, 15 L. R. A. 434, 29 Am. St. Rep. 48.

[7-10] It seems idle to argue that the accident was unavoidable, or that there was no negligence shown in this case on the part of the driver. It was stipulated that Vaio (the man who threw the dunnage bag on respondent's head) was an employee of the defendant, Pickwick Stages System, and had charge of its stage. The evidence is amply sufficient to support the conclusion that he was acting within the scope of his employment in unloading baggage from the stage. The driver was negligent in failing to look where he was throwing the baggage; he was negligent in failing to give warning that a dunnage bag would be thrown from the top of the stage. The law is well established that the master is liable for the torts of the servant if committed by him within the scope of his emploment. O'Callaghan v. Bode, 84 Cal. 489, 24 P. 269; Johnson v. Monson, 183 Cal. 149, 190 P. 635; Ruppe v. City of Los Angeles, 186 Cal. 400, 199 P. 496.

The other contentions made by appellant are also without merit and do not require discussion.

We find no reason to disturb the verdict and judgment. The judgment is therefore affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

112 Cal. App. 719

MULLIN v. ROUSSEAU et al.

Civ. 7291.

District Court of Appeal, First District, Division 2, California.

March 21, 1931.

Rehearing Denied April 20, 1931. Hearing Denied by Supreme Court May 18, 1931.

1. Appeal and error ⇨1005(1).

Credibility and weight of testimony are properly matters for jury, and for court on motion for new trial.

2. Fraud ⇨22(1).

Apartment house purchaser justifiably relied on representation that eastern apartments were identical with inspected western apartments; demand to inspect occupied apartments being unnecessary.

It was contended that, since purchaser knew width of lot and had opportunity to view exterior of building and inspect apartments on west side, representations concerning size of apartments on east side of building related to matters which were patent and obvious and would therefore not be actionable.

3. Health ⇨32.

Statute *held* to prohibit using basement of three-story wooden apartment house for living purposes (St. 1923, pp. 794, 801, §§ 12, 27).

St. 1923, p. 794, § 12, provides that no wooden apartment house shall exceed three stories for living or sleeping purposes at any point, and page 801, § 27, provides that any room in basement of apartment house occupied for living or sleeping purposes must conform to requirements applicable to other rooms.

4. Fraud ⇨10.

Vendor's representations that basement apartments were lawful and were approved by authorities, besides being representation regarding law, included actionable representation of fact (St. 1923, p. 781 et seq.).

It appeared that municipal authorities were in doubt regarding legality of apartments like those involved, and in such cases were accustomed to permit them to be occupied if they were sanitary and complied with certain provisions of St. 1923, p. 781 et seq., and therefore as a practical matter the question of fact whether the municipal authorities had inspected the apartments and issued a permit was of primary importance.

5. Fraud ⇨10.

Representation that basement apartments were lawfully constructed, being on matter of law, is not actionable (St. 1923, pp. 794, 801, §§ 12, 27).

6. Fraud ⇨27.

Grievance of purchaser suing for misrepresentation that basement apartments complied with statute and were approved by municipal authorities arose not solely from statute, but also from absence of municipal approval (St. 1923, pp. 794, 801, §§ 12, 27).

It was contended that purchaser's grievance, if any, arose solely from existence of statute, and not from any actual or threatened interference by municipal authorities, but evidence disclosed that no permit was issued for apartments in question until almost two years after consummation of transaction, and this permit expired after only three months, and that absence of permit gave rise to possibility or threat of interference, thereby decreasing value of apartment house involved.

7. Fraud ⇨33.

To sustain action for fraud in sale or exchange of realty, enforceable written contract between parties before completion of transaction is unnecessary.

8. Fraud ⇨59(2).

Notwithstanding absence of written agreement between parties, damages for fraud in exchange of realty *held* difference between actual value and value if property had been as represented.

It appeared that, although there was no written agreement of sale or exchange signed by plaintiff and defendants, both parties inspected the apartment houses involved in the exchange, and plaintiff conveyed her apartment house to defendants, and they conveyed to plaintiff, and that, without plaintiff's knowledge, real estate broker who brought parties together agreed to accept reconveyance of plaintiff's property from defendants, inasmuch as defendants desired to sell rather than exchange.

9. Appeal and error ⇨207.
Trial ⇨132.

Misconduct, if any, by counsel in arguing that he accompanied witness when witness found certain evidence *held* harmless, where counsel withdrew remarks and no request was made to admonish jury.

10. Appeal and error ⇨978(2).

Judge's conclusion, shown by denying new trial, that counsel's misconduct was harmless, should not be disturbed unless plainly wrong.

11. Costs ⚷32(1).

Where jury at first trial were discharged for plaintiff's counsel's misconduct and costs charged to plaintiff as penalty, court after second trial improperly allowed plaintiff, as prevailing party, costs of first trial (Code Civ. Proc. §§ 956, 963, 1033).

12. Appeal and error ⚷119, 870(2).

Order taxing costs on mistrial, although nonappealable, was reviewable on appeal from final judgment (Code Civ. Proc. §§ 956, 963).

13. Appeal and error ⚷1005(3).

That evidence is sharply conflicting and would sustain verdict for either party does not justify disturbing fact conclusions of jury and court.

Appeal from Superior Court, City and County of San Francisco; Joseph J. Trabucco, Judge.

Action by Enid J. Mullin, also known as Enid J. Crippen, also known as Enid J. Bussey, against Charles J. Rousseau and another. From a judgment for plaintiff and orders denying a motion for judgment notwithstanding the verdict and a motion to tax plaintiff's costs, defendants appeal.

Modified and affirmed.

P. A. Bergerot, A. P. Dessouslavy, and Arthur H. Barendt, all of San Francisco, for appellants.

Livingston & Livingston, of San Francisco, for respondent.

SPENCE, J.

Action for fraud. Upon a trial by jury, judgment upon the verdict was entered in favor of plaintiff and against defendants for the sum of $15,500. The trial court thereafter denied defendants' motion for judgment notwithstanding the verdict, and denied defendants' motion to tax plaintiff's costs. Defendants appeal from the judgment and from the orders denying said motions.

This litigation arose out of a transaction in which plaintiff acquired defendants' apartment house in 1927. In her complaint plaintiff alleged misrepresentation of the size of certain apartments, misrepresentation of the income and expenses, and a misrepresentation to the effect that the apartments on the lobby floor had been built according to law and had been inspected and approved by the municipal authorities. The apartment house, constructed in 1925, was a wooden structure consisting of three main floors of four apartments each and a lobby floor or ground floor or basement, as it has been variously termed, consisting of a lobby and two apartments. Under the original plans for construction there were no apartments on this lobby floor, and the permits for construction and occupancy issued respectively by the board of public works and the department of public health did not contemplate these two apartments. These two apartments were subsequently constructed by appellants and occupied without inspection, approval, or permit by the municipal authorities.

This appeal is taken under the alternative method upon a voluminous transcript. To assist in the determination of the questions presented, counsel have filed voluminous briefs, no one of which is less than 200 pages in length and each brief is arranged under approximately 100 headings. Upon reading these briefs we are convinced that much that has been said is not properly before us for consideration on this appeal. However we will attempt in this opinion to discuss briefly each of the main grounds for reversal urged by appellants.

[1] Appellants attack the testimony of respondent and the witness Cunningham (the real estate salesman who handled the transaction) contending that their testimony was preposterous and so thoroughly discredited as to be insufficient to support any finding in respondent's favor. It will be noted that it is not claimed that there was no evidence to support the implied findings. Although the evidence was conflicting there was ample evidence to show that the misrepresentations were made, believed, and relied upon. In support of their contention appellants indulge in a lengthy argument on matters bearing upon the credibility of these witnesses and the weight to be attached to their testimony. These matters were all proper for the consideration of the jury upon the trial and of the trial court upon motion for new trial. The same argument was no doubt presented in the trial court, and these matters were determined adversely to appellants. On this appeal we are unable to say that the testimony of these witnesses was so preposterous or so thoroughly discredited as to be insufficient as a matter of law to sustain the implied findings of the jury.

[2] Appellants further contend that, even assuming that the representations relating to the size of the apartments on the east side had been made and relied upon, no cause of action would exist since the matters to which they related were patent and obvious. A discussion of this contention requires some reference to the evidence. Respondent testified in substance that three apartments on the west side of the building were shown to her by appellants, but none on the east side, appellant Charles J. Rousseau assuring her that the corresponding apartments on the east side were the same, and stating that it was inadvisable to enter them while occupied by tenants on account of the disturbance. Upon this appeal we have the exhibits be-

fore us, and, with the aid of the floor and elevation plans of the building, it appears that the east side apartments were not and could not be the same as the corresponding apartments on the west side. The evidence shows that respondent knew the width of the lot but does not show that any of the plans were exhibited to her prior to the time that the transaction was consummated. It is claimed by appellant that, as respondent knew the width of the lot and had an opportunity to view the exterior of the building and the apartments on the west side, the representations concerning the apartments on the east side related to matters which were patent and obvious and would therefore not be actionable. In support of their position appellants cite Oppenheimer v. Clunie, 142 Cal. 313, 75 P. 899; Beckley v. Archer, 74 Cal. App. 598, 241 P. 422; 12 Cal. Jur. 756, and other authorities. None of the authorities cited are on all fours with the present case, but relate to representations concerning matters which were in fact patent and obvious where the falsity of the representations was readily ascertainable. In our opinion these authorities have no application to the facts in the present case. The subject of the representations here was the size of the east side apartments. These apartments were occupied by tenants and were barred from respondent's view by walls and locked doors. In the absence of an inspection of these apartments, the falsity of these representations could only be determined by respondent by carefully observing all which she had an opportunity to observe and then by correlating all of the facts, including the width of the building, its exterior appearance, the size of the apartments on the west side, and the number and positions of the various windows and other objects. The facts here more closely parallel those in Kaston v. Zimmerman, 192 App. Div. 511, 183 N. Y. S. 615, and Whittemore v. Wilkins, 77 Colo. 533, 238 P. 69. If the apartments on the east side had been actually shown to respondent, the situation would be different, but respondent was told that it was inadvisable to disturb the tenants in order to make an inspection. Under the circumstances, we are of the opinion that respondent was under no duty to demand entry in order to investigate, and was entitled to rely upon the representations made.

[3-6] The next two contentions of appellants relate to the State Housing Act (Stats. 1923, p. 781) and the representations regarding the lobby floor apartments. Appellants contend that the act permits the use of the basement for living and sleeping purposes in addition to three floors above, while respondent contends that the act prohibits a wooden building with more than three stories for such purposes. The conflicting contentions are based upon counsels' interpretations of sections 12 and 27 of the act (pages 794, 801). In our opinion section 12 clearly limits the use of wooden buildings for living or sleeping purposes where it provides: "No wooden apartment house or hotel hereafter erected shall exceed three stories for living or sleeping purposes at any point. * * *" Section 27, which relates to buildings generally, provides: "And no room in a basement of an apartment house or hotel shall hereafter be constructed, altered, or occupied for living or sleeping purposes, unless such room conforms to all of the requirements of this act for rooms in other parts of the building and the ceiling of each such room shall be in all parts not less than seven feet above the adjoining ground level. * * *" We find nothing in section 27 which removes the limitations of section 12 relating to wooden apartment houses, and in our opinion respondent's contention must be sustained. It appears that some doubt existed in the minds of the municipal authorities regarding the proper construction of the act. The health officer testified that, as it had never been decided whether the authorities had the right to order such apartments vacated, it had not been their policy or practice to do so in all cases; that if in their opinion the apartments were sanitary and complied with the other provisions of the act relating to air, ventilation, conveniences, etc., it was their practice to permit them to be occupied. It will thus be seen that as a practical matter the question of whether the apartments had passed inspection resulting in the issuance of a permit by the municipal authorities was of primary importance. Appellants take the position that any representation relating to the legality of the lobby floor apartments was one of law and not actionable. As thus stated there appears to be merit in the claim, but under the allegations of the complaint and the evidence the representation complained of was not solely a representation regarding a matter of law. It was alleged in the complaint that appellants represented to respondent "that said apartment house comprising four floors of apartments, as aforesaid, had been inspected and approved by the municipal authorities of the City and County of San Francisco and that said four floors of apartments had been built according to law and had been approved as legal by said municipal authorities and that defendants had obtained a building permit to build said apartment house comprising said four floors of apartments, as aforesaid." These allegations refer both to a representation of a matter of law and also representations as to facts, to wit, inspection, approval, and permit by the local authorities. At the request of appellants the trial court instructed the jury that, even if they found that appellants made any representations to respondent "to the effect, substantially, that the apartments on the lobby floor had been built according to law, such an opinion * * * would not justify plaintiff in relying upon it and is not a sufficient basis to support a charge of fraudulent misrepresentations." It will thus be seen that the court by its instructions properly withdrew from the consideration of the jury the alleged misrepresentations respecting the legality of the apartments and confined them to a consideration of the alleged misrepresentation of fact concerning inspection, approval, and permit by the municipal authorities. Continuing, appellants claim that respondent's grievance in respect to the lobby apartments, if she has any, springs solely from the existence of the statute, and not from any actual or threatened interference by the municipal authorities. Under this heading appellants point out that the lobby apartments had not actually been vacated as the result of any action on the part of the municipal authorities. It appears that shortly after the respondent became the owner of the property a "First Notice" was addressed to her by the health officer in May, 1927, stating that the basement apartments were being occupied in violation of law, and that the tenants must be given notice to vacate immediately. About one month later in June, 1927, a "Final Notice" was addressed to respondent calling attention to her failure to comply with the previous notice and giving five days' warning of a proceeding against the premises. A third letter followed, in July, 1927, directing respondent to appear at the office of the department of public health regarding these apartments and stating that a failure to comply would result in the full penalty of the law. Respondent testified that the health officer thereafter said that he would allow her to operate the apartments until her "troubles were over with Mr. Rousseau." The records of the department show an entry in August, 1927, as follows: "Two gas stoves (in basement apartment) not vented to outside. Conceded by health officer owing to fact that original builder and owner sold as is to new owner. Issue permit." Two further entries appear, one in April, 1928, reading: "Four-story frame—no permit"; and another April, 1929, reading: "Case in court. No permit." The only permit issued was one dated January, 1929, which by its terms expired April 8, 1929, prior to the second trial of the case. The health officer testified that this permit had apparently come back into his possession through being sent to the wrong address. He further stated that an inspection was made in April, 1929, and at the time of the second trial he had not ruled upon the inspector's report on account of the case being in court. It thus appears that no permit relating to the apartments in question was issued until almost two years after the consummation of the transaction, and that this permit was issued only for a period of approximately three months. The question of whether good faith surrounded the belated issuance of this permit which had expired at time of the trial has been raised by respondent, but we deem it unnecessary to consider this matter. Under the circumstances existing, we believe that respondent's grievance resulted from the misrepresentations regarding approval and permit of the municipal authorities, and not solely from the existence of the statute. The municipal authorities were in doubt regarding the construction to be placed on the act. They issued permits in some cases and not in others, depending upon whether in their opinion the basement apartments were sanitary and complied with the other requirements of the act. If the apartments had been originally built and occupied with full approval of the authorities evidenced by permits from the board of public works and the department of public health, then, no doubt as testified by the witnesses, they would have had greater value in the eyes of a prospective purchaser than apartments built and occupied without any permit whatsoever. With such approval and permits, the question of whether in the opinion of the authorities the apartments were sanitary and complied with the other provisions of the act would have been settled and would have set at rest the uncertainty which existed in this regard. The threatened interference which followed would have been avoided. Without such approval and permits, these questions remained undetermined, threatened interference followed, and the value of the apartment house was thereby lessened.

[7, 8] It is further contended by appellants that there never was any agreement of sale or exchange between appellants and respondent, and that it was therefore error to instruct the jury that the measure of damages was the difference between the actual value of the property and the value of said property had it been as represented. The general rule relating to the measure of damages in such cases is discussed in the case of Hines v. Brode, 168 Cal. 507, 143 P. 729, but appellants contend that such measure of damages is not applicable where there is no agreement of sale or exchange between the parties, citing Macdonald v. Roeth, 179 Cal. 194, 176 P. 38. In neither of the cases above mentioned are the facts similar to those in the present case. Here the parties inspected the respective apartment houses involved, and respondent believed that she was exchanging her apartment house for that of appellant. In the transaction respondent actually conveyed her apartment house to appellants, and the latter conveyed the apartment house in question to respondent. It is true that there was no written agreement of sale or exchange signed by respondent and appellants, but it is stated by appellants that the transaction was "tripartite." The evidence shows that R. A. Wilson, through his salesman, Cunningham, was the real estate broker who brought the parties together. Wilson obtained from respondent a written authorization to exchange her apartment house for the apartment house of the appellants upon certain specified terms. He also obtained from appellants a written authorization to sell the apartment house in question upon certain specified terms. Appellants apparently desired to sell rather than exchange, and, without the knowledge of respondent, the transaction was consummated in the following manner: Wilson gave written instructions to the title company which read in part: "This agreement is in conformity with that certain agreement of exchange entered into by Mrs. Grippen, conveying the southwest corner of Gough and Bay street, City and County of San Francisco, State of California, which Mr. Rousseau is to accept in exchange, but in lieu thereof reconvey to R. A. Wilson Co., or nominee, for the above stipulated consideration, namely, $26,200.00 cash, and first mortgage of $35,000 upon the Clay street property." Below Wilson's signature appears the following signed by appellant Charles J. Rousseau, "I hereby agree to convey the Clay street property on or before April 1, 1927, in accordance with the terms stipulated above." In our opinion it is not necessary, in order to sustain an action for fraud in the sale or exchange of real property, that there should have been an enforceable written contract between parties prior to the completion of the deal, and we are further of the opinion that under the facts before us the rule governing the measure of damages is the same as in the ordinary case involving an agreement between two parties for the sale or exchange of property, to wit, the difference between the actual value of the property and the value of the property had it been as represented. Hines v. Brode, supra. The agreement, undisclosed to respondent, by which it was provided that respondent's property would be accepted in exchange and conveyed to Wilson for a money consideration, does not alter the situation. Appellants were not strangers to the transaction as was the case in Macdonald v. Roeth, supra. It was their property with which they were dealing and concerning which the representations were made, and it was respondent's property which they received in exchange to deal with as they saw fit.

Further, the contention is made that the evidence is insufficient to justify the finding that respondent was damaged in the sum of $15,500. Several experts were called by both sides and a great deal of conflicting evidence was introduced on the issue of damage. The various elements affecting value were inquired into at length on examination and cross-examination of the various witnesses of the parties. Applying the rule of damages applicable to the present case and hereinabove discussed, we find ample evidence in the record to sustain the award. In this connection appellants further complain that prejudicial error was committed in admitting certain testimony of witnesses called as experts by respondent. We have examined the several assignments of error made by appellants and find no prejudicial error in the admission of the testimony complained of.

It is also claimed that the court erred in giving and refusing various instructions. The alleged error in many instances involves the question hereinbefore considered. We have examined the entire charge to the jury and believe that it fully presented the issues and the law applicable thereto, and are convinced that no prejudicial error was committed.

[9, 10] We find no merit in appellants' contention relating to alleged prejudicial misconduct on the part of the respondent's counsel based upon a statement made during the opening argument to the jury. A card purporting to contain certain listing information and the date of his first visit to appellants' apartments was produced by the witness Cunningham when called and examined by David Livingston, one of respondent's counsel, on rebuttal in the second trial. The witness stated that after his first visit he had made an office record of listing information which was thereafter transcribed on a card showing the date of such receipt. This card had not been previously produced on the first or second trial, although the witness had been requested to search for the pencil notes of the information which he stated Mr. Rousseau had verbally given him on the first visit. He testified that he had made search, and that the original pencil notes could not be found. Appellants endeavored to throw suspicion about the production of this card. In his opening argument to the jury, Lawrence Livingston, also counsel for respondent, stated to the jury that on May 23 or 24, 1929, he and the witness Cunningham had gone into the basement of R. A. Wilson Company and had there found this card. Appellants' counsel objected to this statement and pointed out that there was no testimony that counsel had been with the witness at the time the witness claimed to have found the card. It appears from the affidavits presented on motion for new trial that Lawrence Livingston had not been in the courtroom at the time the witness testified in rebuttal; that the statement made by him in his argument was made in good faith; that David Livingston, who had examined the witness, immediately upon objection stated that there was no testimony in the record to the effect that that counsel had accompanied the witness; that Lawrence Livingston then withdrew his remark, and that no request was made for any special admonition to the jury

regarding this matter. In the general charge to the jury and previously during the trial, the court instructed the jury that statements of the counsel were not evidence in the case. Assuming without deciding that the making of such statement during the argument would constitute misconduct, it does not appear to be prejudicial, nor does it appear that the effect thereof would not have been entirely cured by admonition of the court, if such admonition had been requested. In any event this entire matter was presented to the trial court on motion for new trial. By denying the motion the trial court must be deemed to have concluded that no prejudice resulted, and this conclusion should not be disturbed unless under all the circumstances it is plainly wrong. Lafargue v. United Railroads, 183 Cal. 720, 192 P. 538.

[11, 12] It is further urged that the trial court erred in denying appellants' motion to tax costs. By this motion appellants sought among other things to eliminate the costs of the first trial amounting to $355.50. Upon first trial "the court ordered the jury discharged on account of misconduct of counsel for plaintiff and costs of trial charged to plaintiff and cause ordered off calendar." It is conceded that ordinarily the prevailing party is entitled to recover the costs of a previous trial, but it is contended that the rule should be otherwise where a mistrial has resulted from misconduct of counsel for the prevailing party and where the trial court imposes costs upon the prevailing party by way of penalty. We believe this contention must be sustained. Although the order made upon the first trial was not an order from which an appeal might have been taken, it was subject to review upon an appeal from the judgment. Code Civ. Proc. §§ 956, 963. In our opinion it was not proper for the trial court to review the prior order upon the motion to tax costs and to allow the prevailing party as costs "necessarily incurred" (Code Civ. Proc. § 1033), the costs of the first trial theretofore imposed as a penalty.

[13] In conclusion we may state that the evidence in this case was sharply conflicting on practically all of the material issues. We have been at pains to carefully review the proceedings upon the trial, and in our opinion there was ample evidence to sustain a verdict for either side. The claims of the respective parties were ably presented in a protracted and bitterly contested trial. The issues have been determined adversely to appellants by the triers of the facts, and it is not unusual that they should bend every effort to have the cause tried anew. These considerations, however, are insufficient to justify this court in setting aside the conclusions of the jury and of the trial court on the issues of fact. We have examined the record and the various grounds urged for a reversal, but, for the reasons hereinbefore set forth, we believe that with a modification of the judgment relating to the amount taxed as costs, the judgment and orders appealed from should be affirmed.

The judgment is modified by deducting the sum of $355.50 from the amount taxed as costs, and, as so modified, the judgment and orders appealed from are, and each of them is, affirmed, the parties to bear their respective costs on this appeal.

We concur: NOURSE, P. J.; STURTEVANT, J.

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113 Cal. App. 57

MONTIJO v. SAMUEL GOLDWYN, INC., OF CALIFORNIA.

Civ. 356.

District Court of Appeal, Fourth District, California.

March 28, 1931.

1. Master and servant ⚷5.

Aviator engaged to perform stunt for motion picture *held* independent contractor, as respects his right to damages.

> Before plaintiff was engaged to take part with airplane belonging to him in stunt which involved airplane and automobile rushing toward each other at rapid speed and airplane avoiding collision by zooming over automobile and just missing it, plaintiff was told by motion picture producer's directors results to be accomplished, and plaintiff then told directors what he would need in performing it, and specified distance airplane would have to travel before it could attain flying speed sufficient to zoom over automobile, and specified maximum rate at which automobile should travel and that it was not to start until airplane had started, and directors exercised no control in planning details of stunt or manner in which it was to be executed.

2. Negligence ⚷105.

Aviator engaged to perform stunt for moving picture, whether independent contractor or employee, assumed risk of damage to airplane incident to contract.

3. Negligence ⚷1.

"Negligence" is absence of ordinary care, omission to do something which reasonably prudent man would do, or doing something which reasonably prudent man would not do (Civ. Code § 1714).

Appeal from Superior Court, Los Angeles County; Fletcher Bowron, Judge.

Action by John G. Montijo against Samuel Goldwyn, Inc., of California. Judgment for defendant, and plaintiff appeals.

Affirmed.

George M. Spicer, of Long Beach, and Elliott H. Barrett, of Los Angeles, for appellant.

Loeb, Walker & Loeb, of Los Angeles, for respondent.

MARKS, J.

In 1925 appellant was the owner of a four-passenger cabin airplane of the biplane type. Respondent was engaged in producing moving pictures. In the fall of 1925 respondent was filming a picture known as "Partners Again," one of a "Potash and Perlmutter" series. The plot of the story included an act which involved an airplane and an automobile rushing toward each other at rapid speeds with the airplane avoiding a collision by zooming over the automobile and just missing it. This was characterized as a "stunt" which was intended to give a "thrill" to an audience by the apparent and actual danger to those participating in it.

Respondent engaged appellant to use his airplane in this stunt for a compensation of $100 per day, or $50 an hour if the airplane was out of its hangar for more than two hours on any one day.

Ray Cushman was the owner of a Cadillac automobile of the touring car type. It was generally used for the purpose of transporting moving picture actors and properties from studios to places where scenes were filmed. Samuel Diege conducted an auto rental service in Hollywood under the name of Sammy's Rental Service. He furnished automobiles and drivers to moving picture producers for like transportation purposes. Other than his own automobile, which he occasionally used and drove, he did not own any of the cars working out of his agency, but acted as agent in obtaining business for other owners, such as Cushman, taking 10 per cent. of the charges for his services.

November 20, 1925, was fixed by respondent for filming the "stunt" in Partners Again. Respondent arranged with Samuel Diege to have three automobiles report at its studio in Hollywood to transport the actors and necessary properties to the Municipal Airport at Long Beach. Ray Cushman, Jack Radke, and another driver were assigned to this undertaking by Diege. They reported at the studios of respondent on the morning of November 20th and took the paraphernalia and actors to the airport where appellant was waiting.

Jack Radke was an automobile racing and stunt driver of considerable skill and large experience. He had participated in many dangerous stunts in moving pictures, such as turning his automobile over at high rates of speed, engaging in collisions with other automobiles, and in crossing railroad tracks in front of fast-moving trains in such close proximity to the front of the train that his tail light would appear to be torn off. He was selected to drive the "stunt" automobile over which the airplane was expected to zoom. In this automobile were seated Radke, dressed in a policeman's uniform, an actor also dressed as a policeman, and perhaps two others. The cameras were placed in the tonneau of a second automobile, which, during the first two trials of the stunt was driven by an undisclosed person. The camera car was to follow Radke's car at a distance of twenty-five feet; the cameras photographing the airplane approaching the Radke car and zooming over it.

Cullen Tate was the director in charge of filming this stunt for respondent. He was working under Robert B. McIntyre, who was its production manager. Prior to the 20th day of November McIntyre had explained the details of the story to appellant and had discussed the necessary action with him. On the morning of November 20th, Tate, appellant, Radke, and respondent's head cameraman, together with others, conferred over the details of the stunt. Appellant said that the flying speed of the airplane was between 65 and 70 miles per hour and that he would require from 1000 to 1200 feet in which to attain this speed so that he could zoom over the automobile. The runway at the airport was 1,950 feet long. He directed the stunt automobile to start after the airplane had started and to proceed at a speed of between 30 and 35 miles per hour, which would give him the required two-thirds distance of the runway over which to travel before meeting the automobile. It was arranged that, when the actors and the cameramen were ready, Tate would signal this fact to appellant by waving a white handkerchief, and appellant would then start his airplane and the action would proceed.

On this day the airplane took its position at the west end of the runway facing east, and the automobiles at the east end of the runway facing west. There was a very gentle breeze blowing from the east to the west of the airport. When the cameramen and actors were in their places and ready to perform their duties, Tate gave appellant the agreed signal, and he started his airplane on its course. The automobiles started immediately afterwards and the machines proceeded toward each other at the respective speeds and in the position and manners as arranged by appellant. When the leading automobile was within about 100 feet of the on-coming airplane, Radke lost his nerve, and, thinking that a collision could not be avoided, threw his car to the right and passed out of the picture. The airplane successfully zoomed over the place where the stunt automobile should have been. The action of the picture having been spoiled by Radke, it was necessary to take the scene over again. All of the participants proceeded as before, and the airplane successfully zoomed over the automobile, clearing its top by a very few feet. However the driver of the camera car on this trial swerved his car so that the stunt automobile and the airplane passed out of the field of the cameras and it had to be again retaken. On the third attempt Tate changed the driver of the camera car and put Ray Cushman at the wheel. The third filming of the stunt was a success, though the airplane passed closer to the top of the leading automobile than on the second occasion. Tate desired to refilm the scene to insure a good picture, and directed the action repeated. On the fourth attempt all of the participants executed their parts in accordance with the previous plan. On this occasion the airplane barely cleared the top of the stunt automobile, thus by only a few inches avoiding a serious collision. This ended the filming of the scene for that day.

The films were developed and run in respondent's projection room before Samuel Goldwyn, McIntyre, Tate, and others. They were not satisfied with the picture, for the reason that the cameras, as placed in the second car, were too far from the airplane to give the audience a good idea of the action of the automobile and the airplane rushing toward each other at rapid speeds and the airplane avoiding the collision by starting to zoom over the automobile at about a hundred feet or less in front of it and just clearing its top. For this reason the "thrill," caused by the very evident danger to the occupants of the two machines, was lost to the audience. The representatives of respondent decided to retake the picture and place the cameras in the tonneau of the stunt automobile rather than in a second car. The filming of this scene was fixed for December 1, 1925, and appellant was told to have his airplane in readiness at the Long Beach Airport. Samuel Diege again furnished the automobiles and drivers to transport the actors and properties. He went, driving his own car. Ray Cushman again reported for duty. The driver of the third automobile on this occasion is not identified in the record. When the drivers of the automobiles appeared at the studio on the morning of December 1st, Jack Radke could not be found, and Cushman was asked if he would drive the stunt automobile for an added compensation of $25. He agreed to do this, and was sent to the property room for a policeman's hat and coat. The cameras were lashed in the tonneau of Cushman's car, and the party proceeded to the airport. There they met appellant and briefly went over the details of the stunt. As the wind was blowing from the southwest, appellant chose his position at the east end of the field and that of the automobile at the west end. The day was cloudy, and the filming of the stunt was delayed, during which time the participants had their lunch. After lunch the airplane taxied to its position and the automobile took its position at the other end of the runway. As the light was still poor, the action had to be still further delayed, and the engine of the airplane was stopped for between twenty and forty minutes before it was again started. When the light became better, Tate waved to appellant who thereupon started his engine. The automobile was started, and the two machines rushed toward each other. For some reason the stunt did not work as planned, the automobile and airplane coming into collision a short distance west of the center of the field. The left wheel of the airplane struck the radiator of the automobile between a foot and a half and two feet above the ground. This wheel was torn off as well as the lower left wing of the airplane. The balance of the airplane cleared the automobile and rose over some wires at the end of the field, when it settled and crashed into a brick wall, seriously damaging it. Appellant and his companion escaped without any serious injuries.

Appellant instituted this action to recover for the damage to his airplane and the loss of its use following the accident. After the close of the evidence, the trial court gave a peremptory instruction to the jury to return a verdict in favor of respondent. Appellant appealed from the judgment which was entered upon this verdict. He maintains that the accident was caused by the negligence of Cushman in driving the automobile at a speed in excess of 35 miles per hour so that it traveled more than one-third of the length of the runway and did not give the airplane sufficient space in which to attain its flying speed of from 65 to 70 miles per hour so that it could successfully zoom over the automobile. There is evidence in the record to the effect that the automobile traveled at least 40 miles per hour.

A careful examination of the lengthy transcript would suggest either one, or all, of three explanations for the collision: First, that the airplane engine cooled off during the wait, and therefore could not develop sufficient power to attain its flying speed before reaching the point where it had to zoom over the automobile. Second, that the automobile traveled at too high a rate of speed; therefore not giving the airplane sufficient space in which to attain its flying speed. Third, that atmospheric conditions were different from those on November 20th on account of the clouds and the different heat and density of the air. Any one or all of these conditions might have been contributing factors to the accident.

[1] We have carefully examined the record, and have concluded that, in performing his part of the stunt, appellant was acting as an independent contractor. The airplane belonged to him, and its management, operation, and control were left to him. Neither McIntyre nor Tate knew anything about its operation. Before he was engaged by them, he was told of the results they wished to accomplish and he in turn told them what he would require in performing it. He specified the distance his airplane would have to travel before it could attain flying speed sufficient to zoom over the automobile. He knew the length of the runway at the airport and specified the maximum speed at which the automobile should travel and that it was not to start until after the airplane had started. It clearly appears from the evidence that respondent and its representatives were only interested in the results to be obtained by the stunt, and that the means whereby this result was to be accomplished were left entirely to appellant. The representatives of respondent exercised no control over either the planning of the details of the stunt or the manner in which it was to be executed, which rendered appellant an independent contractor. Green v. Soule, 145 Cal. 96, 78 P. 337. It is true that Tate gave appellant a signal before the stunt started. This signal merely informed him that the cameramen were ready to film the action, and can in no manner be construed as control over the details of the operation of either the automobile or the airplane.

The evidence strongly indicates that Ray Cushman was acting as an independent contractor and not as an employee of respondent on December 1, 1925. His employment divided itself into two separate contracts: First, he was employed through Samuel Diege to transport actors and materials from respondent's studio to the airport. He did this in his own automobile without supervision by respondent except as to the time of departure and the place of arrival. The manner of the operation of his automobile during the trip, together with the route to be taken, were left entirely to him. In this part of his employment there can be no question but that he was acting as an independent contractor. Fidelity & Casualty Co. v. Industrial Accident Commission, 191 Cal. 404, 216 P. 578, 43 A. L. R. 1304; Stephens v. Industrial Accident Commission, 191 Cal. 261, 215 P. 1025. His second contract of employment on December 1st was the driving of his automobile in the stunt for which he received $25 from respondent. He had been present during the four trials held on November 20th, and had driven his automobile in two of these trials. He had also heard appellant give Radke instructions as to the operation of the automobile. It is true that on the day of the accident Tate told him to drive his automobile between 30 and 35 miles per hour after the airplane started. In doing this Tate merely repeated the former instructions given by appellant to Radke which probably had been heard by Cushman. As far as the record discloses, the agents of respondent did not plan any of the details of the operation of either the airplane or the automobile during the filming of the stunt. This was done by appellant.

[2] That the stunt was inherently dangerous appears from the testimony of all of the participants in it as well as that of other aviators called as witnesses. Appellant recognized this danger in his first negotiations with McIntyre. He asked that respondent assume the risk for any damage done the airplane, which respondent did not do. When the success or failure of an undertaking of this kind depends, first, upon the elements of nature, second, upon the operation of highly intricate machines such as an airplane and an automobile, and, third, upon inconstant human factors controlling the exactness and precision of the operation of these machines, and when a change in any one of these three things might result in serious consequences, it would be apparent to any one that a collision with consequent damage and injury would almost surely result from the frequent repetition of the act. Just when this injury would come would depend upon the failure of one of these three factors to function properly and with the exact precision that the success of the maneuver required. Neither appellant nor any one else could reasonably expect exact precision in the operation of each of the three elements on repeated occasions. The fact that the accident did not occur during one of the four trials on November 20th could be attributed more to good luck than to any other cause. In making his contract with respondent, appellant should and probably did take these risks into consideration and fix his compensation at a sum commensurate with them. He should be held to have assumed the risks of damage to his airplane which were incident to his contract.

[3] Negligence is defined as an absence of ordinary care (section 1714, Civ. Code); as the omission to do something which a reasonably prudent man would do, or the doing of something which a reasonably prudent man would not do in the conduct of his affairs. Jamison v. San Jose, etc., Co., 55 Cal. 593. The statement of these rules and their application to the facts of this case immediately leads us to the conclusion that appellant must be charged with negligence in undertaking and carrying out the dangerous stunt in which he participated on November 20th and on December 1, 1925. We do not believe that an aviator exercising ordinary prudence and care would engage in an undertaking of this kind without the reasonable expectation

of incurring serious injury to himself and his airplane. The very dangerous nature of the stunt makes the probability of such injuries imminent, and, because of the probability of an accident following the undertaking, the fact of participating in it must be considered as the proximate cause of the ensuing damages. If the negligence of appellant was the proximate cause of the consequent damages, he cannot recover. Lammers v. Pacific Electric Railway Co., 186 Cal. 379, 199 P. 523.

"Contributory negligence has been defined as 'such an act or omission on the part of the plaintiff amounting to a want of ordinary care, as concurring or co-operating with the negligent act of the defendant, is the proximate cause of the injury complained of.' Merely because one person is at fault does not dispense with the duty of another to use ordinary care, so that if a plaintiff—other than an employee in an action against his employer—is guilty of contributory negligence as above defined, he may not recover." 19 Cal. Jur. 644.

If we assume that Ray Cushman was an employee of respondent in driving the automobile during the stunt on December 1, 1925, and not an independent contractor, and that as such an employee he was negligent in driving the automobile at a speed of more than 35 miles per hour, still we must hold that the negligence of appellant in participating in such a dangerous undertaking contributed to the accident and consequently barred his recovery.

Judgment affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

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113 Cal. App. 145

CAMPBELL v. EAGLE INDEMNITY CO. et al.

Civ. 6690.

District Court of Appeal, Second District, Division 2, California.
March 31, 1931.

Insurance ⚿145(3).

Holder of burglary policy for twelve months' term could not recover for loss sustained after end of year, where agent who received renewal premium had ceased to be company's broker.

By terms of "Three Year Agreement Endorsement" on policy, the insurance company agreed to renew the policy on the expiration of the 12 months' term on payment of specified premium, and policy further provided that the insured should remit each year to the company through its agent and renew the policy by certificate. Insured paid the renewal premium to the former agent of the insurance company, but received no renewal certificate.

Appeal from Superior Court, Los Angeles County; Elias V. Rosenkranz, Judge.

Action by Charles W. Campbell against the Eagle Indemnity Company and another. Judgment for defendants, and plaintiff appeals.

Affirmed.

John M. Bowen, of Los Angeles, for appellant.

J. Karl Lobdell and H. L. Watt, both of Los Angeles, for respondents.

CRAIG, Acting P. J.

The appellant was insured by respondent company against loss by burglary of his residence. Having suffered such a loss, he instituted an action upon the policy of insurance. Judgment was rendered in favor of the defendants, and the plaintiff appealed.

The case comes to us upon stipulated facts and the judgment roll. By a policy of insurance issued in December, 1924, upon which a premium was paid for the period of one year, it was recited that the same should cover loss or damage occurring "within the policy term defined in statement 13 of the schedule or within any extension thereof under renewal certificate issued by the company." In the year 1925 a renewal certificate was issued upon payment to Price by appellant of the premium for a second year. In January, 1927, appellant paid the requisite premium to Price, who receipted for the same. It is stipulated that "the sum of $26.17 for said third premium was not and no part thereof, was at any time paid to Eagle Indemnity Company, or its general agents, or any other person, firm or corporation, and Eagle Indemnity Company at no time issued any renewal certificate on said policy other than the renewal certificate above referred to, which extended said policy to December 19, 1926." Appellant's residence was burglarized during the month of November, 1927. Sworn statements were regularly filed by the insured with said company, and demand was made for reimbursement, which was refused. By the terms of its "Three Year Agreement Endorsement" the company stipulated that it "hereby agrees to renew this policy at date of expiration for a term of twelve months, beginning at noon on the 19th day of December, 1925, on payment of a premium of $39.26 and also at date of expiration of the second term of twelve months to renew for a further term of twelve months, beginning at noon of the 19th day of December, 1926, on payment of a premium of $26.17. The insured by the acceptance of this policy agrees to accept the renewals above referred to, and to pay the premiums therefor, but neither this agreement on the part of the company nor that made by the insured shall be held to abrogate the right of the parties to cancel this policy or either of the renewals at any time in accordance with the policy conditions." There is nothing tending to indicate that the policy had been terminated by either party, nor that the insured was advised of the insurer having severed Price's commission as a broker, although Campbell received no renewal certificate to December, 1927, for which he had paid Price the premium as provided by the policy, ten months before the date of the loss. And the record is equally silent as to knowledge on the part of the insurer of payment of the last premium as an expression of intention to renew the policy.

There is much argument as to the ostensible authority of Price, and the obligations of insurance companies upon payment of premiums to their authorized agents under the provisions of regular three-year contracts of insurance. But we think it beside the question inasmuch as the express conditions of the one-year policy with privilege of renewal as above recited are plain and specific. Upon acceptance of the policy the insured agrees that he will renew with the insurer, but by the mere issuance of the policy it does not follow that the latter insures for a period longer than one year, unless the insured shall remit each year in accordance with the "Three Year Agreement Endorsement" to the company through its agent or otherwise, and renew the same by a certificate "countersigned by a duly authorized official or agent of the company and attached to policy." One of the significant provisions of the contract between the parties provides that "the term of the policy is twelve months." Authorities cited by appellant wholly relate to contracts concededly executed or renewed, wherein the broker's authority was questioned. We are cited to no case in this state which is of assistance. In Raynor v. Nat. Casualty Co., 125 Misc. Rep. 174, 210 N. Y. S. 586, was presented a policy which was dated June 20, 1922, which "by its terms extends from noon of that day until noon of August 1, 1922, 'and for such further time as may be stated in the renewal receipts.'" A judgment in favor of the plaintiff was reversed upon the ground that the interpretation by the trial court "consists in disregarding the fact that this is not a case of a policy issued for a long term, like a year or more, with a requirement of say monthly payments during the time on the 1st of each month, and the provision that in case of default the policy might or should be voided, or substantially a situation of the possibility of the policy being canceled by the nonperformance of a condition subsequent. This policy ended by its very terms on August 1, 1922, and after that time there was by virtue of the added provision, 'and for such further time as may be stated in the renewal receipts,' a continuing offer by the company to renew the same whenever the assured by an additional premium accepted the offer, and for such additional time as might be stated in the corresponding receipt." Like provisions have received a similar construction in other jurisdictions. Nat. L. & A. Ins. Co. v. Reams (Tex. Civ. App.) 197 S. W. 332; Steele v. Great E. C. & I. Co., 158 Minn. 160, 197 N. W. 101.

The judgment is affirmed.

We concur: IRA F. THOMPSON, J.; ARCHBALD, Justice pro tem.

113 Cal. App. 13

WILSON v. KESTENHOLZ.

Civ. 6612.

District Court of Appeal, Second District, Division 2, California.

March 24, 1931.

1. Automobiles 🔑160(5), 218.

Where pedestrian walking along highway is plainly visible to driver, she need not anticipate danger or look back, but driver must exercise reasonable precaution and insure her safety.

2. Evidence 🔑588.

Court is not bound by witness' testimony, but may reject any part thereof and accept another's apparently more probable testimony.

3. Appeal and error 🔑994(3).

Appellate court will not judge credibility of witnesses or question decision unless in nature of things testimony cannot be true.

Appeal from Superior Court, Orange County; E. J. Marks, Judge.

Action by Marguerite Wilson against Emil Kestenholz. Judgment for plaintiff, and defendant appeals.

Affirmed.

McFadden & Holden and Leo J. Friis, all of Anaheim, for appellant.

Albert Launer and Harold A. McCabe, both of Fullerton, for respondent.

CRAIG, J.

The defendant has appealed from a judgment rendered in favor of the plaintiff by the superior court of Orange county for damages, and has assigned as his principal ground for reversal an asserted insufficiency of evidence.

It was agreed that, while driving an automobile in a southerly direction on West street in the city of Anaheim, the defendant struck the plaintiff, who was walking ahead of him in the same direction. The latter swore that she was at all times walking on the "soft dirt," about one and one-half feet to two feet to the right and parallel with an oiled pavement which was between sixteen and eighteen feet wide, constituting the main thoroughfare for motor vehicles. She testified positively that she was at no time on the pavement, that she heard an automobile approaching behind her, but that no signal was given. The defendant testified that he was driving on the pavement, that he saw the plaintiff about fifteen feet in front of his car, and that he did not change his course nor depart from the regular macadamized surface. The trial court found, however, that the defendant was driving "in a negligent, careless and unlawful manner," which caused the plaintiff to be thrown to the ground, as a result of which she suffered serious injuries. As conclusions of law, it is recited that the defendant's negligence was the proximate cause of said injuries and that the plaintiff was entitled to judgment.

[1-3] Appellant contends that, having testified that he did not change his course while proceeding in a southerly direction along the paved highway, the court erred in finding that he was negligent, and in failing to find that the plaintiff did change her course and step in front of the approaching machine. But it requires slight, if any, reference to the authorities for refutation of such theory under the circumstances of the case presented. It has been held under similar circumstances that the pedestrian is plainly visible to the driver, and is under no legal obligation to anticipate danger or to look back, whereas the latter is bound not only to give reasonable warning, but also to exercise every reasonable precaution to insure safety. "In the exercise of 'every reasonable precaution' which the law enjoins, it is well within the spirit of the law to say that the driver of an automobile approaching pedestrians, and particularly women, must have his car under such control as that it may be promptly stopped." Raymond v. Hill, 168 Cal. 473, 143 P. 743, 747. The court is not bound by the testimony of any single witness, but may reject part or all of his testimony and accept that of any other witness which seems more probable under all of the evidence adduced. Zibbell v. Southern Pacific Co., 160 Cal. 237, 116 P. 513. And an appellate court will not attempt to judge the credibility of witnesses nor to question the judgment below, except where the record demonstrates that in the very nature of things certain testimony cannot be true. Badover v. Guaranty Tr. & Svgs. Bank, 186 Cal. 775, 200 P. 638. That this is not such a case is at once apparent. We find no error.

The judgment is affirmed.

We concur: **WORKS, P. J.**; **IRA F. THOMPSON, J.**

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112 Cal. App. 673

In re MAY'S ESTATE.

Civ. 7812.

District Court of Appeal, First District, Division 1, California.
March 19, 1931.

Rehearing Denied April 18, 1931. Hearing Denied by Supreme Court May 18, 1931.

1. Evidence ⚷383(12).

Where provision of foreign law was introduced, court could consider all laws upon question appearing in volume introduced.

2. Executors and administrators ⚷89.

Executor cannot be held answerable when he cannot compel collection of foreign assets upon domestic appointment.

3. Executors and administrators ⚷89.

California court could not punish California executor of estate for failure to collect foreign assets, where whatever interest or profit there might be from foreign company was claimed by another estate pending in foreign country.

4. Partnership ⚷249.

Surviving partners of foreign partnership could insist that decedent's interest should be liquidated in manner provided in original articles.

> Under original articles, heirs were obliged to leave in possession of copartnership or person, or persons legally succeeding same, the amount of their interest in copartnership capital and profits for the term of five years.

Appeal from Superior Court, City and County of San Francisco; Frank H. Dunne, Judge.

Rene A. May, executor of the last will and testament of Alfred May, deceased, filed his first and final account and petitions for final distribution, opposed by Miriam K. May, deceased's widow. From an order for discontinuance of family allowance, from an order of ratable distribution, and from a decree of settlement of final account and final distribution, Miriam K. May appeals.

Affirmed.

Joseph E. Bien and Werner Olds, both of San Francisco, for appellant.

Charles W. Slack and Edgar T. Zook, both of San Francisco, for respondent.

WARD, Justice pro tem.

This is an appeal by the widow from an order for discontinuance of family allowance, from an order for ratable distribution, and from a decree of settlement of final account and final distribution in the matter of the estate of Alfred May, deceased. Appellant in her briefs has ignored the appeal from the first and second order, and accordingly we will confine our attention to the third point.

The decedent, Alfred May, was married to his first wife, Henriette F., in 1889, and immediately thereafter moved to Mexico, where he eventually engaged in business under the firm name of May Hermanos y Compania. Four children were born as the result of this marriage. About 1913, with his wife, Henriette F., he left Mexico and came to California, but did not engage in business. His income was derived entirely from his interest in May Hermanos, and from investments, most of which were in Mexican corporations. On January 3, 1925, Henriette May died intestate, a resident of San Francisco, leaving surviving her husband, Alfred May, now deceased, and the four children before mentioned. Subsequent to the death of their mother, Henriette F. May, the four children executed to Alfred May, their father, an assignment of all their interest wherever situate in the estate of Henriette F. May. This assignment was never used. On March 31, 1926, Alfred May, the deceased, married Miriam K. Streckler, now Miriam K. May, the appellant, and on April 19, 1927, he died leaving surviving his widow, Miriam K. May, and the four children by his first marriage. On May 12, 1927, the last will and testament of Alfred May was admitted to probate in the superior court of the city and county of San Francisco, and under the terms of said will the widow and four children each are bequeathed one-fifth of the entire estate of Alfred May, deceased. By said last will and testament, Rene A. May, a son by the first marriage, is named sole executor to act without bonds, and after due proceedings qualified as such executor. The executor filed his first and final account and the petition for final distribution. Appellant filed objections. After a hearing, the court settled the account and decreed final distribution. Thereafter appellant appealed to this court from the said decree of final distribution.

It appears from the inventory and appraisement that the assets of the estate of Alfred May include an "interest of the decedent in May Hermanos y Compania, a partnership engaged in business in Hermosillo, State of Sonora, Republic of Mexico, amounting to approximately $55,812, subject to whatever interest therein may be determined by the Mexican courts to be vested in the estate of the late Henriette May now being probated in the Mexican courts, appraised at $55,812.00." And it appears from the first and final account filed by the executor that "the appraisers of the said estate in valuing the items of the claim of the decedent against May Hermanos y Compania appraised the said claim at the full amount of $55,812.00, whereas the said executor is of the opinion that only half of the said claim is the property of the estate of the decedent, and the remaining one-half thereof, as said executor is informed and believes, is the property of the estate of the late Henriette F. May, the first wife of the decedent, whose estate is now being probated in the State of Sonora, Republic of Mexico." It further appears from the first and final account that "the claims of the decedent against May Hermanos y Compania and Compania Industrial del Pacifico are not now payable, but are payable over a period of years, and the said claims can be readily collected by the distributees of the estate of the said decedent as in these probate proceedings, and there is no necessity of continuing these probate proceedings for the collection thereof." The inventory and appraisement also contains the following: "Note. Various parcels of real property, situate in the Republic of Mexico, in which the decedent had an interest, one of the said parcels of real property being under a contract of sale to one Emilio Beraud, are not listed in the foregoing inventory because not within the jurisdiction of the State of California."

[1] Appellant contends that the evidence did not show what the community property law of Mexico was, and that the court was bound in its decree of distribution to apply the provisions of the California law in this case. Certain Mexican statutes were discussed during the hearing, and, from the transcript, we conclude that counsel for appellant knew and understood the law of Mexico, and from the briefs that, if the Mexican statutes were properly before the court, there was no misapplication of such statutes to the order of distribution. Likewise, respondent concedes that, if the case were to be considered solely in the light of the California law, the interests of Henriette F. May, the first wife, in the community property, would have vested in her husband on her death, and that the partnership would have been dissolved by the death of Alfred May. We have therefore,

as the first question to consider: Did the court upon the hearing have the right to apply the Mexican provisions of the community property law to the facts as presented? If any provision of this law was introduced, then the court had the right to consider any or all of the Mexican laws upon this subject which might appear in the volume of laws introduced. See Ex parte Spears, 88 Cal. 643, 26 P. 608, 22 Am. St. Rep. 341. The certificate of the judge who presided at the hearing is attached to the reporter's transcript, and he certifies that the Political Constitution of the United States of Mexico, published by Herrero Hermanos, Sucesores, in 1920, was introduced, and that there was read into the evidence paragraph II of article 121 of the Constitution; also the Law of Family Relations of Mexico. The laws are quoted in the Spanish language, and translations given with a statement that the translations were vouched for by a witness produced for the executor. The transcript of testimony does not disclose that any objection was interposed to the method of introduction. Upon examination of witness, counsel for appellant propounded questions which indicated that he knew the laws of Mexico, and evidently accepted the translations as correct. The right of the court to consider the Mexican statutes upon this subject need not be considered further, except to say that the decree of distribution was in accordance with such provisions.

[2, 3] Appellant contends that the court erred in distributing the claim of the estate against May Hermanos y Compania to the heirs instead of requiring the executor to collect the same and account therefor in the estate of Alfred May pending in the city and county of San Francisco. The executor of the Alfred May estate in San Francisco is also the executor of the estate of Alfred May in Mexico; likewise he is the administrator of the estate of Henriette F. May pending in Mexico. Appellant relies upon the decision in the case of In re Ortiz' Estate, 86 Cal. 306, 24 P. 1034, 21 Am. St. Rep. 44. Caledonio Ortiz was a resident of California, and died leaving property in Spain, Mexico, and California. The executor collected and took possession of all that part of the assets of the estate which were then in Spain and converted all the personal property into money. He then came to California and was appointed and qualified as executor of the Ortiz estate. In due course of time, the executor filed his final account, but did not charge himself with the assets collected from Spain. Objections were filed, and, after a hearing thereon, the court charged the executor with an amount found to be the residuum of the Spanish assets after deducting expenses, charges, and demands against the Spanish estate. The court found that the executor could have had the residuum with which he was charged transferred to him in this state before the filing of his final account. The proceeds of the estate were actually on deposit in a bank in Spain. There was no question in the Ortiz Case but that the Spanish tribunal would credit the executor with all that he was required to account for and distribute in California. Under these facts, the California court had the right to demand an accounting of the foreign assets, and the Supreme Court so held. However, an executor cannot be held answerable when he cannot compel the collection of foreign assets upon his domestic appointment. "Whether, then, the principal or domiciliary representative be required pro forma, or not, to include in his inventory assets which come to his knowledge, either situate in the state or county of principal and domiciliary jurisdiction, or out of it, his liability as to assets of the latter sort depends somewhat upon his means of procuring them, and the fact of an ancillary administration in the situs of such assets." In re Ortiz, 86 Cal. page 315, 24 P. 1034, 1036, 21 Am. St. Rep. 44. The court of the domicile has the right to punish an executor upon refusal or neglect to account for foreign assets that are collectible. The California court could not punish the California executor of the Alfred May estate because, whatever interest or profits up to date there may be from May Hermanos y Compania are claimed by the estate of Henriette F. May pending in Mexico. Under the laws of Mexico as introduced in evidence, personal property as well as real property is governed by the law of the situs. Under the circumstances it would have been futile to make an order that would not be binding in Mexican jurisdiction. Assuming that the trial court had jurisdiction over the executor in Mexico in the Alfred May estate by reason of his domiciliary executorship in California, and that the court here ordered a contest to determine the rights of the respective estates, such contest would of necessity be brought in Mexico. The court found that whatever money the respondent executor had received for the estate of Alfred May had been accounted for. There was no evidence to the contrary.

After the death of Henriette F. May, the children heirs executed a so-called assignment of their interest in her estate to their father, the deceased herein. Appellant contends that the trial court sitting in probate passed upon the validity of this alleged assignment. The assignment was executed, but was never accepted and never presented for use in Mexico. In the decree of settlement of the final account and of final distribution, there is a reference to this instrument, but the court did not make a finding thereon.

[4] Further objection is made that respondent had no authority to extend the time of payments of a debt of, or to make himself, as executor, a copartner in, May Hermanos y Compania. Under the California law an executor of an estate of a deceased partner, by

reason of his position of executor, has no power to extend the partnership or to do anything else which would create the partnership anew, but this agreement was in fulfillment of the original articles of copartnership, and the respondent acted in his capacity as executor in Mexico. The surviving partners had a right to insist that the interest of the decedent should be liquidated in the manner provided in the original articles. Under the original articles the heirs are "obliged to leave in the possession of the copartnership or of the person or persons which may legally succeed the same, the amount of their interest in the copartnership capital and profits for the term of five years."

The interest of the decedent in the copartnership in the Beraud contract, also objected to by appellant, would not be binding on the Mexican company, on Beraud, or on the children of Henriette F. May, and the court properly declined to fix the amount, but decreed to each heir an undivided fifth interest.

Judgment affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

WEBB et al. v. FRANCIS J. LEWALD COAL CO. et al. *

Civ. 7451.

District Court of Appeal, First District, Division 1, California.

March 17, 1931.

Rehearing Denied April 16, 1931.

Hearing Granted by Supreme Court May 15, 1931.

1. Damages ⚷192.

Plaintiff's testimony, in action for injuries caused by fright when she saw truck collide with street car and head toward her store, *held* to warrant inference that she was frightened for her own safety as well as truck driver's.

2. Pleading ⚷207.

Complaint alleging permanent physical damage because of truck entering plaintiff's storeroom after collision with street car *held* sufficient to charge that injury was proximately caused by collision, in absence of special demurrers.

3. Witnesses ⚷208(2).

Refusal to compel physician, who examined plaintiff in personal injury suit, to testify for defendant, *held* reversible error (Code Civ. Proc. § 1881, subd. 4).

Code Civ. Proc. § 1881, subd. 4, provides that physician cannot be examined in civil action as to information acquired in attending patient, without latter's consent, but that action to recover damages for personal injuries shall be deemed consent by plaintiff that any physician who prescribed for or treated plaintiff shall testify.

4. Witnesses ⚷28(2).

Physician is entitled only to statutory witness fee, in absence of express contract to pay him extra compensation for expert testimony.

5. Trial ⚷45(1).

Statement that defendants were simply trying to bring before jury all testimony they could as to plaintiff's condition *held* sufficient offer of proof to authorize admission of attending physician's testimony.

6. Appeal and error ⚷1048(1).

Refusal to compel physician to testify as to his examination of plaintiff in personal injury suit *held* prejudicial to defendant.

7. Damages ⚷173(1).

Plaintiff's testimony as to her earnings before alleged injury *held* admissible.

Appeal from Superior Court, City and County of San Francisco; Louis H. Ward, Judge.

Action by Peggy Webb and husband against the Francis J. Lewald Coal Company and others. From a judgment for plaintiffs, defendant coal company appeals.

Reversed.

Hadsell, Sweet & Ingalls, of San Francisco, for appellant.

Walter McGovern, of San Francisco, for respondents.

DOOLING, Justice pro tem.

Plaintiffs and respondents sued appellant Lewald Coal Company and the city and county of San Francisco for damages for personal injuries. The evidence showed that on April 2, 1928, a truck belonging to appellant Lewald Coal Company and a street car of defendant city and county of San Francisco came into collision at the intersection of Ashton avenue and Ocean avenue in San Francisco. The result of the impact was that the truck was propelled easterly on Ocean avenue and into the front of a building occupied by respondent Peggy Webb as a millinery store. Peggy Webb testified that she saw the collision and the approach of the truck to the building from the mezzanine floor and immediately

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

★Hearing granted 4 P.(2d) 532.

after the impact, and as a result of the nervous shock attendant thereon, collapsed and had ever since suffered from extreme nervousness, headaches, sleeplessness, loss of weight, and other nervous disturbances. The jury returned a verdict against both defendants. A new trial was granted to the city and county of San Francisco, but denied to Lewald Coal Company, and the latter prosecutes this appeal.

[1, 2] The first question presented rests upon the claim of appellant that under the testimony of Peggy Webb she was put in fear solely for the safety of the driver of the truck and not for her own safety, and that physical injury caused by fear for the safety of another will not support a recovery for tort. We do not think that the record fairly construed supports appellant's construction of the evidence. It is true that respondent Peggy Webb testified explicitly that she felt sure the driver of the truck would be killed and when she knew that he was not killed "it was better." It is likewise true that she did not testify explicitly that she was put in fear for her own safety, but she did give this significant testimony: "I got there just as the two came together in the street, the street car and the automobile, and then the machine turned away from the street car; it was a terriffic crash then, but he turned away from the street car and headed right straight at us; and we were standing—I was standing and Orlean was seated right at the window, and there was no place to get to, we had to stand and take it, so we just stood and watched him come; it was a great big truck, completely loaded with coal, there wasn't room for any more, and he headed just straight at us, and he went out of sight under my feet; I felt sure the driver would be killed, felt sure he would be killed. * * * And I was frightened, I couldn't move then; finally I collapsed, and my legs wouldn't hold me up. I sat on the floor. I couldn't move." We are satisfied that the fair inference from this evidence is that respondent was frightened for her own safety as well as for that of the driver. Lindley v. Knowlton, 179 Cal. 298, 302, 176 P. 440. It therefore becomes unnecessary for us to decide the question of law urged by appellant on this point. Some complaint is made, under this head, of the allegations of the complaint, but so far as the record shows no demurrer was interposed and no objection made to the introduction of evidence on this ground. The complaint charges "that because and on account of said motor car so entering the said storeroom of said plaintiff, as aforesaid, the said Peggy Webb then and there suffered and sustained and ever since the said 2d day of April, 1928, has and still does suffer and sustain permanent physical pain, suffering and damage," etc. In the absence of a special demurrer, we hold that the complaint sufficiently charges that the physical injury was proximately caused by the collision.

[3] On cross-examination of respondent Peggy Webb it was developed that she had been examined by Dr. Joseph Catton, a physician. Plaintiffs did not produce Dr. Catton as a witness and he was subpœnaed by defendants. When called to the stand he refused to give any testimony concerning his examination of Peggy Webb or his conclusions therefrom. The doctor's position is made plain by the following statement which he made: "It is not the financial arrangement for my time, Mr. Heidelberg, alone; it is a matter that a doctor is called upon to make a decision when it is an equitable thing for him to give that testimony; by that I mean my office is not a very sacred place if a patient or a lawyer may send a case to me and pay for an opinion and then if I do not happen to be used in that particular case in a certain particular way that he would have the opportunity to come into court and say 'Don't go to Joe Catton because if he doesn't go with you he is available to the other side for a fee.'"

After an extended discussion in which court, counsel, and the witness participated, the court ruled that Dr. Catton could not be compelled to testify. This ruling of the court in our opinion constituted reversible error. However commendable may have been the ethical objections of Dr. Catton from a professional standpoint, and we can sympathize thoroughly with him in his stand, the policy of the law as declared by the Legislature required the doctor to set aside his scruples and testify concerning those matters about which he had learned from his professional examination of Mrs. Webb. The pertinent portions of section 1881, subdivision 4, of the Code of Civil Procedure provide: "A licensed physician or surgeon can not, without the consent of his patient, be examined in a civil action as to any information acquired in attending the patient, which was necessary to enable him to prescribe or act for the patient; * * * provided, further, that where any person brings an action to recover damages for personal injuries, such action shall be deemed to constitute a consent by the person bringing such action that any physician who has prescribed for or treated said person and whose testimony is material in said action shall testify."

[4] The position of the trial court that Dr. Catton could not be compelled to testify unless arrangements were made to compensate him as an expert witness would in effect nullify this quoted section in many cases. All that Dr. Catton need do, if the trial court was correct, to keep from the stand would be to demand such an amount for testifying as would be impracticable for defendants to pay. Such is not the law. "The authorities,

however, all agree that, in the absence of an express contract to pay a physician for his testimony as an expert, he is only entitled to the statutory fee. The uniform rule seems to be that a physician who has acquired knowledge of a patient or of specific facts in connection with the patient may be called upon to testify to those facts without any compensation other than the ordinary witness receives for attendance upon court. In those states recognizing the right to extra compensation for a physician who testifies as an expert it is uniformly held that, where such testimony is sought to be elicited without requiring any particular investigation on the part of the physician, he is required to testify without extra compensation." McClenahan v. Keyes, 188 Cal. 574, 583, 206 P. 454, 458.

[5] Respondent claims that there was no sufficient offer of proof to present this question to the appellate court. Defendants stated in this behalf: "We are simply trying to bring out before the jury all the testimony we can as to this lady's condition. We ascertained Dr. Catton examined the lady; they did not call Dr. Catton and I subpoenaed Dr. Catton." In the nature of things this was the only offer defendants could make. They did not know what Dr. Catton's testimony would be and could not state what they could not know. The reason for the rule ceasing, the rule itself ceases. The situation was not unlike that existing in cross-examination where it has been said: "A party can hardly be expected to know what his adversary's witness will testify to on cross-examination, nor could he well state to the court what he expected to elicit by such examination." Harness v. State, 57 Ind. 1, 8; State v. Martino, 27 N. M. 1, 192 P. 507, 509; Cunningham v. Austin & N. W. R. Co., 88 Tex. 534, 31 S. W. 629; Martin v. Elden, 32 Ohio St. 282.

[6] It is folly to urge that it does not appear that appellant was prejudiced by the ruling. Appellant was deprived of the opportunity of showing whether it was injured or not. The language of our Supreme Court in denying a petition for hearing in People v. Stevenson, 103 Cal. App. 82, 93, 284 P. 487, 492, seems particularly appropriate to the facts of this case: "The constitutional provisions impose the burden of showing prejudice or injury by a ruling which is within the power of the complaining party to present. It does not contemplate a situation where such party without fault has been denied an opportunity to determine whether or not he has been prejudically injured."

Appellant was entitled to present the testimony of Dr. Catton. It was denied that right and by that denial it was put out of its power to show to this court what Dr. Catton's testimony would have been. Under such circumstances prejudice must be presumed. In a case very similar in its facts to this, the Supreme Court of Washington reached the same conclusion that we have here. State v. Superior Court, 154 Wash. 144, 281 P. 335.

[7] The objection to Mrs. Webb's testimony of her earnings prior to the alleged injury in our opinion goes only to its weight, not to its admissibility. The instructions based on the Motor Vehicle Act correctly stated the law, and we cannot say that the jury might not as reasonable persons find that the failure to comply with the law in those particulars was a proximate cause of the collision.

Judgment reversed.

We concur: TYLER, P. J.; CASHIN, J.

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113 Cal. App. 36

BEALL v. ERICKSON.

Civ. 328.

District Court of Appeal, Fourth District, California.

March 25, 1931.

1. New trial ⚷165.

When motion for new trial is once acted on, order cannot be vacated and entire matter again considered.

2. Courts ⚷116(1).

If order entered respecting new trial is not order made by court, record may be corrected to speak truth.

3. Courts ⚷116(6).

Order amending order granting new trial *held* intended to correct inadvertence of clerk and to make records set forth true situation.

> It follows that the amending order must be taken as the correct order as originally made by the court. The first order of the trial court merely ordered that motion for new trial be granted, and the subsequent order stated: "Through inadvertence the order heretofore made granting a new trial in the above-entitled action, the grounds were not stated and it is therefore ordered that said order be and it is hereby amended nunc pro tunc as of April 29, 1930, to read: 'It is ordered that plaintiff's motion for a new trial herein be and it is hereby granted on the ground of the insufficiency of the evidence to sustain the verdict rendered in the action.'"

4. Appeal and error ⚷900.

Absent contrary showing, it must be presumed that court's action in correcting min-

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utes respecting granting of new trial was proper one.

> It was argued that, since the transcript was certified as correct, it must be taken to be so, and that no presumptions could then be indulged. However, from the transcript before the court, nothing appeared in connection with the order for new trial except the two minute orders, and, while the record showed that what was done by inadvertence in one was corrected in the other, it did not show whose was the inadvertence or omission.

5. New trial ⚷6.

Broad discretion is vested in trial court in passing on motion for new trial.

6. New trial ⚷71.

Where trial judge is dissatisfied with verdict, and believes it clearly against weight of evidence, he may set it aside, even though there be substantial evidence supporting it.

> In such case, he may grant a new trial, notwithstanding a conflict in the testimony, even though on same conflict appellate court would be bound by verdict, and, even if there be no conflict in the testimony, the probative force and effect of the evidence is ultimately for the determination of the trial judge on hearing of motion for new trial.

7. Automobiles ⚷245 (6, 72).

In action for injuries when automobile struck pedestrian, negligence and contributory negligence are questions primarily for jury.

8. New trial ⚷157.

In automobile accident case, questions of negligence and contributory negligence were for trial judge's consideration in considering motion for new trial.

Appeal from Superior Court, Fresno County; Denver S. Church, Judge.

Action by L. S. Beall against Charles Erickson. From an order granting a motion for new trial, defendant appeals.

Affirmed.

M. F. McCormick, of Fresno, for appellant.

Arthur Frame, of Clovis, and Conley, Conley & Conley, of Fresno, for respondent.

BARNARD, P. J.

This is an appeal from an order granting a new trial in an action for damages for personal injuries alleged to have been caused by negligence in the operation of an automobile. The answer, in addition to denying the allegations of the complaint, alleged contributory negligence. The jury brought in a verdict for the defendant, and a motion for a new trial was argued and submitted and later granted. The original judgment was entered on March 24, 1930. The minutes of the court under date of April 29, 1930, show the following: "Plaintiff's motion for a new trial herein having been heretofore argued and submitted to the court for its decision, and after due consideration and the court being fully advised, it is ordered that said motion be, and it is hereby granted."

The minutes further show under date of May 1, 1930, the following: "Through inadvertence the order heretofore made granting a new trial in the above-entitled action, the grounds were not stated and it is therefore ordered that said order be and it is hereby amended nunc pro tunc as of April 29, 1930, to read: 'It is ordered that plaintiff's motion for a new trial herein be and it is hereby granted on the ground of the insufficiency of the evidence to sustain the verdict rendered in the action.'"

[1-3] The principal question raised on this appeal is as to the effect of this minute order of May 1, 1930; that is, whether or not the order granting a new trial is to be here treated as having been made upon the ground of the insufficiency of the evidence to sustain the verdict. It is well settled that, when a motion for a new trial has been once acted upon by the trial court, the order made cannot be later vacated and the entire matter again considered. Coombs v. Hibberd, 43 Cal. 452; Dorland v. Cunningham, 66 Cal. 484, 6 P. 135. It is equally well settled that, if an order entered is not the order made by the court, the records may be so corrected as to make them speak the truth. Crim v. Kessing, 89 Cal. 478, 26 P. 1074, 23 Am. St. Rep. 491. That the amended order of May 1 did just this is contended by respondent. On the other hand, appellant contends that it must be taken as changing the original order made on April 29. Appellant insists that the instant case is similar to Drinkhouse v. Van Ness, 202 Cal. 359, 260 P. 869, 873, in which case the court said: "But the trial court has no authority, under the guise of an amendment, to correct a judicial error, or make of record an order that was never made. Kaufman v. Shain, 111 Cal. 16, 19, 52 Am. St. Rep. 139, 43 P. 393. Yet the record indicates that is precisely what was attempted to be done in the present case. The later order does not purport to correct the entry of the first, neither is there anything on its face or in the record from which it may be gathered that such was its purpose. It stands out clearly as an order purporting to 'amend,' that is, to change, an order previously made."

We have examined the original briefs in that action, and it appears that the court was

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

there discussing a very different situation. In that case an order had been entered on May 1, 1902, the essential part reading as follows: "It is ordered that the said motion be and the same is hereby granted." On May 8, 1902, the following order was entered:

"In this action it is ordered that the order of May 1st, 1902, be and the same is hereby amended to read as follows:

"Motion of Defendant Frank Van Ness for new trial be denied and motion for new trial of intervener be granted."

It thus appears that, by the second of these orders, the first order was very materially changed. In Biaggi v. Ramont, 189 Cal. 675, 209 P. 892, 895, the court said: "On an appeal from an order granting a new trial the action of the trial court will not be disturbed if upon any hypothesis it can be sustained. Its action is conclusive upon this court, unless an abuse of discretion is made to appear."

A number of cases have been cited by respondent wherein orders have been approved which corrected previous orders passing upon motions for a new trial. Appellant argues that in every such case cited the order of amendment contains recitals which show that the previous minute order did not correctly set forth the order actually made by the court. This does not conclusively appear, however, in the case of Brush v. Pac. Elec. Ry. Co., 58 Cal. App. 501, 208 P. 997, 998. In that case, two minute orders appear as follows: "The first, that of March 18, 1921, reads: 'Defendant's motion for a new trial is granted.' The second, dated March 28, 1921, is as follows: 'It appearing that in the minute entry of the order granting a new trial on the 18th day of March, 1921, the statement of the grounds on which said order was made was inadvertently omitted, and for the purpose of correcting said inadvertent omission, said order is hereby amended and corrected, nunc pro tunc, as of March 18, 1921, to read as follows: Defendant's motion for a new trial is hereby granted, on the ground of the insufficiency of the evidence to support the verdict, in that it appears from the preponderance of the evidence that the plaintiff was guilty of contributory negligence."

Essentially, the amending order in that case was like the one now before us. Both amending orders refer to original orders appearing in the minutes, and in neither case does it appear that reference is made to any verbal order or to anything other than the original minute order entered. In the case before us, the amending order states that, through inadvertence in the original order, the grounds were not stated. In the Brush Case, the amending order states that in the original order the grounds for the order were inadvertently omitted. While the order in the Brush Case states that it is being made for the purpose of correcting an inadvertent omission, it leaves the matter in doubt, whether the inadvertence was that of the judge in making the order or that of the clerk in entering it. In the case before us, it is made plain that the second order is made for the purpose of correcting an inadvertence, and, as in the Brush Case, a doubt is left as to whether it is the inadvertence of the judge or of the clerk. In the Brush Case the appellant made the same contention as is made by the appellant here, that the inadvertence referred to was judicial and not clerical; and therefore that the second minute entry was unauthorized and void. In passing upon that contention, the court said:

"Appellant's claim that the lower court exceeded its authority in entering the nunc pro tunc order of March 28, 1921, is based upon the assumption that the omission from the original minute entry of any statement that the new trial was granted on the ground of the insufficiency of the evidence was a judicial and not a clerical error; that is, it is gratuitously assumed by appellant that, when the trial judge announced that a new trial would be granted, who made no mention of the ground upon which it was ordered, and that therefore the failure of the first minute entry to specify that the new trial was granted upon the ground of the insufficiency of the evidence to support the verdict was not a mistake of the clerk but an error of the judge. Aside from the two minute entries, there is nothing whatever in the record on appeal to show any of the circumstances under which either entry was made. There is nothing in the record on appeal to show that, in ordering the new trial, the trial judge did not specifically direct the clerk to specify in his minute entry of the order that it was made on the ground of the insufficiency of the evidence to support the verdict. This being the condition of the record, we must presume that the trial judge did direct the clerk to specify in the original minute order that the new trial was granted on the ground of the insufficiency of the evidence to support the verdict, or that he in some way communicated to the clerk the fact that insufficiency of the evidence to support the verdict was the ground upon which the order was made. We must presume that, through clerical misprision, the clerk failed to make the entry as directed, or to make it in conformity with the judge's announcement, and that it was for that reason that the court, in the exercise of its inherent power to cause its acts to be correctly recorded, directed the entry of the second order. An appellate court never indulges in presumption to defeat an order or a judgment. On the contrary, every intendment is in favor of the validity and regularity of the order or judgment appealed from. The burden of overcoming this presumption is upon the appellant, and where the record is silent it will be presumed that what ought to have been done was not only done, but rightly done."

The court then concludes that the second minute entry must be treated as a correct record of the order as announced by the trial judge.

We think that the reasoning in the case just referred to is controlling under the circumstances here shown, and that the order of May 1, 1930, must be taken as intended to correct an inadvertence of the clerk in entering the order of April 29, in order to make the record set forth the true situation, and that the minute order of May 1 must be taken as the correct order as originally made by the court.

[4] Appellant argues that, since the transcript in this case was certified as correct, it must be taken to be so, and that no presumptions may then be indulged. He cites Hahn v. Kelley, 34 Cal. 391, 94 Am. Dec. 742, to the effect that, where a record is silent as to what was done, it will be presumed that what ought to have been done was correctly done, but, where a record shows what actually was done, it will not be presumed that something different was done. Assuming the correctness of this rule, the fact remains that, from the transcript before us, nothing appears in this connection except the two minute orders, and, while the record shows that what was done by inadvertence was corrected, it does not show whose was the inadvertence or omission. In the absence of any showing to the contrary, it must be presumed that the action of the court in correcting the minutes was a proper one.

[5, 6] It follows that the order appealed from must be affirmed, unless, in view of the evidence shown by the record, we are of the opinion that the court abused its discretion. A broad discretion is vested in a trial court in passing upon a motion for a new trial. In Brush v. Pac. Elec. Ry. Co., supra, the rule is thus stated:

"But, while an appellate court will not review a verdict where the evidence shows a substantial conflict, the trial court is guided by very different considerations. If the trial judge, notwithstanding a conflict in the testimony, is satisfied that the verdict is against the weight of the evidence, he may, indeed he should, grant a new trial, although upon the same conflict an appellate court would be bound by the verdict. And even though there be no conflict in the testimony, the probative force and effect of the evidence is ultimately for the determination of the trial judge upon the hearing of a motion for a new trial. Meinberg v. Jordan, 29 Cal. App. 762, 157 P. 1005, 1007. The judgment of the trial judge is not based upon the cold record which comes to an appellate court. He hears the evidence, and has ample opportunity to observe the demeanor and manner of the witnesses, and to judge their credibility. If, therefore he is dissatisfied with the verdict, and is of the opinion that it clearly is against the weight of the evidence, he may set it aside and grant a new trial, even though there be substantial evidence to support the verdict. He—'is in a position to determine between the apparent and the real, to detect the fallacy of specious testimony which may have misled the jury, but which his wider experience enables him to readily comprehend. * * * It is for these and other reasons which might be mentioned that a wide discretion is accorded to trial courts in the disposition of motions for new trials.'"

[7, 8] In view of these rules, we are unable to hold that the trial court abused its discretion in the instant case. It is not necessary to review all of the evidence in detail. It does appear that the respondent was crossing a street in the business section of Fresno in the daytime. He was obliged to stop in the street while a truck with high sides passed directly in front of him. The appellant, driving an automobile, was following closely behind this truck. The respondent testified that he stood still and did not move, but that, immediately after the truck passed, the appellant turned the front of his machine sufficiently to his right so that the fender hit respondent's knee and the front wheel passed over his foot, causing the injuries complained of. On the other hand, the appellant testified that he proceeded straight ahead following the truck. While the question of negligence on the part of the appellant and of contributory negligence on the part of the plaintiff were questions primarily for the jury, they were equally questions calling for the consideration of the trial judge, in considering the motion for new trial, under the familiar rules. Green v. Soule, 145 Cal. 96, 78 P. 337.

The order appealed from is affirmed.

We concur: MARKS, J.; JENNINGS, J.

PEOPLE v. MALONE et al.*

Cr. 107.

District Court of Appeal, Fourth District, California.

March 14, 1931.

Rehearing Denied March 25, 1931.

Hearing Granted by Supreme Court April 13, 1931.

1. Criminal law ⚷304(1).

Court takes judicial notice that certain date fell on Sunday.

2. Courts ⚷85(2).

Provisions of court rule following substantially language theretofore used in repealed law are to be interpreted in same manner.

3. Time ⚷10(1).

Generally, when last day of performance of act provided by law falls on Sunday or holiday, that day is excluded in computation of time.

4. Time ⚷10(9).

Notice and application presenting grounds of appeal six days after oral notice of appeal were within time, where fifth day fell on Sunday (Judicial Council Rule 2, § 7; Pol. Code, §§ 12, 13).

Appeal from Superior Court, Kern County; Robert B. Lambert, Judge.

Odell Malone and another were convicted of burglary, and they appeal. On motion to dismiss appeal.

Motion denied.

Rowen, Irwin and W. C. Dorris, all of Bakersfield, for appellants.

U. S. Webb, Atty. Gen., and John D. Richer, Deputy Atty. Gen., for the People.

LAMBERSON, Justice pro tem.

Each of the defendants was convicted of the crime of burglary in the first degree and sentenced to a term of imprisonment in the state prison. Judgment was pronounced on July 15, 1930, and oral notice of appeal was given the same day. No written notice of appeal was filed. On Monday, July 21, 1930, six days after pronouncement of judgment, the notice required by section 7 of rule II of the Judicial Council, promulgated for the Supreme Court and District Courts of Appeal, was filed. Said rule provides in part as follows: "Upon an appeal by the defendant from a judgment of conviction or from an order denying his motion for a new trial, or from an order made after judgment, or upon an appeal by the People from an order granting a new trial, or upon an order setting aside an indictment, information or accusation, or from an order made after judgment, the appellant must, within five days after giving notice of the appeal, file with the clerk and present an application to the trial court, stating in general terms the grounds of the appeal and the points upon which the appellant relies, and designate what portions of the phonographic reporter's notes it will be necessary to have transcribed to fairly present the points relied upon. If such application is not filed within said time, the appeal shall be dismissed; provided, that the appeal shall not be dismissed for any defect in the statement of such grounds or points which does not affect the substantial rights of the respondent."

[1] This court will take judicial notice of the fact that July 20, 1930, the fifth day after the giving of notice of appeal, fell on Sunday.

[2] The provisions of the rule of the Judicial Council above cited follow substantially the language theretofore used in section 1247 of the Penal Code prior to its repeal in 1927 (St. 1927, p. 1048), and are to be interpreted in the same manner. The provisions of that section and of the rule of the Judicial Council have been held to be mandatory in effect. People v. Riga, 104 Cal. App. 477, 285 P. 1069; People v. Shaw, 81 Cal. App. 312, 253 P. 747. In the latter case it was held that even though the objection is not raised by the respondent, the court would have no jurisdiction to proceed if it should appear to the court that the appellant has failed to comply with the provisions of section 1247 of the Penal Code.

In none of the cases, however, do we find that the question which has arisen here was before the court.

Section 12 of the Political Code provides as follows: "The time in which any act provided by law is to be done is computed by excluding the first day, and including the last, unless the last day is a holiday, and then it is also excluded."

Section 13 of the Political Code provides: "Whenever any act of a secular nature, other than a work of necessity or mercy, is appointed by law, or contract to be performed upon a particular day, which day falls upon a holiday, such act may be performed upon the next business day with the same effect as if it had been performed upon the day appointed."

Like provisions are also contained in the Civil Code and Code of Civil Procedure, and section 4480 of the Political Code says that "with relation to each other, the provisions of the four codes must be construed * * * as though all such codes had been passed at the

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Hearing granted 2 P.(2d) 332.

same moment of time, and were parts of the same statute."

[3] An examination of the California cases discloses that generally speaking when the last day of performance of an act provided by law falls on a Sunday or a holiday, that day is excluded in the computation of time and the act may be performed on the next succeeding day. It has been so applied in the case of service of notice of appeal (Estate of Rose, 63 Cal. 346), in the case of filing an undertaking on appeal (Robinson v. Templar Lodge, etc., 114 Cal. 41, 45 P. 998; Rauer's Law, etc., Co. v. Standley, 3 Cal. App. 44, 84 P. 214), to the service or presentation of a bill of exceptions (Derr v. Busick, 63 Cal. App. 134, 218 P. 280), to the filing of points and authorities upon appeal (Troy, etc., Co., Ltd., v. Drivers' etc., Co., 13 Cal. App. 115, 109 P. 36), to an application for relief from a judgment made under section 473 of the Code of Civil Procedure (Bell v. Krauss, 169 Cal. 387, 146 P. 874), and to the time for commencing an action to foreclose a mechanic's lien (Mox v. Leventhal, 89 Cal. App. 253, 264 P. 562).

Those of the above cases which relate to the perfecting of appeals are peculiarly applicable to the condition under consideration, because they cover similar situations, although they are civil and not criminal cases.

In the case of People v. Preciado, 31 Cal. App. 519, 160 P. 1090, it was said, quoting from Estate of Nelson, 128 Cal. 242, 60 P. 772: " 'The right of appeal is conferred by the Constitution, and statutes and rules of procedure for its exercise are to be liberally construed. We are not disposed to dismiss an appeal upon grounds that are purely technical, where there has been no violation or disregard of any express rule of procedure.' "

In the case of People v. Bryant, 207 Cal. 450, 278 P. 1025, involving a motion for dismissal of a criminal appeal under section 1247 of the Penal Code, the court said: "It is the policy of this court, of course, to hear appeals upon the merits and to avoid, if possible, all forfeiture of substantial rights upon technicalities."

The outstanding exception to the general rule hereinbefore stated is found in the interpretation by the courts of that part of section 660 of the Code of Civil Procedure, which provides in substance that the power of the court to pass upon a motion for a new trial shall expire within two months after the verdict of the jury or service on the moving party of notice of the entry of the judgment, and that if such motion is not determined within said two months the effect shall be a denial of the motion, without further order of the court. This provision constitutes a limitation upon the power of the court and is to be distinguished from the rules governing the procedure to be followed by the parties to the action. No particular stress is to be laid upon the use of the word "within," because an examination of the cases hereinbefore cited, particularly those relating to the service of notice of appeal and the filing of an undertaking on appeal, discloses that the word "within" was used in the sections of the Code of Civil Procedure under consideration. Section 939 of the Code of Civil Procedure provides that "an appeal may be taken from any judgment or order of a superior court * * * within sixty days from the entry of said judgment or order." Section 940 of the Code of Civil Procedure formerly provided in part as follows: "The order of service is immaterial, but the appeal is ineffectual for any purpose unless within five days after service of the notice of appeal, an undertaking be filed. * * *"

[4] We are of the opinion that the provisions of the Political Code hereinbefore cited are applicable to the filing of the notice and application prescribed by section 7 of rule II of the rules of the Judicial Council, that each of the appellants acted in substantial compliance with said rule, and that the motion to dismiss the appeal should be denied. It is so ordered.

We concur: BARNARD, P. J., JENNINGS, J.

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112 Cal. App. 548

PEOPLE v. MARTINO.*

Cr. 117.

District Court of Appeal, Fourth District, California.

March 14, 1931.

Time ⚷10(9).

Defendant, where second day after judgment fell on Sunday, had all of succeeding day in which to file written notice of appeal (Pen. Code, § 1239).

Appeal from Superior Court, Fresno County; Denver S. Church, Judge.

P. Martino was convicted of grand theft, and he appeals. On motion to dismiss appeal.

Motion denied.

Frank H. Marvin, of Fresno, for appellant.

U. S. Webb, Atty. Gen., and John L. Flynn, Deputy Atty. Gen., for the People.

LAMBERSON, Justice pro tem.

The defendant pleaded guilty to the offense of grand theft in the superior court of Fresno

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*See, also, 299 P. 86.

county and judgment was pronounced on January 2, 1931. No oral notice of appeal was given by the defendant at that time, but written notice of appeal was served and filed on January 5, 1931, under the provisions of section 1239 of the Penal Code, which provides as follows:

> "An appeal from a judgment may be taken by the defendant by announcing personally or through his attorney in open court at the time the judgment is rendered that he appeals from same or by filing a written notice of appeal within two days after the rendition of judgment with the clerk of the court wherein judgment was rendered; and from any order made after judgment, by announcing in open court at the time the same is made that he appeals from the same."

A motion to dismiss the appeal has been made by respondent upon the ground that the defendant did not file with the clerk of the court, within two days after rendition of judgment, his written notice of appeal. It appears that January 4, 1931, the second day after judgment was pronounced, fell on Sunday, and it is contended by the appellant that he had until January 5, 1931, within which to serve and file his written notice of appeal. It has been aptly pointed out by appellant that a situation might arise where the entire period of two days for the giving of notice under section 1239 of the Penal Code would be covered by holidays, in which event there would be no judicial day upon which the appellant could file his written notice of appeal.

Respondent lays stress upon the use of the word "within" in section 1239 and cites the language of the court in the case of People v. Riga, 104 Cal. App. 477, 285 P. 1069, in which there was some discussion of the interpretation of section 660 of the Code of Civil Procedure relating to the time within which the trial court must pass upon a motion for a new trial in a civil case. The question now before this court upon this motion was not involved in the decision of that case. We have heretofore had occasion to consider, in the case of People v. Malone & Brown (Cal. App.) 297 P. 964, in which an opinion has been filed on this date, a similar question arising from the application of section 7 of rule II of the rules of the Judicial Council to a case where the last day of the five-day period provided by said rule for the presentation of an application by the appellant to the trial court stating in general terms the grounds of the appeal, and the points upon which the appellant relies, and designating what portions of the phonographic reporter's notes it will be necessary to have transcribed, fell on a Sunday. We are of the opinion that the reasoning of the last-cited case applies to the interpretation of section 1239 of the Penal Code, and upon the authority of that case it is our conclusion that the appellant in the case before the court had all of the day succeeding January 4, 1931, within which to file his written notice of appeal.

It is ordered that the motion for dismissal of the appeal be denied.

We concur: BARNARD, P. J.; JENNINGS, J.

113 Cal. App. 106

PEOPLE of State of California, Plaintiff and Respondent, v. Emil WASENIUS, Defendant and Appellant.

Cr. 1615.

District Court of Appeal, First District, Division 1, California.

March 31, 1931.

Appeal from Superior Court, City and County of San Francisco; J. J. Trabucco, Judge.

Emil Wasenius was convicted of a felony, and he appeals.

Affirmed.

Alfred J. Hennessy, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and W. R. Augustine, Deputy Atty. Gen., for the People.

TYLER, P. J.

Defendant was charged in an information filed by the district attorney with the commission of a felony, to wit, violation of section 288 of the Penal Code. He was tried and convicted. Motion for a new trial was made and denied. This is an appeal from the judgment and order.

Insufficiency of the evidence and misconduct on the part of the jury during the course of the trial are relied on for a reversal. The evidence is of such a revolting character that a recital thereof will not be made in this opinion. The prosecuting witness testified in detail to the acts committed, and her testimony was supported by an eyewitness of the affair. Nor is there any merit in the claim that it was inherently improbable that defendant committed the offense charged. Such cases do occur and their facts are therefore not inherently improbable. People v. Troutman, 187 Cal. 313, 201 P. 928. The further claim that there were irregularities on the part of the jury during the deliberation of the case is also without merit. The affidavit, to the effect that the jury was influenced by one of its members who it is claimed visited the scene of the crime, was denied by counter affidavits. There is no merit in the appeal.

The judgment and order appealed from are affirmed.

We concur: KNIGHT, J.; CASHIN, J.

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113 Cal. App. 148

BRUNO et al. v. GUGLIELMO et al.

Civ. 7799.

District Court of Appeal, Second District, Division 2, California.

March 31, 1931.

Judgment ⚷414.

Mortgagors *held* not entitled to aid of equity to vacate decree foreclosing mortgage on ground mortgage was given as temporary subterfuge to shield mortgagors from creditors.

Appeal from Superior Court, Los Angeles County; Fletcher Bowron, Judge.

Action by Michele Bruno and others against Giovanni Guglielmo and others. From a judgment of nonsuit, plaintiffs appeal.

Affirmed.

Frank M. Benedict and George W. Rochester, both of Los Angeles, for appellants.

Ernest M. Torchia, of Los Angeles, for respondents.

CRAIG, J.

The plaintiffs below appealed from a judgment of nonsuit rendered on motion of the defendants in a suit praying the vacation of a decree of foreclosure of a mortgage upon real property.

Suit was commenced by the mortgagees against appellants for the foreclosure of a mortgage given by the latter as security for a promissory note. Thereafter a supplemental complaint and alias summons were served in said suit on behalf of respondent as substituted plaintiff who had succeeded to the rights of the plaintiffs by assignment. None of the defendants having appeared, default judgment, decree of foreclosure, order of sale, and a writ of assistance followed simultaneously. There was no attempt made under the provisions of section 473 of the Code of Civil Procedure by the mortgagors, praying that the judgment be vacated and that they be permitted to answer the supplemental complaint. The grounds of this action sound in fraud and deceit, as stated in appellants' brief, "in falsely representing to plaintiffs and their attorney that they should make no appearance, * * * and that no judgment would be taken against them, and if such judgment was taken, it would be for the plaintiffs' benefit and to preserve their property and that said property would be reconveyed to plaintiffs," at the termination of other litigation against them by creditors.

Appellants' counsel in the original suit testified that it was generally understood, and that he explained to them that that litigation was for the purposes of protecting them against possible demands of creditors in Alameda county. In fact, their contention in the instant case was, and here is, that there was no consideration for the promissory note and mortgage. All of their counsel's negotiations were had through the mortgagee, who employed him for the defendants in that case, and paid him a fee in their behalf. He advised the mortgagors, upon the basis of an understanding with the mortgagee, that "nothing would be done in the action any more than a formal entry of judgment, and that no dispossession would be taken," and that he made no appearance for the reasons so stated. It was also agreed that if the mortgagee was by the general scheme forced to foreclose, the property should be reconveyed to the mortgagors upon a favorable determination of the suits pending in the north. There is nothing tending to indicate that the judgment was entered contrary to such understanding of the parties, that the mortgagee would decline, or had been requested, to reconvey at the time agreed upon, nor that the mortgagors would be precluded from demanding a reconveyance in appropriate proceedings.

The sole ground asserted for equitable relief is that the original suit was commenced to foreclose a mortgage given as a subterfuge to shield the defendants therein from creditors, with the understanding that when the storm should subside the judgment if taken should be vacated. In fear of a threatened breach of this clandestine agreement of the parties, the mortgagors attempt to invoke the aid of equity for its enforcement, and it is strenuously insisted that they have a substantial defense to the respondents' alleged cause of action. It is settled law that courts of equity will not interfere to relieve a party from a judgment in such cases. Bancroft v. Bancroft, 178 Cal. 359, 173 P. 579, L. R. A. 1918F, 1029.

The judgment is affirmed.

We concur: WORKS, P. J.; IRA F. THOMPSON, J.

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

113 Cal. App. 132

COHEN v. BERMAN et al.

Civ. 6448.

District Court of Appeal, Second District, Division 2, California.

March 31, 1931.

Attorney and client 🔑166(2).

Frauds, statute of 🔑158(4).

Evidence supported findings that defendant employed attorney, and that codefendant's promise to pay fees was original promise, justifying attorney's recovery against both.

Appeal from Superior Court, Los Angeles County; A. C. Finney, Judge.

Action by Philip Cohen against Jacob Berman, also known as Jack Bennett, and another. Judgment for plaintiff, and defendants appeal.

Affirmed.

Dudley Robinson, of Los Angeles, for appellants.

Ben C. Cohen, of Los Angeles, for respondent.

ARCHBALD, Justice pro tem.

Plaintiff, an attorney at law, sued defendants for the reasonable value of legal services alleged to have been rendered them. The defendants answered, denying that they were indebted to plaintiff in the amount claimed or in any other sum, and defendant Jacob Berman, also known as Jack Bennett, filed an amended answer which, in addition to said denial, set up the further defense of the statute of frauds. Plaintiff recovered judgment, and defendants appeal.

On the part of appellant Louis Berman, it is contended that the contract for respondent's employment was made with a firm of attorneys in New York, and that it covered the entire service rendered by respondent, that such contract was never terminated, and that respondent had no right to charge Louis Berman as the party primarily liable thereon, and that the latter's assent to the continued employment of respondent did not constitute a novation. Appellant Jacob Berman contends that he did not make or join in the original contract of employing respondent, and that any subsequent promise made by him is within the statute of frauds and void. The court found that respondent was employed by Louis Berman, and that the promise of Jacob Berman "was an original promise and constituted a direct obligation and promise of the said defendant to the plaintiff in conjunction with the promise of defendant Louis Berman to pay for the services rendered and to be rendered for the defendant Louis Berman by said plaintiff."

The first intimation which plaintiff received of possible employment was a wire dated May 17, 1927, signed by Mark Eisner of the New York law firm of Olvany, Eisner & Donnelly, which advised plaintiff that he would "be visited by Louis Berman brother of Jack Bennett," and contained the following instructions: "Take care of him I represent Jack Bennett Please advise regarding developments." Shortly thereafter Louis Berman called on plaintiff, but before that plaintiff had not met either defendant.

In a conversation with Mr. Donnelly of the New York firm, according to plaintiff's testimony, the latter said to Donnelly, in regard to fees, that $10,000 should be paid as a retaining fee for all services up to the time of trial; that the $10,000 should be divided up in this way: That $5,000 should be fixed immediately as a retaining fee and $5,000 held for expenses as they were incurred, the balance, if any, to be applied on general fees; "and that if the case goes to trial, that an arrangement should be made for further compensation. He said he felt that was reasonable." Thereafter plaintiff received a letter from the New York firm, written by Donnelly, in which he states: "Today, when I conferred with Mrs. Berman, she delivered to me a check to your order for $10,000, of which you are to take $5,000 as fees, and $5,000 to apply as disbursements in the matter concerning which you and I spoke while we were there. So much as is not used by you for disbursements may be applied toward your general fees." At that time Louis Berman was evidently in Los Angeles and Jacob Berman in New York; and it is apparent from the letter that the first employment included, not only the representation of Louis Berman, but services to be performed for Jacob Berman as well. It also appears from the evidence that the check for $10,000 received by plaintiff was the "check of Mildred Berman, Mr. Jacob Berman's wife."

The plaintiff also testified that about January 3d or 4th "Mr. Louis Berman called me up on the phone and stated to me as follows: 'You know our case comes up for trial,' I believe he said, 'tomorrow.' I said, 'Yes, I know all about it.' He said, 'You are going to be there to represent me.' I said, 'If you desire to have me represent you I will certainly be there, but some arrangement must be made for my compensation per day during the trial.' He said, 'I know that, and you will be paid for your services.'" The question of fees for the trial was again brought up by plaintiff at a luncheon arranged for that purpose and attended by both defendants. Concerning that, the plaintiff testified: "While we were lunching there I said to both of these defendants—they were both sitting opposite me: 'Now you know, Louis, I have been paid a certain amount of money, which went as general fees under a retainer;' that that had reference to my services in this matter which had taken place from March 20th until the time of the trial; 'here with you in my office pretty near every day from March until September, seeking confidential advice, getting advice, and almost turning my office over to you and your brother in this particular case; going down to New York and communicated certain arrangements that were made in the case for your brother; * * * that that ten thousand dollars has long since been used up. * * * We have met here today, and I want to have some definite understanding as to my fees.' He said, 'Well, what are they?' Jack Bennett said, 'What are they?' Mr. Louis Berman did very little talking. In fact, I don't think he did any. I said, 'I will tell you, Jack, in this case here it is a case of quite some importance. I had assurance from the district attorney that the indictment against Louis here will be dismissed as soon as the jury is polled. * * * I can't consider that as a certainty. * * * I must be in court from ten o'clock in the morning until court adjourns in the evening. I will have very little time for work in my office. * * * And I think under the circumstances $200 is a very reasonable charge per day for my services.' * * * Jacob Berman turned around and said to me, 'If you say that $200 is a reasonable fee it will be so paid.' So I said, 'All I want is what is reasonable.' * * * I then turned around, and he said, 'All right * * * you will be paid a reasonable fee. Let the matter stand a few days.' I said, 'that is all right with me.' He said, 'All right; whatever is reasonable you will be paid.' I said, 'Then you want me to wait until that motion [the motion to dismiss]?' He said, 'Yes.' I said, 'Is that all right with you, Louis?' He said, 'Yes.' I said, 'Then it is all right with me.' So I proceeded and continued to proceed in that trial." After that an arrangement was made, according to the testimony of plaintiff, that Jacob Berman's attorney would represent his brother Louis, and in the consent to plaintiff's withdrawal from the case, which was dated February 6, 1928, and signed by both defendants, appears the following: "In addition to the sum of money heretofore paid you as retaining fee, we agree that between now and March 1, 1928, to pay you such reasonable sum as both yourself and we may agree upon for all of your services to this date."

We have quoted quite at length from the testimony to show that there is evidence to support the findings of the trial court. The money paid respondent for his time and expenses up to the trial came from Jacob Berman's wife. Respondent commenced the trial, not only by reason of the original agreement, but also because of the express request of the defendant Louis Berman, and both defendants repeatedly promised to pay a reasonable fee per day for the time he was engaged therein. No question is raised as to the reasonableness of the fee allowed by the court. We find no error in the judgment rendered.

Judgment affirmed.

We concur: WORKS, P. J.; CRAIG, J.

113 Cal. App. 71

WARNER et al. v. TAFT LAND & DEVELOPMENT CO. et al.

Civ. 7731.

District Court of Appeal, First District, Division 2, California.
March 30, 1931.

Rehearing Denied April 29, 1931. Hearing Denied by Supreme Court May 28, 1931.

1. Trial 388(1).

Main purpose of findings is to indicate decision of court on material issues sufficient to support judgment.

2. Trial 🔑404(1).

Findings are to be liberally construed as whole, and apparent conflicts are to be reconciled, if possible, with other findings to support judgment.

3. Vendor and purchaser 🔑123.

Findings *held* sufficient to support judgment refusing to rescind executory contract to purchase realty on ground of fraudulent representations.

Court found that salesman made no false or fraudulent misrepresentations of existing facts to induce plaintiffs to purchase property nor for purpose of entering into contract with intention of deceiving plaintiffs. Findings set forth representations alleged to have been made, and recited that it was not proved that representations made by sales agent were false or known by agent at time to have been false, nor that agent made statements as false or fraudulent misrepresentations, and that no false or fraudulent representations were made by defendants to defraud plaintiffs or induce them to enter into contract, but that plaintiffs executed contract of own free will without any inducement through fraud.

4. Trial 🔑395(1).

Finding that specific representations were not made as alleged and that no misrepresentations were made was sufficient finding on issues alleged in complaint to rescind contract for fraud.

5. Vendor and purchaser 🔑123.

In action to rescind contract for fraud, lack of finding on promptness of rescission or salesman's agential capacity was immaterial after finding that facts were insufficient for rescission and that agent never made representations.

6. Appeal and error 🔑1071(3).

If findings sustained by evidence support judgment, it is immaterial that other findings lack evidentiary support.

7. Appeal and error 🔑1011(1).

In determining sufficiency of evidence to support findings, trial court's conclusion will be accepted on appeal if supported by evidence, though contradicted.

8. Appeal and error 🔑1011(1).

Trial court's finding is conclusive on appeal on discovery of slightest real conflict in evidence, though contrary conclusion would appear to have more support.

9. Vendor and purchaser 🔑44.

Evidence *held* to support finding that plaintiffs were not induced to enter into executory contract to purchase realty by fraudulent misrepresentations.

> Evidence showed that purchaser on own initiative sought to purchase land as investment, but became doubtful thereof after executing contract and before payment because return might be too slow for his age. Purchaser wrote letter to vendors expressing no dissatisfaction and questioning only one representation, and almost year before rescission consulted attorney and was informed that only way out was to prove misrepresentations.

10. Appeal and error 🔑1032(1).

Error constituting ground for reversal must be shown prejudicial to extent resulting in miscarriage of justice.

11. Evidence 🔑400(2).

Where parties dealt at arm's length and purchaser acquiesced in contract disclaiming responsibility for anything beyond writing, contract was measure of liability (Civ. Code, § 1625).

> Purchaser sued to rescind executory contract for sale of land because of alleged fraudulent representations. Contract provided that it was agreed that purchaser inspected property and had contracted to purchase by reason of own knowledge and not by reason of representations of vendor and that purchaser waived all claims for damages because of representations by agent.

Appeal from Superior Court, Los Angeles County; Marshall F. McComb, Judge.

Action by Willard C. Warner and another against the Taft Land & Development Company and another. Judgment for defendants, and plaintiffs appeal.

Affirmed.

Eugene C. Campbell, of Long Beach, for appellants.

Clock, McWhinney & Clock, of Long Beach, for respondents.

PARKER, Justice pro tem.

This is an action for the rescission of an executory contract to purchase certain real estate in the county of Los Angeles upon the ground of fraudulent representations. The main grounds urged for a reversal of the judgment, which was in favor of the defendants, involve the sufficiency of the findings of the trial court. It is urged by appellant that the so-called findings do not disclose what facts were found, if any, and that the said findings are hopelessly in conflict with each other and also that material issues are left entirely without finding of any sort. These contentions, if correct, would go far towards compelling a reversal of the judgment; indeed, little further inquiry would be necessary.

It was alleged in the complaint that C. A. Campbell solicited plaintiffs to purchase the lot in question and to enter into a contract for the purchase of the same and that he represented and stated as a fact to said plaintiffs certain things, enumerating them in detail. For the purpose of this discussion it might be admitted that the facts thus alleged to have been stated were material and if untrue would, with other elements present, suffice to sustain plaintiffs' cause of action. It was then alleged that each and every of said representations and statements were untrue and known by said Campbell to be untrue when he made the same and that said Campbell made said false statements and misrepresentations in order to cheat and wrong the plaintiffs and to induce them to enter into the contract. These allegations were denied and thus issue was joined thereon. It may be noted, at this stage, that a firm known as Deeble & Myers were the selling agents of defendant Taft Land & Development Company, and that said firm had authorized one I. H. Lunt to find purchasers for said property, and that C. A.

Campbell was a salesman employed by Lunt. The findings of the trial court are as follows: That it is not true that on or about the 30th day of July 1926, Deeble & Myers or C. A. Campbell made any false or fraudulent misrepresentations of existing facts in order to induce plaintiffs to purchase the property (describing the same); nor, for the purpose of inducing them to enter into a written contract for the purchase thereof, falsely stated or misrepresented as existing facts (with any intention of deceiving said plaintiffs) the facts alleged in the complaint. Here the finding sets forth categorically the representations alleged to have been made. That it is not true that each and every, or any, of the statements and representations made by the said C. A. Campbell were false, nor that they were known by said C. A. Campbell at the time to have been false, nor that the said C. A. Campbell made statements as false or fraudulent statements or misrepresentations in order to cheat or wrong the plaintiffs, or to induce them to enter into said contract, or otherwise. The court further finds that no false or fraudulent representations were made by the defendants, or either of them, or Deeble & Myers or by C. A. Campbell, either as alleged in plaintiffs' complaint, or at all, and further that no false or fraudulent representations were made by the defendants or by Deeble & Myers or by C. A. Campbell either for the purpose of defrauding the plaintiffs or of inducing them to purchase the property involved (describing the same) or inducing them to enter into said written contract for the purchase thereof; and that plaintiffs purchased said property and executed the said contract of their own free will and accord and without any inducement through any fraud, either as alleged in plaintiffs' complaint or otherwise or at all. That it is not true that the plaintiffs in or about June, 1927, or at any other time, discovered any facts which entitled them to rescind said contract, nor that plaintiffs, upon discovery of any facts which they believed or were informed entitled them to rescind said contract, promptly made any rescission of said contract or upon being advised by an attorney as to the necessary basis for a rescission either promptly or at all caused to be delivered to defendants any sufficient notice of rescission and/or offered to restore to defendants everything of value received by plaintiffs. That it is not true that the plaintiffs were without knowledge of the things stated in the complaint; nor that plaintiffs believed said statements and/or representations or relied thereon; that it is not true that plaintiffs, believing and/or relying on said alleged statements or representations, entered into a contract for the purchase of the property described. That it is not true that at all times mentioned in plaintiffs' complaint the market value of the property was much less than $4,400, or that plaintiffs were damaged by reason of any statements or representations, false or otherwise. As hereinbefore stated, the attack of plaintiffs on these findings is both specific and general. Every phrase of the findings is taken up separately and analyzed and conclusion being reached agreeable to plaintiffs' contention, with respect to one detached phrase this forms the groundwork for attack upon another part of the findings. And so on throughout the entire list. For instance, it is first urged that the finding that no false or fraudulent representations were made to induce plaintiffs to enter into the contract is pregnant with the finding that such representations were made for some other purpose. That therefore the subsequent finding that no false or fraudulent representations were made is in conflict. And finally it is contended that when the court finds that no false representations were ever made it does not find whether or not untrue representations were made; the basis of this argument being that in as far as falsity of a statement implies a willful intent to deceive, a representation may be untrue and yet not be false. To follow through the contentions of appellant would require almost a treatise on philosophy, logic, grammar, and punctuation. From the older decisions abundant and respectable authority is cited which in a measure supports the appellants' claims.

[1-3] It must be conceded, however, that we have passed through the period of these decisions and have emerged into the more open field where the main purpose of findings (and a large portion of the bench and bar but grudgingly admit that findings serve any purpose) is to indicate the decision of the court upon the material issues sufficient to support the judgment. The findings are to be liberally construed and are to be construed as a whole and where conflicts seem to be present these are to be reconciled if possible with other findings to the end that the judgment may be supported, if reasonably possible so to do. In the case of Berry v. Crowell, 55 Cal. App. 534, 537, 203 P. 835, 836, it is said: "If sufficient can be gathered from the whole of the findings of the court that material issues are fairly determined, the finding will support the judgment. 'It was not necessary that the facts as found should be in any particular form or follow the pleadings. If the truth or falsity of each material allegation in issue can be demonstrated from the findings, the law is complied with.'" And in American National Bank v. Donnellan, 170 Cal. 9, 15, 148 P. 188, 190, Ann. Cas. 1917C, 744, we find the following: "* * * however unsupported, however lame, however inconclusive, any number of the findings may be, if in any case there be one clear, sustained, and sufficient finding upon which the judgment may rest, every presumption being in favor of the judgment, it will be here concluded that the court did rest its judgment upon that finding.

or those findings, and the others may and will be disregarded." See also cases referred to in the opinion as cited and also the cases of Klegman v. Moyer, 91 Cal. App. 333, 346, 266 P. 1009, and Hulen v. Stuart, 191 Cal. 562, 571, 217 P. 750. Without further analysis of each finding or discussion of the objections raised thereto, we conclude, under the principles laid down in the cited cases, that the findings are sufficient to support the judgment.

[4, 5] Appellants next contend that the court failed to find on certain material issues. Appellants again review the findings and call specific attention to the detailed representations alleged to have been made and complain of the lack of a finding as to each. The court did find, as hereinbefore shown, that the specific representations were not made as alleged in the complaint and that no misrepresentations or false representations of any kind were made as stated or otherwise. Without repeating, we deem the findings covered the requirements. Next are a series of allegations and denials upon which finding is alleged to be lacking. While these specifications of omission are not wholly in accord with the record the fact remains that even if appellants are correct in their contention that certain other material issues are without finding we hold, under the authorities hereinbefore cited, that sufficient was found to sustain the judgment. And illustrating, the lack of a finding on the issue of the sufficiency or promptness of the alleged rescission or the lack of a finding on the agential capacity of the salesman became of no moment after it is found that there were insufficient facts upon which to base a rescission and that the alleged agent never made any untrue or false representations. Sharp v. Pitman, 166 Cal. 501, 137 P. 234.

[6-9] The next argument advanced by appellants is that the findings are not supported by the evidence. This opens up a wide field of inquiry. At the outset it may be well, perhaps at the expense of repetition, to note that the pleadings present many issues and that if it should happen that findings on some issues lack evidentiary support, nevertheless if the remaining findings, amply supported, support the judgment, then under the case of Sharp v. Pitman, supra, and the general rule in accord therewith, it becomes immaterial whether or not the other findings are discarded or accepted. And again, in approaching the inquiry as to the sufficiency of the evidence to support any finding, it is a fundamental rule of appellate practice that we will not attempt to solve again any conflicts in the testimony, but will accept as final the conclusion of the trial court where we find evidence supporting the same, regardless of the fact that much evidence might be opposed thereto. Repeating, there were many issues and many phases of the case. There was the issue of fraud as involved in the alleged representations inducing the contract; there was the question of knowledge on the part of plaintiffs respecting the facts represented and the opportunities of investigation. Likewise the matter of investigation, independent of the representations. And, aside from these considerations, there was the issue of promptness of rescission after knowledge of facts and the manner of rescission. It might well be that the trial court's finding on fraud was correct and its finding on reliance thereon incorrect without affecting the judgment, and this same situation might exist with reference to any of the findings. Yet, if the finding that there was no fraud or misrepresentation and that the contract was freely entered into were the correct finding or at least a finding supported by the evidence, then it would be manifest that there was, in the present case, no grounds for rescission and the mode of attempted rescission or its sufficiency would be wholly immaterial. We are not inclined to discuss minutely each finding and the details supporting the same. We have carefully read the record presented and we conclude that the findings have ample support. As a background of the entire case its general outline may be sketched. While the executed contract is in the name of both of the plaintiffs the actual negotiations were by the plaintiff Willard C. Warner. He was a man of wide business experience and acquainted with real estate in Southern California and in the vicinity wherein the land in question is located. He, on his own initiative, sought out the tract and began without solicitation his inquiry as to the merits of the investment. After executing the contract and before any payments thereunder he had become doubtful as to whether he should proceed further, expressing the thought, not that he had been defrauded, but that at his age the returns might be slow in materializing. In his attempt at withdrawal or expression of desire to that end, and after all of the alleged representations had been made he wrote a letter to defendants expressing no dissatisfaction and questioning but one representation, namely, as to the construction of a street or boulevard. Plaintiffs then, almost a year before the rescission, consulted an attorney, denying this until confronted with written proof. Notwithstanding this examination and their claimed suspicions no action was taken until almost a year thereafter. Incidentally, it appeared that at the time of consulting the attorney they were advised that their only way out was to prove misrepresentations. With this background and the veracity of plaintiffs impeached, it is not difficult to infer that the trial court looked with some distrust upon the entire testimony of plaintiffs, and from this viewpoint it took perhaps less evi-

dence on the part of the defendants. The court below had the witnesses before it and there was available to that court an opportunity to find the truth that is not nor cannot be presented to us. So, therefore, while there may be a finding where from the mere record a contrary conclusion would appear to have more support, we deem the inquiry closed upon discovery of the slightest real conflict in the evidence. Without further discussion we hold that sufficient evidence supports findings ample to sustain the judgment.

[10] Finally appellants urge errors committed by the trial court in its rulings upon the admission or rejection of evidence as grounds for reversal. There are some seventy-two specifications of error set forth. We have gone over these one by one and find no sufficient reason for disturbing the judgment. It must always be remembered that error constituting ground for reversal must be shown to be prejudicial to an extent resulting in a miscarriage of justice. Errors such as alleged here could have no such effect if every specification were well founded. A detailed discussion of each specification of error would almost necessarily demand a detailed analysis of all of the testimony from each point of attack. For instance, it might well be that evidence rejected was admissible and yet the record discloses that the same evidence was received at some other stage of the proceeding and from the same witness. And likewise where error is alleged, as here, in the rejection of testimony sought to be adduced on the ground that the questions eliciting such testimony were leading, it would seem almost obvious that after an objection is sustained to a question as being leading the purpose of suggestion has been accomplished and it is rarely that the complaining party is unable to elicit the same testimony by proper question. We have, as indicated, noted carefully the errors complained of and repeat that none of them nor all of them would constitute a compelling basis for a reversal. We find, however, that there is some merit in but a few of these specifications. On the whole the rulings of the trial court were correct. The few errors, which might be conceded, were not prejudicial to an extent warranting our interference with the judgment.

[11] Lest this be deemed a too summary mode of disposing of the claims of the appellants, we will, in conclusion, note another feature of the case which might indicate that the case and the appeal has received more consideration than it warranted. The contract contains a clause reading as follows: "It is understood and agreed that the property above described has been inspected by the buyer or the buyer's duly authorized agent and that the buyer has contracted to purchase the property covered by this contract by reason of the buyer's own knowledge thereof and not upon, or by reason of, any representations made by said seller or any selling agent, and said buyer hereby waives any and all claim for damages because of any representation made by any selling agent or person whatsoever other than what is contained in this contract and the said seller shall not in any way be responsible or liable for any inducement, promise, representation, agreement, condition or stipulation not set forth therein." It seems that this provision is not lacking in clarity. There is nothing before us to indicate that the buyer, plaintiffs, did not or should not have read the contract before signing; nor is there evidence that the physical execution was procured or induced by fraud or design. All that the record can disclose is that the execution of the contract, as far as physical execution goes, was admittedly the free and presumed intelligent act of the buyers. In Gridley v. Tilson, 202 Cal. 748, 751, 262 P. 322, 323, it is said: "While the Civil Code, § 1625, provides that a written contract supersedes all negotiations and stipulations concerning the matter between the parties, it has always been the law that fraud in the inducement of a contract may be shown. A well-settled exception, however, is the case where the party seeking to rely on fraudulent representations of an agent had notice of the limitation on the agent's authority to make representations. Therefore a principal is bound only by the representations embodied in the written contract, where a provision in the contract notified the prospective purchaser that the agent's authority went no further." And the court goes further in commenting upon the proffered excuse as to why the contract, in the cited case, was not read. In this connection it says: "But this cannot afford him an excuse, in the absence of a showing that he was prevented by the agent from reading the limiting clause, or was otherwise tricked into signing the document without reading it." Many authorities are cited in support of the rule thus declared. In the instant case the fraudulent representations are charged to the selling agent and there is nothing to take the case out of the rule. The language employed might not, in every conceivable case, protect the seller. This we do not decide. Fraud manifests itself in various and varied forms, and it might be that a case could be made wherein a sufficient showing of hardship and oppression might be made to limit this rule within confines compatible with the ever-existing purpose of the law, namely, the preservation of justice. Yet, in the absence of any peculiar showing, the wording of the contract cannot be ignored entirely. Much of modern business is done through some form of agency and if there were no way in which a principal, himself without fault, could be apprised of the integrity and finality of his

contract we fear that an unhappy condition of insecurity would result. The buyer and the seller here were dealing at arms length and when the latter so plainly informed the former that his contract was based only upon the express conditions thereof and disclaimed responsibility for anything beyond the writing and the buyer thereupon acquiesced, it follows that the contract as thus made was the measure of the liability of the parties thereto.

The judgment is affirmed.

We concur: SPENCE, Acting **P. J**; STURTEVANT, J.

113 Cal. App. 127

KALLEM v. VINCENT et al.

Civ. 7500.

District Court of Appeal, First District, Division 2, California.
March 31, 1931.

Rehearing Denied April 30, 1931. Hearing Denied by Supreme Court May 28, 1931.

1. Brokers ⚷35.

Stockbrokers' sale of certificates pledged as collateral at time they had on hand large quantity of identical securities was not conversion.

2. Pledges ⚷36.

Demand for return of pledged securities without tendering amount of indebtedness due would not support action in conversion.

3. Brokers ⚷38(4).

Evidence *held* not to show illegal assumption of ownership of certificates by stockbrokers with whom they were pledged as security.

> Evidence established that stockbrokers with whom securities were pledged as collateral sold securities at a time when they had on hand a large quantity of identical securities, and at all times were ready, able, and willing to deliver certificates on payment of indebtedness secured thereby.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by Hannah A. Kallem against Frederic Vincent and another, individually and as copartners doing business as such under the firm name and style of Frederic Vincent & Co. Judgment of nonsuit, and plaintiff appeals.

Affirmed.

Joseph F. O'Malley, of San Francisco, for appellant.

Joseph McInerney, Henry C. Clausen, and Shortridge & McInerney, all of San Francisco, for respondents.

STURTEVANT, J.

The plaintiff commenced an action in conversion against the defendants. Later she amended her complaint. The defendants appeared and answered the complaint as amended, and the trial was had before the trial court sitting with a jury. At the end of the plaintiff's case the defendants made a motion for a nonsuit. The court made an order granting the motion, and the plaintiff has appealed, bringing up typewritten transcripts. In plaintiff's amended complaint she alleged that the defendants were partners transacting a general stock brokerage business in San Francisco; that on the 21st day of July, 1926, plaintiff was the owner of sixty units of the stock of the National Ice Cream Company; that each unit consisted of one share of preferred stock of the value of $100 per share and one share of common stock of no par value; that said stock was of the value of $6,000; that on July 21, 1926, plaintiff agreed to purchase from defendants forty additional units of the same stock and agreed to pay $4,000 therefor; that thereupon she executed her promissory note payable six months after date for the sum of $4,000, bearing interest at 8 per cent. per annum; that thereafter she delivered to defendants said promissory note; that thereafter on August 4, 1926, defendants converted said hundred units to their own use; and "that plaintiff has made demand upon said defendants for the return of said units of said corporation stock, but to return the same defendants have refused and still refuse to return or deliver to said plaintiff the said one hundred units of said corporation stock." The defendants interposed several denials, but they did not deny the paragraph just quoted. Excepting the allegation of conversion, the plaintiff introduced evidence tending to support each and all of her allegations. In doing so it transpired that, when she executed the promissory note in the sum of $4,000 she brought forward her certificates evidencing the said sixty units, indorsed the certificates in blank, and delivered them to the defendants to hold as security for the payment of the above-mentioned promissory note. After the defendants received the certificates for the said sixty shares, the defendants held, together with said certificates, many other certificates evidencing stock in the same corporation. Of the stock represented by said certificates the defendants owned several hundred shares in their own right. On August 3, 1926, the defendants received an order for one hundred units. That order came from H. D. McCoy. The defendants thereupon sold and delivered to McCoy the certificates for sixty shares so delivered to the defendants by the plaintiff and certain other certificates, making up the total of one hundred units as contained in the order of McCoy. At no time did the plaintiff pay any of the principal or interest represented by the said promissory note. About March 20, 1928, the plaintiff borrowed from the defendants $2,000, and thereupon a new note dated March 20, 1928, for the principal sum of $6,000 bearing interest at the rate of 7 per cent. per annum was executed by the plaintiff to the defendants. It was agreed that the note last mentioned was to take the place of the $4,000 note and was also to evidence the $2,000 so borrowed from the defendants by the plaintiff. The note in form is a collateral note, and recites that it was secured by one hundred units of the stock of the corporation above mentioned. On May 18, 1928, no part of the principal or interest had been paid on the note last mentioned. On that date the defendants wrote to plaintiff asking her to call and settle the National Ice Cream account. Later that was done. At the time of the settlement the agreed market value of the said units was $65 per share. The stock for which the plaintiff had agreed to pay $4,000 was worth only $2,600—a loss of $1,400. The defendants added to the $1,400, $2,000 for moneys loaned, making a charge of $3,400. Estimated in the same manner the plaintiff's sixty shares were then worth $3,900, deducting from that sum $3,400, the balance owing to the plaintiff was $500, which the defendants paid to the plaintiff. At the same time the defendants loaned her $4,000 on a mortgage on real estate on property down the peninsula, and said loan is now outstanding and unpaid.

The plaintiff calls to our attention that on August 4, 1926, the date when the defendants sold her sixty units, the plaintiff's note was not due, and that she was not in default in either principal or interest, and that the act of making said sale was in and of itself a conversion. The defendants reply that the evidence shows that, at the time the defendants sold the certificates which they had received from the plaintiff, the defendants owned and had on hand a large quantity of the same identical securities and at all times were ready, able, and willing to deliver to the plaintiff the full sum of one hundred units whenever the plaintiff should have completed making her payments, and therefore no conversion took place. They cite Thompson v. Toland, 48 Cal. 99, and Bell v. Bank of California, 153 Cal. 234, 94 P. 889, sustaining their contention. The answer is full and complete.

[1, 2] It appears, therefore, that, on the theory of an overt act of conversion, the plaintiff had not made a prima facie case. But she now contends that, because she had alleged that she had made a demand and the demand was refused, there was a constructive conversion. This second theory ignores the facts concerning the plaintiff's continued indebtedness to the defendants. The plaintiff did not allege, and at the trial she did not present any evidence to the effect that, when she made her alleged demand, she tendered, or at any time tendered, to the defendants any part or portion of her indebtedness. Such a demand unaccompanied by a legal tender would not support an action in conversion. 38 Cyc. 2058; Lininger Implement Co. v. Queen City Foundry Co., 73 Colo. 412, 216 P. 527, 530.

It is contended that the motion for a nonsuit was not sufficiently specific to support the order made by the trial court. The motion was made in open court. It was there argued. No contention was made that it was not sufficiently specific. The language of the motion appears in the record. After reading it and after reading the objection which is now made by the plaintiff, we are unable to say the defendants should have made their motion any more specific.

[3] Finally the plaintiff asserts that on a motion for a nonsuit the evidence must be taken most strongly against the defendant, and, if the plaintiff has produced proof sufficient to make out a prima facie case under the allegations of his complaint, the motion, if made on the close of his case, should be denied. In re Daly, 15 Cal. App. 331, 114 P. 787. Conceding such to be the rule, the first question is whether the plaintiff had made out a prima facie case. She claims she had on the grounds that she had shown that the defendants' acts were (1) an illegal assumption of ownership, and (2) an illegal use or misuser. Glaze v. McMillion, 7 Port. (Ala.) 279. Applying the first assignment to the sixty units, the evidence was all one way and showed no illegal assumption of ownership. Thompson v. Toland, 48 Cal. 99. As to use or misuse, there was no evidence on the subject. As to the forty units, there was no evidence of any conversion under either assignment.

The judgment is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

112 Cal. App. 644

BUSH v. BASTIAN et al.

Civ. 360.

District Court of Appeal, Fourth District, California.

March 17, 1931.

1. Landlord and tenant ⚷79(1).

Assignment of lease *held* mere naked assignment, in absence of allegations assignee agreed to assume lease obligations or to pay rent.

> Lessor's complaint in action for rent against original lessee and lessee's assignee alleged that lessee assigned lease with express stipulation that lessee would continue to be bound by all terms of lease, and that pursuant to said assignment assignee went into possession.

2. Landlord and tenant ⚷208(2).

Liability of mere naked assignee of lessee was limited to rentals accruing before assignee's abandonment of possession.

> This was so, because there was no privity of contract, but only privity of estate between assignee and landlord.

3. Appeal and error ⚷934(3).

In reviewing default judgment, appellate court cannot assume case was tried on theory of sufficiency of pleading or that evidence supported judgment (Const. art. 6, § 4½).

> Const. art. 6, § 4½, provides that no judgment shall be set aside for error as to matter of pleading, unless after examination of entire cause, including the evidence, appellate court believes error complained of resulted in miscarriage of justice.

4. Appeal and error ⚷1170(1).

Constitutional provision prohibiting reversal under specified circumstances was adopted to prevent reversal of equitable judgment for technical reasons, not to require court to uphold unfair and excessive judgment (Const. art. 6, § 4½).

5. Appeal and error ⚷1170(1).

Words "including evidence" in constitutional provision relating to reversals does not apply where no evidence was introduced (Const. art. 6, § 4½).

Appeal from Superior Court, Los Angeles County; George W. McDill, Judge.

Action by Mrs. S. E. Bush against Mary Bastian and Mrs. H. K. Herbert. From an adverse judgment, defendant last named appeals.

Judgment against appellant reversed, with directions.

John M. Martin, of Los Angeles, for appellant.

Willebrandt & Horowitz, of Los Angeles for respondent.

MARKS, J.

[1] Respondent was the owner of a bungalow court in the city of Los Angeles. On or about September 1, 1923, she entered into a written lease of this property with the defendant Mary Bastian. The term of the lease was for five years at the monthly rental o $315, payable in advance on the first day of each month. On or about November 19, 1923 Mary Bastian assigned the lease to Mrs. H. K Herbert, the appellant. The following allegation appears in the complaint concerning this assignment: "That on or about the 19th da of November, 1923, the said defendant, Mary Bastian, assigned said lease to the defendant Mrs. H. K. Herbert, with the express stipulation that she, the said Mary Bastian, woul continue to be bound by all of the terms of said lease; that pursuant to said assignment the said defendant, Mrs. H. K. Herbert, went into possession and occupation of said premises."

Nowhere in the complaint is it alleged tha the appellant agreed to assume the obligations of the lease or to pay the rent therein reserved. It was merely a naked assignment. It is alleged in the complaint that on or about February 10, 1925, both defendants vacated and abandoned the leased premises. Respondent brought this action to recover the unpaid rent. It is alleged that $185 rental was unpaid for the month of December, 1924, and that all the subsequent rentals were unpaid by the defendants. Respondent, however, succeeded in leasing the premises at a reduced rental which she credited on the amount claimed to be due from the defendants. Mary Bastian filed an answer, but Mrs. H. K. Herbert did not appear, and her default was entered. The case went to trial upon the issues presented by the complaint and the answer of Mary Bastian. Judgment was entered in favor of respondent and against both defendants in the sum of $5,004.77. Mrs. Herbert prosecutes this appeal on the judgment roll alone, and maintains that, as the complaint failed to state a cause of action against her, the judgment cannot be sustained.

It is evident from the complaint that no privity of contract existed between respondent and appellant, their relations being limited to a privity of estate as the appellant did not agree to assume the obligations of the lease or to pay the rent. It is said in 15 Cal. Jur. 753: "Privity of contract between landlord and lessee, however, is not affected by the latter's assignment, but continues until the end of the term notwithstanding he is no longer in possession of the premises. In the absence of fresh contractual stipulation, there is no privity of contract between the assignee and the landlord. But the assignee may, by express stipulation to be bound by the covenants of the lease, create a privity of contract between himself and the landlord, which will also endure till the term expires. By virtue of such an agreement the assignee becomes liable upon and entitled to the benefit of all the covenants of the lease as such. It seems, however, that to establish privity of contract between landlord and assignee, the necessary agreement must be made between them themselves. It is not sufficient that the assignee should have promised his assignor to perform the covenants of the lease. Such a promise is enforceable only by the original lessee."

In the case of Chase v. Oehlke, 43 Cal. App. 435, 185 P. 425, 426, the court said: "Appellants' first contention is that, as assignees of the lease, their liability as tenants of the property was, as to the landlord, limited to their occupancy of the same, and terminated with their abandonment of possession. This is true where the tenant holds under a mere naked assignment of the lease, since the sole basis of his obligation is what is termed the privity of estate (section 822, Civ. Code; Samuels v. Ottinger, 169 Cal. 209, Ann. Cas. 1916E, 830, 146 P. 638; Carter v. Hammett, 18 Barb. (N. Y.) 608; Bonetti v. Treat, 91 Cal. 226, 14 L. R. A. 151, 27 P. 612)."

[2] It would appear clear, therefore, that under the allegations of the complaint the liability of appellant to respondent was limited to the rentals accruing prior to her abandonment of the possession of the leased premises.

[3-5] Respondent earnestly maintains that this court cannot reverse the judgment against appellant, even though it be excessive because of the provisions of section 4½ of article 6 of the Constitution. This section provides that "no judgment shall be set aside * * * for any error as to any matter of pleading * * * unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." It is her contention that, as no evidence has been brought up on this appeal, this court cannot examine it and as a result is powerless to correct the apparently erroneous judgment of the trial court. In support of this contention she cites the cases: Bird v. Murphy, 72 Cal. App. 39, 236 P. 154; Meyer v. Moore, 72 Cal. App. 367, 237 P. 550; Turner v. Stock, 79 Cal. App. 662, 251 P. 814; Platner v. Vincent, 194 Cal. 436, 229 P. 24, and Etienne v. Kendall, 202 Cal. 251, 259 P. 752. In these cases the appeals were taken on the judgment rolls alone after issues joined and trials had upon the merits. It was held that under such circumstances the appellate courts are required to presume, in support of judgments, that the evidence submitted fully sustained the findings and supported the judgments of the trial court; that the pleadings were treated at the trials as sufficient to raise the issues determined by the findings, and that the evidence on such issues went in without such objection. Silvers v. Grossman, 183 Cal. 696, 192 P. 534. Under such circumstances the appellate courts have refused to reverse the judgments on the grounds of deficiencies in the pleadings, section 4½ of article 6 of the Constitution furnishing ample authority for such rulings.

The instant case is easily distinguishable from the cases cited by respondent. In the case before us, the default of appellant was entered, and no evidence was introduced against her or on her behalf. Consequently we cannot assume that the case against her was tried upon the theory of the sufficiency of the pleadings, or that the evidence supported the findings and judgment. There is no evidence to bring up to this court and there is no evidence to be reviewed here. Section 4½ of article 6 of the Constitution is remedial in its nature and beneficent in its purpose. It was adopted to prevent the necessity of reversing a judgment for highly technical reasons where the judgment was fair and equitable. It was not intended to permit injustice nor to require an appellate court to uphold a judgment which on the face of the record appears unfair, unjust, and excessive. The words, "including the evidence," must be held to apply only to a case in which evidence was taken in the court below and not to such a case as we have here, where no evidence was introduced by the parties to the appeal for or against each other.

Under ordinary circumstances this court would reduce the amount of the judgment against appellant to the few hundred dollars rent appearing from the pleadings to have been unpaid by her during her occupancy of the premises. Respondent earnestly urges that, at the time of the assignment of the lease to appellant, she agreed in writing to assume its obligations. If this allegation can be supplied to the complaint and evidence produced in its support, it would seem inequitable to preclude respondent from offering the amendments and furnishing the evidence.

The judgment against appellant is reversed, with directions to the trial court to permit respondent to amend her complaint against appellant should she be so advised.

We concur: BARNARD, P. J.; JENNINGS, J.

TREFF v. GULKO.[*]

Civ. 345.

District Court of Appeal, Fourth District, California.

March 18, 1931.

Rehearing Denied April 15, 1931. Hearing Granted by Supreme Court May 15, 1931.

1. Landlord and tenant 🔑217(1).

On lessee's surrender of leased premises before expiration of term, lessor has three remedies.

> On lessee's surrender of premises before expiration of term, lessor has three remedies: (1) He may do nothing and sue lessee as each installment of rent becomes due, or for whole thereof when it becomes due; (2) he may treat lease as terminated and retake possession of premises and use same for own purposes as exclusive owner thereof; or (3) he may retake possession for tenant's account and hold tenant in damages for difference between rentals provided for in lease and what in good faith he was able to procure from reletting.

2. Landlord and tenant 🔑227.

Landlord having elected to take possession and relet, action for damages against lessee's assignee before expiration of original term *held* prematurely begun.

3. Landlord and tenant 🔑231(8).

Finding that lessee's assignee promised to pay rent *held* not sustained by proof of assignee's occupancy of premises and payment of rent.

> The lease contained no provisions respecting reletting, but provided, in substance, that, if default be made in payment of any portion of rent when due and for thirty days thereafter or in any of covenants contained in lease, lessor might reenter and take possession of premises, remove all persons therefrom, and at his option terminate lease.

4. Landlord and tenant 🔑79(2).

Without fresh contractual stipulations, there is no privity of contract between lessee's assignee and landlord.

5. Landlord and tenant 🔑208(2).

Tenant holding under mere naked assignment of lease is liable for rent to landlord only during occupancy, and liability terminates with abandonment of possession.

Appeal from Superior Court, Los Angeles County; J. Walter Hanby, Judge.

Action by J. P. Treff against J. Gulko. Judgment for plaintiff, and defendant appeals.

Reversed.

Burke, Camarillo & Herron, of Los Angeles, for appellant.

Eastham & Smith, of San Pedro, for respondent.

LAMBERSON, Justice pro tem.

On August 25, 1924, respondent, Treff, leased to two persons certain storeroom premises at San Pedro for the term of five years, beginning September 1, 1924, and for a total rental of $9,000, payable in monthly installments graduated from $125 per month for the first year to $175 per month during the fifth year. The lease was assigned to appellant, the lessor consenting thereto, on February 2, 1925, but appellant signed no acceptance or agreement to take over the lease. He occupied and paid rent for the premises from February 2, 1925, up to and including the month of February, 1926. The court found that appellant entered into possession of the premises and paid such rentals. No objection has been made to such finding, and the evidence is sufficient to support it. Appellant paid rent at a reduced amount during a portion of the time the premises were occupied by him, by agreement with respondent. In December, 1925, and January, 1926, the two parties had some conversations about the rent, and the lessor told the appellant that the rent, beginning with January, would be $150, and the appellant said, in effect, that he could not pay that amount because of business conditions, and that he was going to move out. He did quit the premises during the early part of February, 1926, and paid no further rents.

The premises, apparently, remained vacant until January 1, 1927, when respondent leased them for $75 per month for the first eighteen months of a term, and at the rate of $100 per month for the following eighteen months, the total length of such term being in excess of the unexpired portion of the term specified in the original lease.

On March 2, 1926, respondent lessor gave written notice to appellant that he refused to accept appellant's "attempt to surrender the possession of the premises," and demanded payment of the rent up to and including the month of March. Other demands for rent were made at later dates, both in writing and orally. The complaint in this action was filed on March 12, 1928. The court found that plaintiff notified defendant lessee that he would hold defendant liable for the payment of all of the rent reserved in the lease, and that plaintiff would release the premises to the best advantage for the account and benefit of defendant, and that said premises were

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[*] Hearing granted 7 P.2d 697.

relet for the benefit and account of defendant and for the best price obtainable therefor. The court gave judgment in favor of the respondent lessor in the sum of $2,625 after deducting the amount received by reason of reletting the premises.

The appellant lessee appeals from the judgment and contends that plaintiff and respondent accepted the surrender of the premises from appellant on January 1, 1927, by reletting the premises without notice to the appellant that he intended to relet for the benefit and account of the appellant. He further contends that the evidence is insufficient to support finding IV in which the court found that the reletting was after notice, and for the benefit and account of defendant.

The only testimony in regard to the matter is found in the testimony of respondent, Treff, and is as follows:

"Q. Now at the time you rented this store at $75.00, when did that begin? A. January 1, 1927.

"Q. And at what time, did you have any conversation with Jacob Gulko in reference to renting the store to someone else? A. I went to Mr. Gulko before that.

"Mr. Camarillo: What Gulko?

"A. To J. Gulko, and asked him to try to rent that store if he could and I would do the —somebody that I liked to rent it, and I would do the best I could to rent it. But he tried to tell me that he didn't have anything to do with it; so I done the best I could to rent the store.

"Q. (By Mr. Mason.) What did he tell you at that time? A. He says that he didn't have anything to do with it.

"Q. What did you tell him? A. Well I didn't tell him anything, I just went my way, there was no use to argue with him."

Under date of December 9, 1927, almost a year after the reletting of the storeroom, respondent's attorney addressed a "memorandum of rent due" from appellant, to respondent, and concluded the memorandum with the following statement: "The premises involved are now under lease at the best price obtainable, to-wit, $75.00 per month for the first 18 months of the term, and $100.00 per month for the next 18 months of the term, said term commencing January 1, 1927. In computing the rents due from Mr. Gulko, credit has been given for the rents payable under the present lease as shown above." Aside from the testimony already quoted the record is silent as to what the respective parties did in regard to exercising any control over the premises after their abandonment by appellant.

The lease contained no provisions in regard to reletting. It provided, in substance, that, should default be made in the payment of any portion of the rent, when due, and for thirty days thereafter, or in any of the covenants contained in the lease, the lessor, his agent, or attorney might re-enter and take possession of the premises, remove all persons therefrom, and at his option terminate the lease.

[1] The rule is well settled that upon the surrender of leased premises by a lessee before the expiration of the term provided for by the lease, the owner of the premises has three remedies: First, he may do nothing and sue the lessee as each installment of rent becomes due, or for the whole thereof when it becomes due; second, he may treat the lease as terminated and retake possession of the premises and use the same for his own purposes as the exclusive owner thereof; or, third, he may retake possession of the premises for the tenant's account and hold the tenant in damages for the difference between the rentals provided for in the lease and what in good faith he was able to procure from a reletting. Siller v. Dunn, 103 Cal. App. 154, 284 P. 232.

In the case of Phillips-Hollman, Inc., v. Peerless Stages, Inc. (Cal. Sup.) 291 P. 178, the court said at page 180:

"The rule is well settled that where a lease has been repudiated by a tenant, and the premises abandoned, and there are no covenants in the lease to the contrary, the landlord has a choice of but two remedies:

"1. He may rest upon his contract and sue for each installment of rent as it falls due. If this alternative be selected, obviously the action must be limited to accrued installments, and no recovery can be had for future installments, because, the lease being still in existence, no obligation to pay the rent arises until each installment falls due.

"2. He may take possession of the premises, relet the same, and recover from the tenant any damages suffered thereby. Such damages will be the difference between the amount secured on the reletting and the amount provided for in the original lease. If this alternative be selected, in the absence of a covenant in the lease to the contrary, and perhaps where the landlord has relet for the balance of the entire term (which latter point we do not here decide), the law is well settled that the landlord cannot recover in installments, but must bring his action at the expiration of the original term, at which time the damages for the first time can be ascertained. Oliver v. Loydon, 163 Cal. 124, 124 P. 731; Bradbury v. Higginson, 162 Cal. 602, 123 P. 797; Hermitage Co. v. Levine, 248 N. Y. 333, 162 N. E. 97, 98, 59 A. L. R. 1015. See, also Respini v. Porta, 89 Cal. 464, 26 P. 967, 23 Am. St. Rep. 488."

[2] In the present case, the respondent having elected to take possession of the premises and relet the same and to rest upon his action for damages, we must conclude, upon the

authority of the last-quoted case, that his action was prematurely begun, and that the judgment awarding damages to him must be reversed.

[3] There is a further and more serious reason why the judgment of the trial court cannot be sustained. The only allegations appearing in the complaint in regard to the assignment of the lease and the assumption of its obligations by appellant are found in paragraph II and are as follows: "That thereafter and during said term, to-wit, on the 2nd day of February, 1925, the said Peretz and Addleson in writing assigned and transferred unto the said defendant all their right and interest in and to said lease and premises, and thereupon their rights therein and thereto became, and ever since have been, vested in the defendant, and the defendant thereupon entered into possession and remained in possession of said premises under said lease so assigned to him."

The court found, in substance, that it was true that, after the making and delivery of said lease by the respondent to the original lessees on February 2, 1925, said lessees in writing assigned and transferred to appellant all their right and interest in and to said lease and leased premises and the said lease thereon, and that thereupon their rights therein became, and ever since have been, vested in the appellant, and that the appellant thereupon entered into possession and remained in possession of said premises under said lease so assigned to him and occupied said premises and "promised to pay said rent." The finding that appellant promised to pay the rent is not sustained by the evidence, the only basis for such a finding being appellant's occupancy of the premises and his payment of the rent during the period between February 2, 1925, and the month of February, 1926. The appellant did not sign the original lease or any acceptance of such lease and entered into no new agreement to assume the obligations of the lease or to pay the rent.

[4, 5] In the absence of fresh contractual stipulations, there is no privity of contract between the assignee of the lessee and the landlord (Farber v. Greenberg, 98 Cal. App. 675, 277 P. 534), and when a tenant holds under a mere naked assignment of a lease, his liability is, as to the landlord, limited to his occupancy of the premises and terminates with his abandonment of possession. Chase v. Oehlke, 43 Cal. App. 435, 185 P. 425. The subject is carefully discussed in 15 California Jurisprudence at page 753, where it is said: "Privity of contract between landlord and lessee, however, is not affected by the latter's assignment, but continues until the end of the term notwithstanding he is no longer in possession of the premises. In the absence of fresh contractual stipulation, there is no privity of contract between the assignee and the landlord. But the assignee may, by express stipulation to be bound by the covenants of the lease, create a privity of contract between himself and the landlord, which will also enure till the term expires. By virtue of such an agreement the assignee becomes liable upon and entitled to the benefit of all the covenants of the lease as such. It seems, however, that to establish privity of contract between landlord and assignee, the necessary agreement must be made between them themselves." See, also, Bush v. Bastian et al., 297 P. 976, decided March 17, 1931, in this court, wherein it was held that, under the allegations of a complaint in which it was alleged in substance that a lessee assigned a certain lease to the appellant with the express stipulation that the lessee would continue to be bound by all of the terms of the lease, and that pursuant to such assignment the appellant went into possession and occupation of certain premises, the liability of the appellant assignee to the lessor was limited to the rentals accruing prior to the assignee's abandonment of the possession of the leased premises.

In view of the conclusions which we have announced, we consider it unnecessary to discuss the various questions treated in the briefs of appellant and of the respondent.

For the foregoing reasons the judgment is reversed.

We concur: MARKS, Acting P. J.; JENNINGS, J.

112 Cal. App. 660

CLA VELL v. COCHRAN et al.

Civ. 6578.

District Court of Appeal, Second District, Division 2, California.

March 18, 1931.

Rehearing Denied April 10, 1931.

1. Bail ⚷64.

Bond to effect supersedeas does not involve accused's right to freedom pending writ of error.

2. Bail ⚷63.

Appearance or bail bond is required to permit defendant to go free pending writ of error.

3. Bills and notes ⚷92(1).

Note to surety on supersedeas and appearance bond for money furnished to pay fine to stay execution of sentence against defendants and continue liability on bond *held* based on valid consideration.

> Person convicted of criminal offense was granted stay of execution of sentence after affirmance of judgment on appeal on condition that fine imposed should be paid immediately. Surety on accused's supersedeas and appearance bond consented to continuance of liability on bond in consideration of defendants executing note and advanced money to defendants for amount of note which defendants used in paying fine to secure accused person's freedom for time necessary to complete business transactions in which defendants were interested.

On Rehearing.

4. Appeal and error ⚷883.

> Where appellate court announced that, in absence of objection, it would be deemed stipulated that all justices could participate in all matters, counsel not objecting could not object to opinion as written by justice not present at oral argument.

Appeal from Superior Court, Los Angeles County; Clair S. Tappaan, Judge.

Action by Mary F. Cla Vell, an incompetent person, by the California Trust Company, her guardian, against J. B. Cochran and others. Judgment for plaintiff, and defendants appeal.

Affirmed.

Arthur T. Stollmack, of Los Angeles, for appellants.

W. Joseph Ford and J. F. Moroney, both of Los Angeles, for respondent.

ARCHBALD, Justice pro tem.

Defendants have appealed on the judgment roll from a judgment against them in plaintiff's favor. The complaint alleges that the action is brought on a promissory note in the sum of $2,250, executed by the defendants in favor of plaintiff, no part of which has been paid. The answer admits such allegations, and sets up as a defense that plaintiff was a surety on a supersedeas bond given to stay execution of the sentence of two years' imprisonment and $5,000 fine imposed upon one Rush Meadows after conviction in the District Court of the United States for the Southern District of California and pending review of said judgment by the United States Circuit Court of Appeals for the Ninth Circuit, 11 F.(2d) 718; that after said judgment was affirmed said Meadows applied to the trial court for an additional stay of execution of thirty days, which the court refused to grant except upon immediate payment of the $5,000 fine; that defendants contributed $1,400, and various other sums were contributed by other friends and relatives, including the plaintiff, Cla Vell; that after said sum of $5,000 had been raised and the fine paid, plaintiff demanded that she be secured for her contribution, and that defendants, in order to appease the ravings of said Cla Vell, executed the promissory note, which is the subject of this action, to repay to plaintiff the amount she had theretofore paid on her own obligation.

With regard to said defense the court found that Meadows was found guilty and sentence imposed as alleged; that plaintiff was related by marriage to Meadows, and that on July 30, 1925, the latter, as principal, and Mrs. Cla Vell, with two other sureties, "executed a supersedeas bond in said proceeding in favor of the United States of America in the penal sum of $25,000," with the following condition: "* * * That if the said Rush Meadows shall appear in person in the United States Circuit Court of Appeals for the Ninth Circuit on such day or days as may be appointed for the hearing of said cause in said court, and prosecute his writ of error, and shall abide by and obey all orders made by the United States Circuit Court of Appeals for the Ninth Circuit in said cause, and shall pay any fine and costs imposed by the judgment of the District Court against him, and shall surrender himself in execution of the judgment and sentence appealed from as said court may direct, if the judgment and sentence against him shall be affirmed or the writ of error or appeal is dismissed, and if he shall appear for trial in the District Court of the United States for the Southern District of California, Southern Division, on such day or days as may be appointed for a retrial by said District Court and abide by and obey all orders of said court, provided the judgment and sentence against him shall be reversed by the United States Circuit Court of Appeals for the Ninth Circuit, then the above obligation to be void; otherwise to remain in full force and effect." The court further found that said Meadows perfected his appeal, and that on November 3, 1926, said United States Circuit Court of Appeals affirmed the judgment of the trial court theretofore rendered against him; "that at and prior to the time that said conviction * * * was affirmed said defendants and the said Rush Meadows were interested in obtaining the rights to certain mica claims in the state of New Mexico, and that at the time that said conviction of said Rush Meadows was affirmed the said Rush Meadows was assisting the said defendants in obtaining an interest in said mica claims; that upon said conviction being affirmed as aforesaid, it was necessary that the said Rush Meadows produce himself at once and be delivered into custody, and it was the desire of the defendants, and each of them, that said Rush Meadows be granted a stay of execution for a period of thirty days or more to enable him to consummate a transfer of an interest in said mica claims to the said defendants, and to enable him to obtain the assistance of one Walter A. Jones and his mother and one Mrs. Derenia in defendant's business;" that before said stay would be granted by said court it "was ordered and required by the Honorable Edward J. Henning, judge of said court, that as a condition to the granting of said stay of execution the said Rush Meadows pay his said fine at once and forthwith, namely, on or before the 8th day of November, 1926." The findings further state that defendants and each of them were interested in obtaining said stay in order that Meadows could complete the transaction of said business in New Mexico, and that they attempted to raise the money to pay said fine, but succeeded only in raising $1,400 thereof; that defendants each agreed with plaintiff "that if she would advance the sum of $3,600 towards the payment of said fine that they, the said defendants, in consideration of her advancing the said sum of $3,600, and as security to her," would execute the promissory note sued on; that said fine was paid on the 8th day of November, 1926, said stay of execution granted and the note in question executed and delivered. The court further found that the plaintiff, Cla Vell, was not of unsound mind at the time, and that said note was not executed to appease her ravings, and as a conclusion of law therefrom that "said promissory note was executed and delivered to plaintiff by defendants for a valuable consideration."

It is appellants' contention that the conclusion of law above referred to is contrary to and not supported by the findings, for the reason (1) that the supersedeas bond posted on appeal from a judgment in the United States District Court in a criminal case operates as a stay of execution and obligates the sureties to pay the fine imposed upon an affirmance of the judgment, and (2) that neither the performance of nor the promise to perform that which one is already obligated to a third party to do is a sufficient consideration for a promise. We agree with the second contention, and the first is substantially correct, although it might be more proper to say that the supersedeas effects the stay, the bond being simply a necessary step to make it effective; but it seems to us that the principle contended for is not applicable to the facts of this case.

[1-3] The authority of the court to require such a bond as was given in the instant case is not questioned, and any doubt that might exist seems to be settled by the authorities. Williams v. U. S. (C. C. A.) 1 F.(2d) 203, 204; Rule 13, U. S. C. C. A., 150 F., p. xxviii; Rule 75, U. S. Dist. Ct. Sou. Dist. of California. But the bond used in effecting a supersedeas "does not involve the question whether the defendant shall be permitted to go at large pending the writ of error, an appearance or bail bond being required to permit such result." Hardesty v. U. S. (C. C. A.) 184 F. 269, 272. So we must conclude, there being no evidence before us, that the defendant in the criminal case here involved was in custody at the time the sentence was imposed; and it would appear that the bond given is not only a supersedeas but an appearance bond as well, and so it reads, for it not only requires the defendant Meadows to prosecute his appeal and pay any fine and costs imposed, but also that he "shall surrender himself in execution of the judgment and sentence appealed from" as the trial court "may direct, if the judgment and sentence against him shall be affirmed." We must assume, therefore, in an appeal of this kind, and in the absence of evidence, that the trial court ordered Meadows to appear for sentence—and that seems to be a proper inference from the finding—and that upon Meadows' request for a stay of execution he was ordered to pay the fine as a condition to granting the same, and that plaintiff, at the request of defendants, agreed, not only to furnish the money required to make up the necessary amount, in consideration of the execution of the note in question, but as well consented to continue her liability for thirty days on the bond for the appearance of the defendant even after the affirmance of the judgment against him, in order to permit him to go to New Mexico on business in which the defendants were interested and she was not. This was a considerable additional risk and a sufficient detriment to the promisee to support the note—the contract. It is also a fair inference from the findings that plaintiff did not pay the fine, but that in addition to consenting that her bond remain in force for ninety days, in consideration of the defendants executing the note, she advanced the defendants the money necessary, with the $1,400 which they already had, to make up the $5,000 needed, and that the latter either paid the fine themselves or gave the money to Meadows with which to pay it, he having the primary obligation under the bond so to do.

We see no error in the conclusions of law reached by the trial court.

Judgment affirmed.

We concur: CRAIG, Acting P. J.; IRA F. THOMPSON, J.

On Rehearing.

PER CURIAM.

[4] In their petition for rehearing appellants call attention to the fact that the author of the opinion herein was not present at

the hearing of the oral argument, and therefore that the opinion should, in the absence of a stipulation covering the matter, have been written by one of the justices present at such oral presentation. In answer to this it is only necessary to remind counsel that, immediately preceding the calling of the calendar upon the date of oral argument herein, the court announced that, unless objection were made at the time of argument, it would be deemed stipulated in all matters then before the court that any justice pro tempore might participate in the decision of any or all matters then on the calendar, and that no objection was made by any counsel appearing in the present case.

In the fourth paragraph of the opinion, as reported in 297 P. 980, at page 982, the sentence commencing, "We must assume, therefore, in an appeal of this kind, and in the absence of evidence, that the trial court ordered Meadows to appear for sentence" is changed to read: "We must assume, therefore, in an appeal of this kind, and in the absence of evidence, that the trial court ordered Meadows to appear for execution of the judgment and sentence," etc.

Petition for rehearing denied.

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113 Cal. App. 80

JACKSON v. THE GABLES et al.

Civ. 7729.

District Court of Appeal, First District, Division 2, California.

March 30, 1931.

1. Clubs 🔑11.

Plaintiff *held* not entitled to damages on theory of breach of contract in excluding him from club (Civ. Code, §§ 3300, 3301).

> There was no specific finding, nor any finding from which inference might be drawn that plaintiff ever became member of club, or that corporation conducting club owed him any service whatsoever.

2. Clubs 🔑11.

No responsibility could rest on corporation conducting club under findings showing directors and employees acting entirely without their functions and individually deceived plaintiff into believing he was member.

3. Clubs 🔑12.

Loss of wife's company and services was not proper element of damage for club's failure to accord plaintiff privileges.

> That wife would leave plaintiff because of humiliation and ridicule could not be anticipated damage that would arise from breach of contract to accord plaintiff privileges of club, nor could it be damage flowing from alleged injury on theory that defendant's act was tort.

4. Clubs 🔑11.

Corporation conducting club, and its directors, could not be held liable for acts of clubhouse manager ordering plaintiff from clubhouse.

> It was found that the clubhouse manager took orders from each of the directors in their individual capacity and knowingly and willfully enforced them under the guise of his authority as manager.

5. Appeal and error 🔑1073(7).

Judgment for damages could not stand, where findings did not disclose amount imputed to each injury, and one element of damages should not have been allowed.

Appeal from Superior Court, Los Angeles County; Charles F. Cook, Judge.

Action by Louis H. Jackson against The Gables and others. Judgment for plaintiff, and named defendant and others appeal.

Reversed as to all defendants, except named defendant, and, as to it, judgment modified and affirmed.

Mitchell, Silberberg & Davis, of Los Angeles, for appellants.

William G. Bryce, of Sawtelle, for respondent.

PARKER, Justice pro tem.

This is an appeal by certain defendants from a judgment rendered against them in an action, the nature of which will hereinafter appear. The appeal comes before us on the judgment roll alone. The nature of the case will appear from the findings of fact, and, these said findings controlling, as they must, the judgment will be determinative of the appeal. The Gables is a corporation regularly organized and existing, with its principal place of business at Los Angeles. More than 75 per cent. of the capital stock of said corporation is owned by the defendants Cohen, Saunders, and Crawford. These defendants were the directors of the corporation at all times covered by the pleadings, the two first named being president and secretary, respectively. It seems that this corporation owned and controlled and operated what was by it designated as a club, though not in the sense that the term is generally used. The name of the club was "The Gables." This club was not a social organization, the affairs of which were directed, in any sense, by the members, but was more in the nature of an invitational hotel or rendezvous for those who might comply with the terms of the corporation. Speaking more or less loosely, but descriptive to some degree of accuracy, the idea was to operate an institution for the exclusive use of selected patrons to the end that the conceit of a private club might be indulged. The corporation did not issue stock to its members, but did issue to them a license to use the property and facilities of the club upon payment of certain stipulated membership fees in accord with the rules and regulations of the club, and the club was managed and operated under the direction and control solely of the board of directors in the manner in which said board might determine. The corporation was at all times the owner of the clubhouse at Santa Monica and was in possession and active operation of the said club. The actual operation of the club was carried on by the board of directors, employees, agents, and servants of The Gables, the said employees being partially under the direction and control of the board of directors and partially under the personal direction of Cohen, Saunders, and Crawford and one Tyler, the latter being the manager of the club. About March, 1926, the plaintiff was solicited to become a member and thereafter made application for life membership in the club. He made the payments required, part in cash and part by note, aggregating the sum of $500. Incidentally, the note was subsequently paid. He was given a card indicating life membership, was given keys, and his name was printed in the roster of membership, and he was urged to solicit new members. The specific finding of the court is as follows, with respect to plaintiff's application: "The court finds that plaintiff complied with all of the by-laws but that the defendants Cohen, Saunders and Crawford did not function in accordance with the by-laws of The Gables governing the board of directors, of which they composed the membership of said board, but were lax, negligent and careless in their duties in such capacity and exercised authority as individuals under the guise of being directors of said club." In any event, in addition to the giving of the keys and the publication of the name in the roster, plaintiff held himself out to members of his family and to friends and business associates as a life member of the club and entertained members of his family and friends and business associates at the clubhouse with the knowledge and consent of the officers of The Gables, to whom the management of the club was intrusted by the board of directors, which board of directors were the owners of more than 75 per cent. of the capital stock of the corporation. The court finds as follows: "That some of these things were done by officers and employees of The Gables, with the knowledge and consent of the officers and members of the board of directors of The Gables and some were done by said directors and manager, as individuals, knowingly and intentionally." The application for membership, hereinbefore referred to, was not formally acted upon by the directors by reason of the individual negligence and carelessness of Cohen, Saunders, and Crawford, but at a special meeting of the board of directors, supposedly to be held on June 30, 1926, Cohen, Saunders, and Crawford did knowingly, willfully, and intentionally, and under the guise of the board of directors of The Gables, attempt to pass a valid resolution rejecting the application of the plaintiff for life membership. The directors thereafter notified plaintiff of his rejection and made various offers of restoration, none of which, it may be conceded, conformed to the requirements of a tender. Again, quoting verbatim the findings: "That by its actions The Gables accepted the application of plaintiff for life membership and entered into a contractual obligation with plaintiff to give plaintiff all of the rights and privileges accorded to other life members under the rules and regulations." On July 30, 1926, the plaintiff went to the clubhouse with a prospective purchaser of certain property owned by plaintiff, the purpose of the visit, as the court finds, being to consummate a transaction for the sale of the said property. Here again we take the findings verbatim: That on said occasion plaintiff was notified by the defendant Morgan S. Tyler and other defendants in a boisterous and ungentlemanly way, that The Gables refused to accord plaintiff the privileges of the club, and refused to accord him the privileges to which he, as a life member, was entitled under the rules and regulations, and that he (the said Morgan S. Tyler) individually ordered plaintiff from the clubhouse in a loud and vulgar tone of voice within the hearing of other persons in the clubhouse, and plaintiff was insulted, humiliated, and ridiculed in the presence of his guest, and that the plaintiff suffered damage thereby, on said occasion on July 30, 1926. The court then specifically finds that plaintiff was not damaged by reason of the loss of the contemplated sale, and finds also that it is not true that plaintiff has lost business or suffered in his income, or been damaged by the injury to his business by reason of the refusal of The Gables to accord him the privileges of the club or by reason of any act of The Gables or any of the defendants. The court, however, does find as follows: That it is true that plaintiff and plaintiff's wife suffered humiliation and damage by reason of cancellation of invitation to guests to dine at and visit The Gables Club. That it is true that plaintiff's wife left the home of plaintiff to avoid the publicity, ridicule, and humiliation of facing friends and the public by reason of the failure of The Gables to accord plaintiff the privileges of life membership in The Gables Club, and by reason of the actions of The Gables and of the other defendants, and that plaintiff's wife remained away from plaintiff's home and would not associate with plaintiff by reason of the refusal of defendants, and each of them, to accord plaintiff the rights and privileges of life membership in The Gables Club, and by reason of the actions of The Gables and of the other defendants plaintiff was deprived of the right of his wife's company and her services by reason of said act and/or acts of The Gables and the other defendants. Then follows the general finding that plaintiff has been damaged in the sum of $1,500 and is entitled to 7 per cent. per annum interest on $500 thereof from July 30, 1926, until judgment is entered. The foregoing passages are taken directly from the findings of the trial court, and, while some portions reflect specific findings in verbatim, the remainder is an accurate synopsis of the findings as the same appear before us. From these findings the court drew its conclusions of law. These are few in number and comparatively brief. The court concluded that the action of The Gables constituted an acceptance of an application of plaintiff for life membership in the club operated by The Gables; and The Gables thereby entered into a contract with plaintiff to accord him the rights and privileges of a life member. It also drew the conclusion: "That The Gables is a corporation of which more than seventy-five per cent of the capital stock was owned individually by Cohen, who acted as one of the board of directors of said Gables Club, through whose instrumentality said board of directors conducted the affairs of the club under the name and guise of club memberships in The Gables, for their own private gain and purpose and were the beneficiaries from the funds paid in for membership fees by the plaintiff for the privileges afforded under the rules and regulations of said club, and said board of directors were lax, negligent and careless in not conducting the affairs of said club in accordance with the by-laws, rules and regulations of said club. That the notice of the rejection of plaintiff's application and refusal to accord plaintiff the rights and privileges of a life member, constituted a breach of the contract and amounted to a cancellation of the membership without compliance with the provisions of the rules and regulations on the subject of cancellation of memberships. That plaintiff is entitled to judgment against the defendants, The Gables, a corporation, J. Ward Cohen, Edward Charles Saunders, James Crawford and Morgan S. Tyler, and each of them, in the sum of one thousand five hundred dollars, with interest at 7% per annum from July 30, 1926, until the entry of judgment on the sum of $500, as a part of said judgment." Judgment was entered accordingly, and it is from the judgment so entered that defendants prosecute the appeal.

[1, 2] We have gone into the foregoing detail, urged by the very necessity of the case, in order to demonstrate the complete unintelligibility of the findings of fact and conclusions of law upon which rest the judgment. It cannot be determined upon what theory, either of law or fact, the judgment followed. The underlying basis of the judgment, as indicated both in the findings and in the conclusions of law predicated thereon, seems to be that a certain contract between plaintiff and the corporation was violated. This breach of contract consisted in the refusal of the corporation to render to plaintiff the privileges due him as a member of a so-called club operated by it. From this viewpoint, plaintiff was entitled to recover only such an amount, as damages, as would compensate him for all the detriment proximately caused thereby, or which, in the ordinary course of things would be likely to result therefrom. Civ. Code, § 3300. No damages can be recovered for a breach of contract which are not clearly ascertainable in both their nature and origin. Civ. Code, § 3301. And the facts here found do not indicate damages of that nature. Notwithstanding all of the actions of the defendants who constitute the board of directors of the corporation, however they may be characterized in the findings with respect to the admission of the plaintiff into the club, no damage could have resulted to plaintiff thereby. The alleged and found purpose of the activities of these individuals was to refuse admission to the plaintiff, which purpose was not accomplished in that the court finds that the plaintiff was admitted to membership and accorded the usual privileges of the club. The apparent holding of the trial court was that plaintiff became a member of the club, not by reason of express action on the part of the directorate, but through failure of the said controlling authority to function. And this is apparent from the finding that no formal action was ever taken upon plaintiff's application by the board of directors by reason of the individual negligence of the members of said board. But the court then finds that these same directors did knowingly, willfully, and intentionally, under the guise of the board of directors, attempt to pass a valid resolution rejecting plaintiff's application for membership. Likewise the trial court, throughout its findings, stresses the fact that these directors did not function in accordance with the by-laws, but were lax, negligent, and careless in their duties in such capacity, and exercised authority as individuals under the guise of being directors. The court therefore bases its finding on the existence of a contract on the actions of the parties. It found that a membership card was issued to plaintiff, a key given him, and account opened. That his name was published in a roster of members, and that he was solicited to bring in others of the elect who might be found

worthy. Yet the court finds the fact to be that some of these things were done by officers and employees, with the knowledge and consent of the officers and the members of the board of directors, and some were done by said directors and manager, as individuals, knowingly and intentionally. So it seems apparent from the foregoing that there is no specific finding, nor any finding from which such inference may be drawn, that plaintiff ever did become a member of the so-called club or that the corporation owed him any service whatsoever. And it must follow that any rights plaintiff had or could claim to have on the premises described as the clubhouse were by virtue of his election to membership. If, as is found, the directors and employees of the clubhouse, acting entirely without their functions, and individually, deceived the plaintiff into believing that he was a member of the club, in violation of the corporation's by-laws and regulations, it seems too plain for citation that no responsibility under these findings would rest upon the corporation. Respondent urges that the contract is merely by way of inducement, and that the action is in fact and effect an action in tort. This would hardly be true as against the corporation whose initial liability must rest upon the alleged contract.

[3, 4] However, we may consider the action as one in tort. Assuming that plaintiff was a life member of the club, the only overt act alleged or found by the court was that on July 30th when plaintiff presented himself at the clubhouse the defendant Tyler, neither an officer nor director in the corporation, and other defendants not designated nor described, in a boisterous and ungentlemanly manner notified plaintiff that The Gables refused to accord plaintiff the privileges of the club and refused to accord him the privileges to which he as a life member was entitled. There is no finding as to what those privileges were or were claimed to be, and nothing to indicate what acts or words would support the conclusion, to-wit, "in a boisterous and ungentlemanly manner." And further embraced in this one occasion of July 30th is the finding that Morgan S. Tyler, individually, ordered plaintiff from the clubhouse in a loud and vulgar tone of voice and plaintiff was insulted, ridiculed, and humiliated in the presence of his guest. And here it is interesting to identify the said Tyler. He is found to be the manager of the clubhouse operated by The Gables and took orders from each of the directors in their individual capacity and knowingly and willfully enforced the same under the guise of his authority as manager. Such a finding means absolutely nothing. The further finding in relation to the alleged tort is that, some weeks before the alleged wrong, the directors, acting "under the guise of their directorship," notified plaintiff that he was not a member, and with this notification an attempt was made to return to him the moneys paid, which plaintiff refused. The findings as to damage are equally confusing. The court found that plaintiff was humiliated and also that he suffered damage thereby; also that his wife was humiliated, and that, because the family friends ridiculed plaintiff on account of this club refusing him service, the wife left plaintiff and refused to further abide with or serve him; also that plaintiff's wife refused to return to plaintiff's home and would not associate with him by refusal of the defendants, and each of them, to accord the plaintiff the rights and privileges to which he was entitled by reason of his membership. Surely this could not be an anticipated damage that could arise from a mere breach of the contract, nor could it be a damage flowing from the alleged injury. If the exclusion of plaintiff from this club brought upon him the ridicule of his friends, it would, in the ordinary course of events, be presumed that the marital bond would be tightened and that the wife's obligation to cleave only unto him for better or for worse would reach its highest fulfillment. A claim of this sort on account of the acts found can find no support in law or reason, and with the nondescript relationship of Tyler to the corporation or to the other defendants, even if the former could be held liable for these damages, the latter could not.

[5] Summing up, it appears that the court found that the moneys received by the directors were paid to and retained by the corporation, totaling $500, regardless of the contract. It is not claimed that the directors are liable for the return thereof, but the defendant corporation called The Gables as one of the appellants concedes its liability for the return of this money. The findings as to damages are not segregated so as to disclose the amount of damage imputed to each alleged injury. It is impossible to determine from the findings what amount of damage is allowed by reason of the loss of the wife's companionship and service, or for either, and what amount allowed as compensation for the indignity, suffered with the accompanying humiliation and ridicule of the friends of plaintiff. A somewhat similar situation will be found in the case of Hullinger v. Big Sespe Oil Co., 28 Cal. App. 69, 151 P. 369, wherein it was held that the findings as to the different elements of damage were too uncertain and indefinite to support the judgment, and it was the conclusion of the reviewing court that for such reason alone the judgment could not stand. This is particularly true here for the reason that the damages found to have accrued to plaintiff on account of the loss of wife's consortium and service was, in no event, a proper element of damage. It is not for us to determine what might have been

in the mind of the trial court, and, having thus determined, adjust the items in accord therewith; much less would it be the function of this court to attempt an independent segregation. We have gone rather exhaustively into the record before us, not because we felt that plaintiff has presented or has made a case worthy of profound consideration, but solely because we are mindful of the rule and policy which leans toward the upholding of a trial court's findings and judgment whenever the record will permit. We have searched in vain for any substantial ground of reasoning from which we might declare the judgment before us to have even the semblance of a basis that might sustain it. There are no compelling features demanding that plaintiff have relief; nor are there any clear facts indicating his great injury. It might be barely possible, from the claims of plaintiff, that he might have better contended that his ancestral line had become attainted by reason of the fact that this camouflaged arbiter of the elegance of the locality had taken from him the nobility which membership in this ultra select commercial organization might have implied. The findings amply disclose that plaintiff was notified by those found to be in full charge of the club and its affairs that his membership had been canceled and efforts were being made to refund plaintiff the money he had paid. In the face of this and with an advance knowledge that those in charge disputed his right, the plaintiff took with him a witness and went to the club premises, obviously for the purpose of establishing a basis for just such an action as this. It is clear that he deliberately sought to build up a cause of action, and, while it is possible that a cause of action may be constructed in this way, yet, when the artifice appears, it must be of such skillfulness to withstand scrutiny and attack. It might be noted, however, that an apparent injustice results from reversing the judgment in toto. Sufficient appears from the findings to indicate that the defendant The Gables, a corporation, has received and now retains the sum of $500, paid by plaintiff as a membership fee. This membership has been denied plaintiff. Defendant corporation concedes its liability to plaintiff in that amount. Therefore it is the conclusion of this court that the judgment be reversed as to all of the defendants, save and except defendant The Gables, a corporation. That as to this defendant corporation the judgment be modified and reduced to the sum of $500, with interest from July 30, 1926; appellants and each of them, including the corporation, to recover costs on this appeal.

We concur: SPENCE, Acting P. J.; STURTEVANT, J.

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